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ALLAHABAD SERIES

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(2022)01ILR A1
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 04.01.2022

BEFORE

THE HON'BLE VIKAS KUNVAR SRIVASTAV, J.

Criminal Misc. Bail Application No. 3487 of 2020

Ajay @ Anoop @ Ashok Kumar Gharadiya ...Applicant

Versus

State of U.P. ...Opposite Party

Counsel for the Applicant:
Anurag S. Kaalesh

Counsel for the Opposite Party:
Govt. Advocate

Dead body recovered-informant identified the body from the photograph shown- of his missing son-alleged that deceased was last seen with accused applicant -the statement cannot be treated as last seen evidence as no nexus with probable time of death-Further post mortem report signified that the dead body might be of a mohammedan male.

Bail granted. (E-9)

List of Cases cited:

1. Prahlad Singh Bhati Vs. NCT, Delhi & anr.-(2001 4 SCC 280),

2. Sanjay Chandra Vs. Central Bureau of Investigation reported in [(2012 1 SCC 40)-(Spectrum Scam Case)]

3. Dataram Singh Vs. St. of U.P. & ors. reported in [(2018) 3 SCC 22]

(Delivered by Hon'ble Vikas Kunvar Srivastav, J.)

1. The case is called out.

2. Learned counsel for the bail applicant, Sri Anurag. S. Kaalesh, Advocate and learned A.G.A. for the State Sri L.J. Maurya, Advocate are present in the Court.

3. The present bail-application is moved on behalf of the accused-applicant "Ajay @ Anoop @ Ashok Kumar Gharadiya", involved in Case Crime No.061 of 2015, under Sections 302, 201, 34 of I.P.C., registered at Police Station Alambagh, District Lucknow.

4. The occasion of present bail application has arisen on rejection of bail application of accused-applicant by learned Additional Sessions Judge, Court No.1, Lucknow vide order dated 17.12.2019.

5. Learned A.G.A. argued the case on the basis of counter affidavit filed on behalf of the State.

6. On the basis of materials placed alongwith affidavit in support of bail application as annexures, learned A.G.A. submitted that an unknown dead body floating in the drainage stuck on behind the shop of informant, Manoj Kumar Sharma, by reason of some obstructions in the drainage, the dead body was dragged out from the drainage by the local police. It was found in post mortem report that the dead body was about two days old as rigor mortis was passed over the whole body and skin was pealed off severally.

7. This is the incident dated 13.02.2015. The police entered into Case Diary, the identification details and took

photographs of the unknown dead body. Two days later, one Ram Autar Ladh resident of Village Harinam Kheda, Police Station Asoha, District Unnao came at the Police Station Alambagh, District Lucknow on information received about the recovery of unknown dead body from drainage suspecting that might be of his son, missing from several months. He identified the dead body from the photographs that the same was of his son who was living alongwith one Ajay @ Anoop @ Ashok Kumar Gharadiya and Anil, both resident of District Lucknow. The father, Ram Autar Ladh stated, he earlier had come at the place of residence of his aforesaid son with Ajay and Anil but did not find them. This was the incident on the festive days of Holi when he did not find his son. He apprehended that the aforesaid Ajay and Anil might have murdered his son and threw the body into the drainage for vanishing the evidence of their guilt.

8. The aforesaid Ajay and Anil were apprehended by the Police and on the disclosure by Ajay in the custody, the police party went to the place on his leading and recovered the article of murder, namely, knife. It is the confessional statement on the basis of which, the present accused-applicant was connected with the crime of killing the deceased "Umesh @ Banafar @ Jaggu", the son of Ram Autar Ladh. The post mortem report has also reported anti mortem injuries, which are as follows:-

"Stab wound 2 cm x 1 cm. x trached deep present on lateral aspect of left side neck, 5 cm. below angle of left mandible, margin sharp, crescent & well defead on opening, ecehymosis under neath the injury under lying soft tissues, minor & major vessels of left side neck, found."

9. The only evidences whereupon the police has submitted the charge sheet before the Court are confessional statement of the present accused-applicant. The knife recovered on the leading of the accused-applicant when he was in custody and the statement of father of the deceased, Ram Autar Ladh to the effect that when he first came to Lucknow to meet his son, he was residing with Ajay and Anil but when again on the festive days of Holi, he went there to meet his son he did not find him, even the aforesaid Anil and Ajay were also not found there. Forensic Science Laboratory's report is also taken into consideration which examined the clothes, wore on the person of the dead body stained with blood and it was reported that the same was human blood. However, the knife was sent for the forensic examination but human blood was not reported thereupon as the stains were diffused.

10. Learned counsel for the bail-applicant argued that there is no strong prima facie case or even the case reasonably to be believed for fastening the present accused-applicant under Section 302 of the I.P.C. as neither the direct evidence with regard to the involvement into the offence of killing under Section 302 read with Section 34 of I.P.C. with some other co-accused nor circumstantial evidences are there to form a chain so as to lead the only conclusion about the killing of the deceased "Umesh @ Banafar @ Jaggu" by the accused and none else.

11. On the aforesaid plea, learned counsel for the bail-applicant submitted that the accused-applicant is a local resident of the District Lucknow and a common man having no criminal antecedents for the reason of which, he may be held to tamper with evidence and to

adversely affect the witnesses. Learned counsel for the bail-applicant further submitted that even he is facing trial and almost six prosecution witnesses have been examined in the case, therefore, there is no possibility of tampering with the evidences now, if he is released on bail, it would facilitate him to put his defence efficaciously and properly.

12. Learned A.G.A. for the State who has argued in the case on the basis of counter affidavit filed on behalf of the State opposed the bail on the ground that the accused-applicant was last seen by the father of the deceased with the deceased when he was alive. Secondly, he argued that the knife recovered from the possession of the accused-applicant also bears stains of blood, however, it could not be determined by reason of technical cause of diffusion, whether the same is of human blood or otherwise. Thirdly, learned A.G.A. submitted that the accused-applicant has admitted himself his involvement in the killing of deceased.

13. Learned A.G.A. further stated that the deceased was in habit of taking smack as said by the father, therefore, the possibility cannot be denied of over powering him by the accused-applicant for the purpose of killing, therefore, the accused-applicant cannot plead his innocence for the purpose of grant of bail.

14. In ***Prahlad Singh Bhati Vs. NCT, Delhi and another - (2001 4 SCC 280)***, Hon'ble the Supreme Court has held some parameters for grant of bail, which are being quoted hereunder:-

"8. The jurisdiction to grant bail has to be exercised on the basis of well-settled principles having regard to the circumstances of each case and not in an arbitrary manner. While granting the bail, the court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character, behaviour, means and standing of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public or State and similar other considerations. It has also to be kept in mind that for the purposes of granting the bail the legislature has used the words "reasonable grounds for believing" instead of "the evidence" which means the court dealing with the grant of bail can only satisfy it (sic itself) as to whether there is a genuine case against the accused and that the prosecution will be able to produce prima facie evidence in support of the charge. It is not expected, at this stage, to have the evidence establishing the guilt of the accused beyond reasonable doubt."

15. Hon'ble the Supreme Court in para 21, 22 and 23 of the judgment given in the case of ***Sanjay Chandra Vs. Central Bureau of Investigation*** reported in ***[(2012 1 SCC 40)-(Spectrum Scam Case)],*** has laid down certain objects of bail under Section 437 & 439 of the Cr.P.C. which are as follows:

"21. In bail applications, generally, it has been laid down from the earliest times that the object of bail is to

secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it is required to ensure that an accused person will stand his trial when called upon. The courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty.

22. From the earliest times, it was appreciated that detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, "necessity" is the operative test. In this country, it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances.

23. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him a taste of imprisonment as a lesson."

16. In the present case where the father stated, he had lastly seen the accused-applicant with his son when he was alive long ago much before the date 13.02.2015 when the dead body was found in the drainage on the information of Manoj Kumar Sharma, a shopkeeper of the area. Last seen evidence is important when the witness disclose the accused-applicant was seen in the company of deceased just before his death when he was alive. There should not be an unreasonable and unexplained gap of time between the time when the accused last seen with the deceased when he was alive and his death. The father's statement cannot be treated as last seen evidence as the same has no nexus with the probable time of death. Moreover, when the direct evidence is not available and in absence of direct evidence, the circumstantial evidences as collected by the Investigating Officer are not so intact and unbroken so as to make a chain of sequence so as to prima facie hold liable the present accused-applicant and none else for killing of the deceased "Umesh @ Banafar @ Jaggu", whose body was found on 13.02.2015 in drainage and identified by Ram Autar Ladh as his son. This is also doubtful that whether Ram Autar Ladh has correctly identified the dead body of his son, as the doctor, who done the autopsy and prepared the post mortem report when examined in the Court stated that the private part (penis) in the religious tradition of Islam had circumcision *(Khatana)* which signified the dead body might be of a mohammedan male.

17. All these doubts either may find affirmation or be disproved only in the course of trial by cogent and sufficient evidence. At this stage of grant or refusal of bail, only this is to be assessed that whether prima facie case of the prosecution is established with regard to the offence with which the accused-applicant is arraigned. The answer would certainly be "No', the prima facie case of prosecution is not

established. Gravity of offence alone cannot be taken for refusal of bail even severity of punishment is not material for consideration of bail plea.

18. Keeping into mind the valuable right of personal liberty and the fundamental principle not to disbelieve a person to be innocent unless held guilty and if he is not arraigned with the charge of an offence for which the law has put on him a reverse burden of proving his innocence, as it is held in the judgment of Hon'ble the Supreme Court in ***Dataram Singh Vs. State of U.P. and ors. reported in (2018) 3 SCC 22,*** I find force in the submission of learned counsel for the bail-applicant to enlarge him on bail.

19. Considering the facts and circumstances of the case, perusing the record, considering the nature of allegations, arguments advanced by learned counsel for the parties and looking into the complicity of the applicant-accused in the offence, the gravity of offence, severity of punishment without expressing any opinion on the merit of the case, I find it to be a fit case for granting bail.

20. Let applicant ***(Ajay @ Anoop @ Ashok Kumar Gharadiya)***, involved in Case Crime No.061 of 2015, under Sections 302, 201, 34 of I.P.C., registered at Police Station Alambagh, District Lucknow be released on bail on his furnishing a personal bond of Rs.50,000/- and two reliable sureties of the like amount to the satisfaction of the court concerned subject to following additional conditions, which are being imposed in the interest of justice:-

(i) The applicant shall file an undertaking to the effect that he shall not seek any adjournment on the dates fixed for evidence when the witnesses are present in court. In case of default of this condition, it shall be open for the trial court to treat it as abuse of liberty of bail and pass orders in accordance with law.

(ii) The applicant shall remain present before the trial court on each date fixed, either personally or through his counsel. In case of his absence, without sufficient cause, the trial court may proceed against him under Section 229-A of the Indian Penal Code.

(iii) In case, the applicant misuse the liberty of bail during trial and in order to secure his presence, proclamation under Section 82 Cr.P.C. is issued and if the applicant fails to appear before the court on the date fixed in such proclamation, then, the trial court shall initiate proceedings against him, in accordance with law, under Section 174-A of the Indian Penal Code.

(iv) The applicant shall remain present, in person, before the trial court on the dates fixed for (i) opening of the case, (ii) framing of charge and (iii) recording of statement under Section 313 Cr.P.C. If in the opinion of the trial court absence of the applicant is deliberate or without sufficient cause, then it shall be open for the trial court to treat such default as abuse of liberty of bail and proceed against him in accordance with law.

(2022)01ILR A5
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 04.01.2022

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Criminal Misc. Bail Application No. 4507 of 2020

Harnam @ Harinath ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Vinay Kumar Verma, Suresh Kumar Yadav

Counsel for the Opposite Party:
G.A.

Applicant-father in law of the deceased-no specific role-living separately since last five years after the marriage-in view of period of detention already undergone, unlikelihood of early conclusion of trial and unlikelihood of tampering of evidence-Applicant enlarged on bail.

Bail granted. (E-9)

List of Cases cited:

1. In Criminal Appeal No. 969 of 2009 (Bakshish Ram & anr.Vs. State of Punjab)

2.Takht Singh Vs. St. of M.P., 2001 (10) SCC 463

3. Kamal Vs. St. of Har., 2004 (13) SCC 526

4. Dataram Singh Vs. St. of U.P.& anr., reported in (2018) 3 SCC 22

(Delivered by Hon'ble Shamim Ahmed, J.)

1. Heard Shri Suresh Kumar Yadav, learned counsel for the applicant and Shri Rao Narendra Singh, learned A.G.A.-1 and perused the record.

2. Applicant has moved the present bail application seeking bail in Case Crime No. 349 of 2019 under sections 498A,304B IPC and section 3/4 Dowry Prohibition Act, Police Station-Kothi, District- Barabanki.

3. Learned counsel for the applicant submits that as per the prosecution case first informant Ram Sagar lodged a first information report on 14.11.2019 at about 15.53 p.m. that her daughter Shimla Devi was married with accused Lallan son of Harnam in the year 2013 according to Hindu rites and customs. On 11.11.2019, the daughter of first informant Shimla Devi was willing to come at her parents house in village Badhery and had come out three times for the same from her in law's house, but the accused persons who are named in the FIR had forcibly compelled her back to inside the house and on the same day all the accused persons namely Lallan son of Harinam alias Harinath, applicant Harnam alias Harinath son of Gokaran and Krishnawati wife of Harinam alias Harinath had inflicted physical injuries upon the daughter of the first informant and thereafter they strangulated and hanged her as their demand of dowry was not fulfilled. General role has been assigned to all the three accused persons.

4. Learned counsel for the applicant further submits that mother of the deceased Smt. Dashratha Devi in her statement (Annexure No.3) has stated that wife of applicant Smt. Krishnawati has no role in torturing her daughter (deceased) and the general allegations are levelled against the husband Lallan and present applicant.

5. It was further argued that the applicant is an innocent person and he never demanded dowry from the deceased or first informant (father of the deceased) and was living separately for the last five years after the marriage of his son. In this regard, a copy of Ration Card issued by the Food and Logistic Department, Uttar Pradesh and a certificate issued by the Village Gram Pradhan are annexed with the supplementary affidavit in this bail application, which show that the applicant alongwith his wife Krishnawati are living separately, so there is no question that any demand of dowry is made or any cruelty was caused with the deceased who is daughter-in-law of the applicant.

6. It was further argued by the learned counsel for the applicant that applicant is an old aged person and at present he is around 66 years of age and is suffering from ailments. In this regard, learned counsel for the applicant has placed reliance of the judgment of Hon'ble Supreme Court in **Criminal Appeal No. 969 of 2009 (Bakshish Ram and another Vs. State of Punjab)** and referred paragraph 12 of the judgment which is reproduced herein below:

"12) With regard to the case of appellant no.2/Dalip Kaur, it has been contended that she is an 80 years old lady and is suffering from various age related ailments. This factual assertion is not disputed by the respondents. Looking at the age of the appellant it does not seem fair to hold her back in jail during the pendency of appeal even if she had been convicted for the alleged serious offence, against which she has come before this Court. furtermore, in the peculiar circumstances of this case and in view of the fact, that the appellant no.2 is an old lady of 80 years of age and she had already been in jail for more than one year, in our view, she is entitled for the relief prayed in the application. Accordingly, we grant interim bail to the second appellant, subject to the appellant furnishing the bail bond as well as surety to the satisfaction of the Additional Sessions Judge, Jalandhar, Punjab. The observations made by us is only for the purpose of disposal of this application and we make it clear that we have not expressed any opinion on the merits of this appeal."

7. It was further argued by the learned counsel for the applicant that the applicant has already undergone the substantial period of imprisonment and in view of the judgment of Hon'ble Supreme Court prayer was made to release the applicant on bail and has placed reliance of para 2 of the judgment in the case of **Takht Singh Vs. State of Madhya Pradesh, 2001 (10) SCC 463,** the same is reproduced herein below:-

"2. The appellants have been convicted under section 302/149 , Indian Penal Code by the learned Sessions Judge and have been sentenced to imprisonment for life . Against the said conviction and sentence their appeal to the High Court is pending. Before the High court application for suspension of sentence and bail was filed but the High Court rejected that prayer indicating therein that the applicants can renew their prayer for bail after one. After the expiry of one year the second application was filed but the same has been rejected by the impugned order. It is submitted that the appellants are already in jail for over 3 years and 3 months. there is no possibility of early hearing of the appeal in the High Court. In the aforesaid circumstances the applicants be released on bail to the satisfaction of the learned Chief Judicial Magistrate, Sehore. the appeal is disposed of accordingly."

8. Further, the learned counsel for the applicant has placed reliance of para 2 of the judgment of Hon'ble Supreme Court in the case of **Kamal Vs. State of Haryana, 2004 (13) SCC 526,** the same is reproduced herein below:-

"2. This is a case in which the appellant has been convicted u/s 304-B of the Indian Penal Code and sentenced to imprisonment for 7 years. It appears that

so far the appellant has undergone imprisonment for about 2 years and four months. The High Court declined to grant bail pending disposal of the appeal before it. We are of the view that the bail should have been granted by the High court, especially having regard to the fact that the appellant has already served a substantial period of the sentence. In the circumstances, we direct that the bail be granted to the appellant on conditions as may be imposed by the District and Sessions Judge, Fridabad."

9. Leaned counsel for the applicant further submitted that in view of the law laid down by the Hon'ble Supreme Court in the aforesaid cases the case of the applicant for grant of bail may be considered sympathetically.

10. It was further argued by the learned counsel for the applicant that there is no male member in the family of the accused applicant to look-after the grand children of the deceased and on that ground also his bail application may be considered sympathetically.

11. Several other submissions in order to demonstrate the falsity of the allegations made against the applicant have also been placed forth before the Court. The circumstances which, according to the counsel, led to the false implication of the accused have also been touched upon at length. It has been assured on behalf of the applicant that he is ready to cooperate with the process of law and shall faithfully make himself available before the court whenever required and is also ready to accept all the conditions which the Court may deem fit to impose upon him. It has also been pointed out that the accused is not having any criminal history and he is in jail since 15.11.2019 and that in the wake of heavy pendency of cases in the Court, there is no likelihood of any early conclusion of trial.

12. Learned A.G.A. opposed the prayer for bail and submitted that the allegation against the applicant is very serious in nature.

13. After perusing the record in the light of the submissions made at the bar and after taking an overall view of all the facts and circumstances of this case, the nature of evidence, the period of detention already undergone, the unlikelihood of early conclusion of trial and also the absence of any convincing material to indicate the possibility of tampering with the evidence and also considering the old age of the applicant and observation given by the Hon'ble Supreme Court in the cases of **Takht Singh (supra), Kamal (supra)** and **Bakshish Ram (supra)** and larger mandate of Article 21 of the Constitution of India and the law laid down by the Hon'ble Apex Court in the case of **Dataram Singh Vs. State of U.P. and another, reported in (2018) 3 SCC 22,** this Court is of the view that the applicant may be enlarged on bail.

14. The prayer for bail is granted. The application is allowed.

15. Let the applicant **Harnam @ Harinath** involved in in Case Crime No. 349 of 2019 Under section 498A,304B IPC and section 3/4 Dowry Prohibition Act, police station Kothi, District- Barabanki be released on bail on his executing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned on the following conditions :-

(1) The applicant will not make any attempt to tamper with the prosecution evidence in any manner whatsoever.

(2) The applicant will personally appear on each and every date fixed in the court below and his personal presence shall not be exempted unless the court itself deems it fit to do so in the interest of justice.

(3) The applicant shall cooperate in the trial sincerely without seeking any adjournment.

(4) The applicant shall not indulge in any criminal activity or commission of any crime after being released on bail.

(5) In case the applicant misuses the liberty of bail during trial and in order to secure his presence, proclamation under Section 82 Cr.P.C. is issued and the applicant fails to appear before the court on the date fixed in such proclamation, then the trial court shall initiate proceedings against him, in accordance with law, under section 174-A of the Indian Penal Code.

(6) The applicant shall remain present in person, before the trial court on the date fixed for (i) opening of the case, (ii) framing of charge and (iii) recording of statement under section 313 Cr.P.C. If in the opinion of the trial court absence of the applicant is deliberate or without sufficient cause, then it shall be open for the trial court to treat such default as abuse of liberty of bail and proceed against him in accordance with law.

(7) 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.

(8) 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.

16. It may be observed that in the event of any breach of the aforesaid conditions, the court below shall be at liberty to proceed for the cancellation of the applicant's bail .

17. It is clarified that the observations, if any, made in this order are 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.

(2022)01ILR A9
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.01.2022

BEFORE

THE HON'BLE SHEKHAR KUMAR YADAV, J.

Criminal Misc. Bail Application No. 20529 of 2021
connected with
Criminal Misc. Bail Application No. 19926 of 2021
Criminal Misc. Bail Application No. 21132 of 2021
Criminal Misc. Bail Application No. 21208 of 2021

Neeraj Mandal @ Rakesh ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Deepankar Chaudhary, Sri Tripurari Pal, Sri I.M. Khan

Counsel for the Opposite Party:
A.G.A., Sri Amit Kumar Srivastava, Sri Chandra Prakash Yadav, Sri Gaurav Gautam, Sri Vivek Mishra

Accused have allgedly misappropriated a sum of Rs. 5 lakhs from the account

of the victim-by calling her and asking her copy of her Pass book, aadhar and PAN Card-During investigation the role of all accused have been duly proved-chargesheett submitted-the accused have returned the embezelled amount to the informant-no ground to enlarge them on bail-Application rejected. (E-9)

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

1. दाण्डिक प्रकीर्ण जमानत **आवेदन पत्र संख्या 20529** वर्ष 2021,आवेदक नीरज मण्डल उर्फ राकेश, दाण्डिक प्रकीर्ण **जमानत आवेदन पत्र संख्या 19926 वर्ष 2021,** आवेदक तपन मण्डल, दाण्डिक प्रकीर्ण **जमानत आवेदन पत्र संख्या 21132 वर्ष 2021**, आवेदक शूबो शाह उर्फ सुभाजीत एवं दाण्डिक प्रकीर्ण **जमानत आवेदन पत्र संख्या 21208 वर्ष 2021,**आवेदक तौसीफ जमां द्वारा मुकदमा अपराध संख्या 407 वर्ष 2020, अन्तर्गत धारा 420, 467, 468, 471 भा0 दं0 सं0 एवं धारा 66 (डी) आई0 टी0 एक्ट, थाना कैन्ट, जिला प्रयागराज में जमानत पर मुक्त किये जाने हेतु प्रस्तुत किया गया है।

2. चूँकि उपरोक्त चारों जमानत आवेदन पत्र एक ही घटनाक्रम एवं अपराध से सम्बन्धित है। अतएव उपरोक्त चारों जमानत आवेदन पत्रों का निस्तारण एक साथ किया जाता है।

3. अभियोजन कथानक संक्षेप में इस प्रकार है कि इलाहाबाद उच्च न्यायालय के पूर्व न्यायाधीश श्रीमती पूनम श्रीवास्तव ने एक प्राथमिकी दिनाँक 8–12–2020 को थाना कैण्ट, जनपद प्रयागराज में इस आशय से दर्ज करायी गयी कि दिनाँक 4–12–2020 को लगभग दो बजे दोपहर उनके मोबाईल नम्बर 9431115605 जो राँची का है, पर फोन करने वाले ने अपना नाम एस0 एन0 मिश्रा बताया जिस नम्बर से उसने फोन किया था, उसका नम्बर 8573895914 है और जिस Whatsapp नम्बर पर वादिनी का पासबुक, आधार एवं पैन मांगा उसका नम्बर 9669147409 है। इस प्रक्रिया में अभियुक्त द्वारा वादिनी के एस0 बी0 आई0 बैंक खाते से आनलाईन लगभग पाँच लाख रूपये जो अभी संज्ञान में आया है, गबन कर लिया है।

4. दौरान विवेचना अभियुक्त राजू रंजन पुत्र अशोक भगत, निवासी जनपद देवधर, झारखण्ड, नीरज कुमार मण्डल पुत्र तीरथ नाथ मण्डल जनपद देवधर, झारखण्ड, तपन कुमार मण्डल पुत्र सरकार मण्डल, जिला जामताड़ा, झारखण्ड का नाम प्रकाश में आया तत्पश्चात उनकी गिरफतारी की गयी।

5. सह–अभियुक्त राजू रंजन पुत्र अशोक भगत ने अपने बयान अन्तर्गत धारा 161 दं0 प्र0 सं0 में कहा है कि वह झारखण्ड राज्य ग्रामीण बैंक का ग्राहक सेवा केन्द्र चलाता है जो गाँधी चौक पर उसके घर में ही है। मोबाईल नम्बर 7908793022 को उससे अभियुक्त नीरज मण्डल उर्फ राकेश पुत्र तीरथनाथ मण्डल जो गांजा मोड़ थाना चितरा जनपद देवधर झारखण्ड व तपन कुमार मण्डल पुत्र सरकार मण्डल निवासी सुपाई डीह थाना जामताड़ा जिला जामताड़ा, झारखण्ड बात करते थे लेकिन कुछ समय से बात नहीं करते हैं। तपन मण्डल भी सुपारेड़ी में ग्राहक सेवा केन्द्र चलाता है तथा नीरज मण्डल उर्फ राकेश उसके साथ ही उसके पास आता जाता था लेकिन बाद में उसे पता चला कि नीरज उर्फ राकेश व तपन मण्डल ठीक व्यक्ति नहीं है क्योंकि मण्डल व तपन ने एक बार उससे कहा कि वे लोग लोगों से बात करके उनके बैंक खातों की डिटेल प्राप्त करके अच्छा पैसा कमाते है और यदि वह भी उनके साथ मिलकर काम करेगें तो कोई पकड़ नहीं पायेगा क्योंकि वे लोग फर्जी नाम पता का मोबाईल नम्बर प्राप्त करके उससे कार्य करते है तथा मोबाईल नम्बर 7908793022 की फर्जी पते का ही सिम है। इस पर राजू रंजन ने मना कर दिया तथा तपन ने राजू रंजन के भाई अमित भगत की फर्म जो ट्रेड़िंग सब ब्रोकर का काम करता है, डिमेट एकाउण्ट खोलने के लिए पेपर दिए थे जिसे राजू रंजन ने मना कर दिया कि इनके साथ काम मत करो। नीरज उर्फ राकेश मण्डल व तपन से उसकी बात दिसम्बर के पहले हुई थी। आगे यह भी कहा कि उसे पूरा विश्वास है कि नीरज उर्फ राकेश और तपन मण्डल मिलकर धोखाधड़ी से किसी के खाते से पैसा निकाल लेते हैं। आगे यह भी कहा कि उसका मोबाईल फोन नम्बर 7908793022 आर. जैम 2 के नाम से सेल है।

6. सह–अभियुक्त नीरज कुमार मण्डल ने अपने बयान अन्तर्गत धारा 161 दं0 प्र0 सं0 में कहा है कि उसके पास मोबाईल नम्बर 7908793022 था तथा यह सिम उसे तपन मण्डल जो उसके मामा का बेटा है। फर्जी नाम पता के आधार पर प्राप्त किया हुआ था लाकर दिया था जिसके माध्यम से वह तपन मण्डल व नीरज कुमार उर्फ नीरज सिन्हा मिलकर लोगों के बैंक एकाउण्ट की सूचना प्राप्त करके धोखाधड़ी से पैसा निकाल लेते हैं। आगे यह भी कहा कि दिसम्बर माह में भी उन सभी लोगों ने एक रिटायर जज महिला का पैसा धोखाधड़ी से निकाल लिए थे, जिसमें नीरज सिन्हा ने Yono App के सहारे से पैसा निकाला था। आगे यह भी कहा कि वे तीनों लोग मिलकर अपराध करते हैं। सिम भी दिसम्बर में तपन मण्डल के दुर्घटना में घायल होने के बाद नीरज सिन्हा के पास रह गया था। नीरज कुमार उर्फ नीरज सिन्हा जनवरी में सिम के साथ राँची साइबर थाना द्वारा पकड़ लिया गया है तथा वर्तमान समय में राँची जेल में निरूद्व है। आगे यह भी कहा कि वे लोग एक साथ मिलकर ही सारा धोखाधड़ी से पैसा निकालने का काम करते हैं।

7. इसी प्रकार तपन कुमार मण्डल पुत्र सरकार मण्डल ने अपने बयान अन्तर्गत धारा 161 दं0 प्र0 सं0 में यह कहा है कि वह झारखण्ड राज्य ग्रामीण बैंक का ग्राहक सेवा केन्द्र चलाता था तथा उसकी मुलाकात नीरज कुमार उर्फ नीरज सिन्हा पुत्र विनय किशोर प्रसाद निवासी पाकडीह मोहल्ला बेना थाना जामताड़ा, जिला जामताड़ा झारखण्ड से हुई जो पहले से साइबर अपराध करता था उसी ने बताया कि एक गलत नाम पता का सिम ले आओ तो धोखाधड़ी करके खूब पैसा कमाया जायेगा। आगे यह भी कहा कि एक व्यक्ति घूमकर सिम बेच रहा था जिससे उसने मोबाईल नम्बर 7908793022 नम्बर का सिम खरीदा तथा वह अपने बुआ के लड़के नीरज मण्डल उर्फ राकेश से भी बात किया तो वह भी तैयार हो गया उसने सिम नीरज मण्डल को दे दिया तथा समय समय पर इकट्ठा होकर लोगों से उनके बैंक एकाउण्ट की सूचना प्राप्त करके पैसा निकाल लेते थे। इसी तरह दिसम्बर माह में भी उन लोगों ने एक रिटायर महिला जज के खाते से नीरज सिन्हा के माध्यम से दोनों एस0 बी0 आई0 के खाते से लगभग चार लाख रूपया निकाल लिए थे। नीरज मण्डल उर्फ राकेश तथा नीरज सिन्हा मिलकर ही सारा धोखाधड़ी का कार्य करते हैं जो सिम वह खरीद कर लाया था वह नीरज मण्डल के पास रहता था किन्तु दिसम्बर माह में सात तारीख को उसकी गाड़ी पलट जाने के कारण दुर्घटना में उसे चोट आ गयी थी तब मोबाईल नम्बर 7908793022 नम्बर का सिम नीरज सिन्हा लेकर चला गया था। दुर्घटना के बाद से उसकी मुलाकात नहीं हुई पता चला कि साइबर थाना राँची के मुकदमें में दिनांक 29–1–2021 को पकड़ लिया गया है तथा आज भी राँची में निरूद्व है।

8. **दाण्डिक प्रकीर्ण जमानत प्रार्थना पत्र संख्या 20529 वर्ष 202**1 में आवेदक नीरज मण्डल उर्फ राकेश की ओर से विद्वान अधिवक्ता श्री दीपाकंर चौधरी एवं उनके सहायक के रूप में श्री त्रिपुरारी पाल, **दाण्डिक प्रकीर्ण जमानत प्रार्थना पत्र संख्या 19926 वर्ष 2021** में आवेदक तपन मण्डल के विद्वान अधिवक्ता श्री दीपांकर चौधरी एवं नासिरा आदिल, **दाण्डिक प्रकीर्ण जमानत प्रार्थना पत्र संख्या 21132 वर्ष 2021** में आवेदक शुभो शाह उर्फ सुभाजीत के विद्वान अधिवक्ता श्री इमरान उल्ला उनके सहायक के रूप में श्री दिलीप कुमार पाण्डेय एवं श्री अब्दुल माजिद तथा **दाण्डिक प्रकीर्ण जमानत प्रार्थना पत्र संख्या 21208 वर्ष 2021** में आवेदक तौसीफ जमां की ओर से विद्वान अधिवक्ता श्री दिलीप कुमार पाण्डेय एवं उनके सहायक के रूप में श्री अब्दुल माजिद का यह कथन है कि अभियुक्तगण निर्दोष है और उन्हें प्रश्नगत प्रकरण में झूंठा फसाया गया है।

9. **दाण्डिक प्रकीर्ण जमानत आवेदन पत्र संख्या 20529 वर्ष 2021** में आवेदक नीरज मण्डल उर्फ राकेश के विद्वान अधिवक्ता द्वारा यह तर्क प्रस्तुत किया गया कि आवेदक प्रथम सूचना रिपोर्ट में नामजद नहीं है। आवेदक के कब्जे से कोई बरामदगी नहीं दर्शायी गयी है। दौरान विवेचना सह–अभियुक्त शूबों शाह एवं तौसीफ जमां का नाम प्रकाश में आना बताया जाता है। दिनाँक 4–2–2021 को उक्त दोनों अभियुक्तों की अन्तरिम जमानत विद्वान अपर मुख्य न्यायिक मजिस्ट्रेट, लालबाग मुर्शिदाबाद द्वारा स्वीकार की जा चुकी है। यह भी तर्क रखा गया कि दौरान विवेचना दिनाँक 8–12–2020 से 21–2–2021 तक विवेचक द्वारा आवेदक के विरूद्व कोई साक्ष्य एकत्र नहीं किया गया। दिनाँक 21–2–2021 को सह–अभियुक्त

राजीव रंजन के गिरफतारी के पश्चात उसके स्वीकारोक्त बयान के आधार पर आवेदक एवं सह–अभियुक्त तपन मण्डल का नाम प्रकाश में आया है। सह–अभियुक्त राजीव रंजन का बयान विश्वसनीय नहीं है। आवेदक के कब्जे से कोई आपत्तिजनक सामग्री की बरामदगी नहीं दर्शायी गयी है। यह भी तर्क रखा गया कि आवेदक द्वारा न तो कोई कूटरचित दस्तावेज तैयार किया गया है एवं न ही कोई कूटरचित दस्तावेज उसके द्वारा प्रयोग में लाया गया है। प्रश्नगत प्रकरण में आवेदक के विरूद्व कोई ऐसी साक्ष्य उपलब्ध नहीं है जिसके आधार पर यह कहा जा सके कि आवेदक के विरूद्व प्रथम द्वष्टया अपराध बनता है। आवेदक के विरूद्व कोई पूर्व अपराधिक इतिहास नहीं है। इसी प्रकार **दाण्डिक प्रकीर्ण जमानत आवेदन पत्र संख्या 19926 वर्ष 2021, 21132 वर्ष 2021 एवं 21208 वर्ष 2021** में आवेदकगण के विद्वान अधिवक्तागण द्वारा तर्क प्रस्तुत किये गये एवं आवेदकगण को जमानत पर मुक्त किये जाने की याचना की गयी है।

10. इसके विपरीत राज्य की ओर से विद्वान अपर शासकीय अधिवक्तागण द्वारा जमानत का विरोध करते हुए तर्क प्रस्तुत किया गया कि प्रश्नगत अपराध आवेदकगण द्वारा कारित किया गया है एवं दौरान विवेचना अभियुक्त राजू रंजन पुत्र अशोक भगत, निवासी जनपद देवधर, झारखण्ड, नीरज कुमार मण्डल पुत्र तीरथ नाथ मण्डल जनपद देवधर, झारखण्ड, तपन कुमार मण्डल पुत्र सरकार मण्डल, जिला जामताडा, झारखण्ड का नाम प्रकाश में आया तत्पश्चात उनकी गिरफतारी की गयी। यह भी तर्क रखा किया गया कि प्रश्नगत मामले में उपरोक्त आवेदकों द्वारा अन्य आरोपियों के साथ मिली भगत करके वित्तीय, साइबर धोखाधडी का अपराध किया गया है और ग्राहक पहचान मोड्यूल (सिम) तथा बैंक खाते के लिए निर्मित एवं जाली पहचान पत्रों का उनके द्वारा उपयोग किया गया है। उपरोक्त अपराध के कारित होने में उनके द्वारा सक्रिय भागीदारी को स्थापित करने के लिए अभियोजन के पास पर्याप्त साक्ष्य मौजूद है। वादी मुकदमा के वित्तीय, साइबर धोखाधडी करके जो पैसा निकाला गया उसे पेटियम वालेट (PAYTMC 123456) से सम्बद्व वालेट नम्बर 8343884119 के माध्यम से निकाला गया था। यह भी तर्क रखा गया कि प्रश्नगत प्रकरणों में उपयोग किये गये आई0 पी0 ऐड्रेस का विवरण प्राप्त करने के बाद एक मोबाईल नम्बर 7076707670 का पता चला है जिसका उपयोग आवेदक सुभो शाह द्वारा किया जा रहा था और जब उपरोक्त फिलपकार्ट के विवरण की जाँच की गयी तो यह पता चला कि उक्त वालेट नम्बर 8343884119 वालेट नम्बर के माध्यम से सात मोबाईल नम्बर 7679054205 के द्वारा आनलाईन खरीदे गये थे जो अब्दुल मोमीन पुत्र नजीब हुसैन निवासी मुर्शीदाबाद के नाम पर था। यह भी तर्क रखा गया कि जब अब्दुल मोमीन से उपरोक्त खरीददारी के सम्बंध में पूंछतांछ की गयी तो उसने अपने बयान अन्तर्गत धारा 161 दं0 प्र0 सं0 में अभियुक्त तौसीफ जमां निवासी मुर्शीदाबाद का नाम लेते हुए बताया कि उपरोक्त मोबाईल इसी व्यक्ति ने लिए है। यह भी तर्क रखा गया कि जांच अधिकारी द्वारा जब सुभो शाह को गिरफतार किया गया तो उसके कब्जे से मोबाईल नम्बर 7076707670 बरामद हुआ जो कि प्रश्नगत अपराध में प्रयुक्त होने की कड़ी में शामिल है। उपरोक्त अभियुक्तों ने फर्जी कार्ड़ के आधार पर सिम निकलवाया और ब्राडबैण्ड कनेक्शन उक्त मोबाईल नम्बर 7076707670 पर लिया जो अभियुक्त सुभो शाह द्वारा प्रयुक्त किया जा रहा था। यह भी तर्क रखा गया कि जब मोबाईल नम्बर 8343884119 का ग्राहक आवेदन पत्र निकाला गया तो पता चला कि यह किसी नईम सरकार के झूठे नाम व नकली पते के आधार पर प्राप्त किया गया था। यह भी तर्क रखा गया कि जांच के दौरान पता चला कि जो पैसा खाते से निकाला गया था वह योनो ऐप के माध्यम से किया गया था और जिस आई0 पी0 पते का उपयोग किया गया था वह मोबाईल नम्बर 7908793022 द्वारा चलाया जा रहा था जब कि उक्त संख्या के ग्राहक आवेदन पत्र का जाँच अधिकारी द्वारा अवलोकन किया गया तो यह पता चला कि शुभ लाल हंसदा नाम के एक व्यक्ति के नाम पर था जिसकी मृत्यु दिनांक 21–6–2016 को हो चुकी है। जब सी0 डी0 आर0 द्वारा उपरोक्त नम्बर का अवलोकन किया गया तो मैक्स बी पार्टी में एक मोबाईल नम्बर (अर्थात मोबाईल नम्बर 7004097335) प्राप्त हुआ और ग्राहक आवेदन पत्र प्राप्त किया गया और उसका अवलोकन किया गया जिसमें अशोक भगत पुत्र राजीव रंजन का नाम सामने आया। यह भी तर्क रखा गया कि जब राजीव रंजन से पूछतांछ की गयी तो उसने बताया कि वह एक ग्राहक सेवा प्रदाता केन्द्र चला रहा है और मोबाईल नम्बर 708793022 का उपयोग नीरज

मण्डल उर्फ राकेश और तपन कुमार मण्डल द्वारा किया जा रहा था। नीरज मण्डल और तपन कुमार मण्डल भाई है और मोबाईल नम्बर 7908793022 का उपयोग कर रहे थे, जिनके द्वारा योनो अप्लीकेशन चलाया जा रहा था और उक्त मोबाईल नम्बर एक मृत व्यक्ति के जाली दस्तावेज के आधार पर प्राप्त किया गया था। ऐसी दशा में आवेदकगण जमानत पर मुक्त होने योग्य नहीं है।

11. मामले की गम्भीरता के कारण भारत सरकार की ओर से श्री एस0 पी0 सिंह, विद्वान वरिष्ठ अधिवक्ता एवं अपर महान्यायवादी भारत सरकार, रिजर्व बैंक की ओर से श्री विकास बुधवार एवं प्रदेश सरकार की ओर से श्री महेश चन्द्र चतुर्वेदी, विद्वान वरिष्ठ अधिवक्ता एवं अपर महाधिवक्ता उत्तर प्रदेश तथा श्री शिव कुमार पाल, विद्वान शासकीय अधिवक्ता, श्री अमृतराज चौरासिया व श्री मिथिलेश कुमार, विद्वान अपर शासकीय अधिवक्तागण व भारतीय दूर संचार की ओर से श्री रवि रंजन उपस्थित हुए और देश में बढ़ते साइबर ठगी के मामले को देखते हुए उन्होनें न्यायालय को अवगत कराया कि गरीबों का पैसा साइबर ठगों द्वारा बैंक खाते से निकालने का जो कम जारी है, उसे रोका जाना चाहिए। चूँकि ग्राहकों द्वारा पैसा बैंक में जमा किया जाता है और वे बैंक में पैसा जमा करके निश्चिन्त हो जाते हैं कि उनका पैसा बैंक में सुरक्षित रहेगा परन्तु जब आवश्यकता पड़ने पर उन्हें पता चलता है कि उनके बैंक खाते में साइबर ठगों ने डकैती डाल दी है और बैंक भी इस सम्बंध में अपने को असहाय बताता है और साथ साथ ही यह कहता है कि आपकी गलती के कारण साइबर ठगों ने आपके बैंक खाते से पैसे निकाल लिए है, जिसके लिए बैंक नहीं बल्कि आप स्वयं ही जिम्मेदार है। तब वह गरीब व्यक्ति पुलिस में रिपोर्ट लिखवाता है किन्तु पुलिस भी इस सम्बंध में अपने को असहाय बताकर इससे पल्ला झाड़ लेती है और वह गरीब व्यक्ति जिसकी जीवन की कमाई लुट जाती है तब वह परेशान होकर अपने भाग्य को कोसते हुए अपने घर पर बैठ जाता है और उसे आर्थिक तंगी का सामना करना पड़ता है।

12. यह भी कहा गया कि गरीब व्यक्ति अपना पैसा बैंक में जमा करता है जिससे देश की आर्थिक स्थिति मजबूत होती है और देश आगे बढ़ता है किन्तु वहीं दूसरी ओर देश के सफेद कालर वाले लोग व काला–बजारी करने वाले, कालाधन को बैंक में न रखकर अपने घरों, रिश्तेदारों एवं तहखानों में रखकर देश की आर्थिक स्थिति को कमजोर करके देश के विकास में रोड़ा उत्पन्न करते हैं। ऐसी दशा में बैंक मात्र यह कहकर नहीं बच सकता है कि साइबर ठगी का बैंक से कोई वास्ता व सरोकार नहीं है और न ही पुलिस यह कहकर बच सकती है कि साइबर ठग करने वाले दूरदराज नक्सलवादी क्षेत्रों में रहते है इसलिए उनकी पहुँच वहाँ तक नहीं है।

13. उल्लेखनीय है कि वर्तमान मामले में आवेदकगण के विरूद्व गवाहों और सबूतों के आधार पर आरोप पत्र न्यायालय प्रेषित किया जा चुका है।

14. आवेदक/अभियुक्त शुभो शाह उर्फ सुभाजीत के विद्वान अधिवक्ता श्री इमरान उल्ला के द्वारा सुझाव दिया गया कि साईबर अपराध को रोकने के लिए जवाबदेही निश्चित होनी चाहिए। चूँकि ग्राहक अपना पैसा बैंक में जमा करता है और निश्चिन्त हो जाता है कि आवश्यकता पड़ने पर वह बैंक से पैसा निकाल लेगा किन्तु जब उसे यह पता चलता है कि आनलाईन फ्राड द्वारा उसके पैसे किसी और ने निकाल लिए है तब बैंक यह कहकर बच नहीं सकता कि उसका पैसा साइबर ठगी द्वारा किया गया है इसलिए वह जिम्मेदार नहीं है। बैंक ही ग्राहकों के पैसों की भरपाई के लिए जिम्मेदार होगा। यह बैंक का सिरदर्द है कि वह ग्राहकों के पैसों की सुरक्षा के लिए कैसा नियम बनायें। भारतीय रिजर्व बैंक के वरिष्ठ अधिवक्ता श्री विकास बुधवार जो अब माननीय न्यायमूर्ति है और उनके द्वारा सुझाव रखे गये कि रिजर्व बैंक द्वारा भी समय समय पर दिशा निर्देश बनाये जाते हैं एवं आनलाईन धोखाधड़ी को रोकने के लिए बैकों को अगाह किया जाता है और न मानने पर कार्यवाही की बात की जाती है। परन्तु रिजर्व बैंक के अधिवक्ता यह बताने में असमर्थ रहे हैं कि बैकों द्वारा दिशा निर्देश का पालन न करने पर उनके द्वारा क्या कार्यवाही की गयी है। भारतीय रिजर्व बैंक की सलाह के अनुसार,

ग्राहकों का पैसा धोखाधड़ी से निकलने पर बैंक ही जिम्मेदार होगा।

15. भारत सरकार की ओर से विद्वान अपर महान्यायवादी व वरिष्ठ अधिवक्ता श्री एस0 पी0 सिंह की ओर से तर्क रखा गया कि धोखाधड़ी से बैंक ग्राहकों का पैसा निकालने का पूरा प्रकरण रिजर्व बैंक से सम्बन्धित है और वे ही इसके जिम्मेदार हैं। उनके द्वारा आगे यह भी सुझाव रखा गया कि आधार कार्ड के माध्यम से बैंक सभी ग्राहकों के खाते पर नजर रख सकती है किन्तु माननीय सर्वोच्च न्यायालय ने आधार कार्ड की अनिवर्यिता को समाप्त कर दिया है इस कारण बैंक ग्राहकों से आधार कार्ड की अनिवर्यिता पर दबाव नहीं दे सकती है। न्यायालय श्री एस0 पी0 सिं के इस तर्क से सहमत है कि वह आधार कार्ड की अनिवर्यिता के सम्बंध में पुर्नविचार याचिका, माननीय सर्वोच्च न्यायालय में दाखिल करें जिससे आधार कार्ड को बैंकों से खाताधारकों के साथ जोड़ा जाए जिससे आनलाईन बैंक धोखाधड़ी को रोका जा सके।

16. भारतीय दूर संचार विभाग की ओर से विद्वान अधिवक्ता श्री राजीव रंजन द्वारा सुझाव दिया गया कि जब से मोबाईल सिम निःशुल्क अथवा बहुत कम पैसों में और बिना किसी कठोर नियम के बेचे जाने लगे है तब से आनलाईन अपराधों में बढ़ोत्तरी हुई है इसलिए मोबाईल सिम बेचने वाली कम्पनियों को सिम बेचते समय पहले तो सिक्योरिटी मनी जमा करानी चाहिए और दूसरा मूल पहचान पत्र में दिए गये पते का सत्यापन पते पर जाकर कराने के बाद ही सिम का वितरण करना चाहिए। ऐसे कुछ कड़े नियम बनाने होगें तभी साइबर अपराध पर लगाम लगाई जा सकती है।

17. आवेदकगण के विद्वान अधिवक्ता श्री दिलीप पाण्डेय द्वारा यह भी तर्क रखा गया कि बैंक के0 वाई0 सी0 के माध्यम से खाताधारको के खाता को सख्ती से जोड़ना चाहिए और उसे यह पहले निश्चित करना चाहिए कि ग्राहको ने अपना जो पता व मोबाईल नम्बर दे रखा है वह उसी का है या फिर वह पता और मोबाईल नम्बर किसी और का है। इन बातों पर सन्तुष्ट होने पर ही उसे खाताधारकों का खाता खोलना चाहिए किन्तु देखने में आता है कि खाता खोलने की होड़ में बैंक इस प्रकार की सावधानियों को ध्यान नहीं रखता है जिसका फायदा साईबर क्राइम करने वाले अपराधी भोले भाले ग्राहकों का पैसा हड़प कर जाते हैं।

18. राज्य सरकार की ओर से श्री महेश चन्द्र चतुर्वेदी, विद्वान अपर महाधिवक्ता, श्री शिव कुमार पाल, विद्वान शासकीय अधिवक्ता एवं श्री अमृतराज चौधरी, श्री मिथिलेश एवं श्री प्रशान्त कुमार विद्वान अपर शासकीय अधिवक्ता ने अपने अपने तर्क प्रस्तुत किये और इस बढ़ते हुए साईबर अपराध जो कि आनलाईन पूरे देश में हो रही है, पर चिन्ता व्यक्त की और कहा कि आनलाईन अपराध देश के पूरे सिस्टम को खोखला किये जा रहा है और आज शायद ही ऐसा कोई व्यक्ति हो जो इसका शिकार न हो। ऐसी स्थिति में भारत सरकार और राज्य सरकार को ऐसा सिस्टम इजाद करना चाहिए कि ऐसे अपराधों पर रोक लगे। उनके द्वारा भी यह सुझाव दिया गया कि ग्राहकों के पैसों की सुरक्षा की गारंटी होनी चाहिए। चूँकि पैसा बैंक में जमा होता है तो यह जिम्मेदारी बैंक की होती है कि वह ऐसा सिस्टम इजाद करें कि उसके बैंक में ग्राहकों का पैसा किसी भी हाल में साईबर क्राइम के हाथ में न जाए और वह इसे रोकने का हर सम्भव प्रयास करे बावजूद इसके बैंक असफल रहता है तो ग्राहकों के पैसों की वापसी के लिए बैंक ही जिम्मेदार है। उनके द्वारा यह भी सुझाव रखा गया कि बैंक ग्राहकों का खाता खोलते समय ग्राहकों का पता व मोबाईल नम्बर का सख्ती से सत्यापन नहीं कराता है जिसका लाभ साइबर अपराधी आसानी से उठाता है और हजारों सिम जिसे उसने सम्बन्धित बैंक से जोड़ रखे है उसे लेकर वह नक्सलवादी क्षेत्रो से संचालित करता है जहाँ पुलिस भी जाने से डरती है इसलिए सिम बेचने वाली कम्पनी को भी सिम बेचते समय ग्राहकों को तब तक सिम न दे जब तक उसे पूर्ण विश्वास न हो कि अमुक सिम लेने वाला व्यक्ति सही व्यक्ति है। बैंक को खाताधारकों का खाता खोलते समय उसका पूर्ण सत्यापन मोबाईल नम्बर एवं पता पूर्ण रूप से सन्तुष्ट होने पर ही अपने बैंक में खाता खोलना चाहिए। साथ ही उनका यह भी सुझाव है कि आनलाईन पैसा स्थानान्तरित के समय सम्बन्धित बैंक अपने ग्राहकों से व्यक्तिगत फोन करके इसका सत्यापन करें तत्पश्चात पैसों का स्थानान्तरण करें और बैंक द्वारा यदि ऐसा नहीं किया जाता है तो ऐसे सभी आनलाईन फ्राड से ग्राहकों का गया पैसों के लिए बैंक को ही जिम्मेदार ठहराया जाए।

19 उपरोक्त विद्वान अधिवक्तागण के तर्क एवं सुझाव सुनने के बाद न्यायालय का यह मत है कि बैंक खाताधारकों का पैसा सुरक्षित रहना चाहिए। केवल इसलिए नहीं कि ग्राहक पैसा बैंक में जमा करता है कि आवश्यकता पड़ने पर वह उसे निकाल सकता है, वह इस लिए भी, ग्राहकों द्वारा बैंक में जमा पैसा एक नम्बर का होता है और जिससे देश की आर्थिक स्थिति भी सुधरती है। वहीं दूसरी ओर देश में ऐसे लोग भी है जो करोड़ो रूपये बैंक में जमा न करके घरो में तहखानो में छिपा कर रखते है उससे न तो बैंक को कोइ लाभ होता है वरन् वे देश की आर्थिक स्थिति को भी खोखला करते हैं। ऐसी स्थिति में बैंक का वह ग्राहक, देश के प्रति ज्यादा ईमानदार है और उसका पैसा बैंक को हर हाल में सुरक्षित रखना चाहिए और अगर किसी भी प्रकार से साईबर अपराधियों द्वारा उसके उसके बैंक खाते में डाका ड़ालकर पैसा निकाला जाता है तो इसके लिए बैंक को ही इसकी जिम्मेदारी लेनी होगी।

20. यहाँ यह भी उल्लेखनीय है कि आवेदकगण ने इस न्यायालय के एक न्यायमूर्ति के बैंक खाते से साइबर ठगी के माध्यम से पैसे निकाले हैं और आवेदकगण के विद्वान अधिवक्तागण ने यह स्वीकार किया है कि उक्त पैसा आवेदकगण ने वादिनी को वापस कर दिये हैं।

21. प्रकरण के समस्त तथ्य एवं परिस्थितियों को दृष्टिगत रखते हुए तथा प्रस्तुत मामले के गुण–दोष पर बिना कोई टिप्पणी किये मेरे विचार से आवेदकगण **नीरज मण्डल उर्फ राकेश, तपन मण्डल, शूबो शाह उर्फ सुभाजीत एवं तौसीफ जमां** को जमानत पर मुक्त करने का कोई पर्याप्त आधार नहीं पाया जाता है।

22. तदनुसार आवेदकगण **नीरज मण्डल उर्फ राकेश, तपन मण्डल, शूबो शाह उर्फ सुभाजीत एवं तौसीफ जमां** के उक्त जमानत आवेदन पत्र बलहीन है एवं निरस्त होने योग्य है।

23. **तदनुसार आवेदकगण** नीरज मण्डल उर्फ राकेश, तपन मण्डल, शूबो शाह उर्फ सुभाजीत एवं तौसीफ जमां के उपरोक्त जमानत आवेदन पत्र निरस्त किये जाते हैं।

(2022)01ILR A15
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.12.2021

BEFORE

THE HON'BLE MAHESH CHANDRA TRIPATHI, J.
THE HON'BLE SUBHASH VIDYARTHI, J.

Criminal Misc. Writ Petition No. 8403 of 2021
alongwith
Criminal Misc. Writ Petition No. 8370 of 2021

Vibhor Rana ...Petitioner
Versus
Union of India & Anr. ...Respondents

Counsel for the Petitioner:
Sri Nipun Singh, Sri Rishi Upadhyay, Sri Neelesh Ram Chandani, Sri Sumit Suri, Sri Gopal Swaroop Chaturvedi, Sri Anurag Khanna

Counsel for the Respondents:
Sri Pranay Krishna, Ashish Pandey, Special Public Prosecutor (NCB), Sri Arunendra Kumar Singh, A.G.A.

Narcotic Drugs & Psychotropic Substances, 1985 – Section 42 - Petitioners have been made distributor of drugs manufactured by Abbott Health Care Pvt. Ltd. Including Phensedyl New Cough Linctus-NCB seized 61000 bottles of Phensedyl New Cough Linctus Syrup-out of 5 batches seized-three batches distributed by Petitioners-absolutely no material on record to indicate that NCB had any reason to believe that seized consignment was of narcotic drug-and that he has power-pre-requisite for exercising power u/s 42 of NDPS Act-Phensedyl New Cough Linctus-not a narcotic drug-and any dealing in it-would not be subject to the provision of NDPS Act.

W.P. allowed. (E-9)

List of Cases cited:

1. Ashok Kumar Vs U.O.I., 2014 SCC OnLine All 16411

2. Bail No.13555 of 2021, Ajay Bajpai Vs St. of U.P.

3. St. of Pun. Vs Rakesh Kumar, (2019) 2 SCC 466

4. Hemant Kumar Saini Vs U.O.I., 2021 SCC On Line AII 497

5. Roger Shashoua Vs Mukesh Sharma, (2017) 14 SCC 722

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

1. Both these Writ Petitions involve a common question i.e. whether Phensedyl New Cough Linctus Syrup is a Narcotic Drug and it comes within the purview of Narcotic Drugs and Psychotropic Substances Act (which will hereinafter be referred to as the NDPS Act"), therefore, both these Writ Petitions are being decided by a common judgment.

2. Heard Sri Gopal Swaroop Chaturvedi, learned Senior Advocate and Sri Anurag Khanna, learned Senior Advocate assisted by Sri Nipun Singh, Shri Rishi Upadhyay, Sri Neelesh Ram Chandani and Sri Sumit Suri, Advocate learned counsel for the petitioner in Writ Petition No. 8403 of 2021 and Sri Navin Sinha, learned Senior Advocate assisted by Sri Raghav Dev Garg, Advocate, learned counsel for the petitioner in Writ Petition No. 8370 of 2021, Sri Ashish Pandey, Advocate, Special Public Prosecutor for Narcotic Control Bureau, Lucknow and Sri. Arunendra Kumar Singh, the learned A.G.A. for the State.

3. The petitioner in Writ Petition No. 8403 of 2021 is the sole proprietor of a proprietorship firm "G. R. Trading Company" (hereinafter referred to as the "Company') having its office at Saharanpur, which has been granted a license under Rules 61(1) and 61(2) of the Drugs Rules, 1945. The petitioner's company deals in the distribution of various pharmaceutical drugs and it has entered into an agreement with M/S Abbott Health Care Pvt. Ltd., under which the company has been made a super distributor to distribute more than 300 pharmaceutical drugs manufactured by Abbott Health Care Pvt. Ltd.

4. The petitioner in Writ Petition No.8370 of 2021 is the proprietor of a proprietorship concern by the name of "Sachin Medicos" having its registered office at Bajaria Road, First Floor, Thana Janakpuri, Saharanpur, which is a drug distribution company having license under Rules 61 (1) and 61 (2) of the Drugs Rules, 1945. Sachin Medicos deals in the distribution of various pharmaceutical drugs, including Phensedyl New Cough Linctus.

5. The dispute which gave rise to the filing of both the Writ Petitions, started on 17-01-2021, when a joint team of the Narcotic Control Bureau (which will hereinafter be referred to as "the NCB") and the Special Task Force Varanasi conducted a search and seized 61,000 bottles of Phensedyl New Cough Linctus Syrup from some location in district Jaunpur. These bottles of the cough syrup came from five different batches. Pursuant to the aforesaid seizure, some arrests were made by the NCB and a Case No. NCB-LZU-CR No. 04/21 was registered under the NDPS Act. The Investigating team has found that out of the five batches of

Phensedyl New Cough Linctus Syrup, three batches have been distributed by G. R. Trading Company owned by Vibhor Rana and Sachin Medicos owned by Bittu Kumar.

6. The Intelligence Officer, NCB sent notices to G. R. Trading Company owned by Vibhor Rana and to Sachin Medicos owned by Bittu Kumar in purported exercise of powers conferred under Section 67 of the NDPS Act, summoning them to appear before him on 02-03-2021. The petitioner in Writ Petition No. 8403 of 2021 Vibhor Rana being the proprietor of G. R. Trading Company, appeared in response to the aforesaid notice and on 03-03-2021 his voluntary statement was recorded in which he inter alia stated that he is the proprietor of the company. He applied for a license in the year 2019 and he is a super distributor of M/S Abbott Health Care Pvt. Ltd. On being asked about Batch Nos. PHB0423, PHB0435 and PHB0440, he has given all the documents of these batches. He had sent the goods on 13-01-2021 and issued invoices and E-way bills and has received payments of the goods through RTGS in the bank account of the Company in Punjab National Bank, Main Ghantaghar Branch. The petitioner in Writ Petition No. 8370 of 2021 Bittu Kumar, being the proprietor of Sachin Medicos also recorded his voluntary statement which was on similar lines. Both the petitioners have filed copies of licences granted to them by the Food Safety & Drug Administration, U.P. District Saharanpur.

7. The petitioners have pleaded that they have appeared in response to further notices issued by the Intelligence Officer, NCB and provided all the relevant documents.

8. Section 42 of the NDPS Act confers the power of entry, search, seizure and arrest without warrant or authorisation in the following conditions: -

"42. Power of entry, search, seizure and arrest without warrant or authorisation.--(1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, **if he has reason to believe from personal knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed** or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter V-A of this Act is kept or concealed in any building, conveyance or enclosed place, may, between sunrise and sunset,--

(a) enter into and search any such building, conveyance or place;

(b) in case of resistance, break open any door and remove any obstacle to such entry;

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter V-A of this Act; and

(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act:....."

9. There is absolutely no material on record to indicate that before entering the premises in Jaunpur and seizing therefrom 61,000 bottles of Phensedyl New Cough Linctus, the Officers of N.C.B. had any reason to believe that the consignment being seized was of a narcotic drug, and that he had power to seize the same, which is a pre-requisite for exercising the power under Section 42 of the NDPS Act.

10. Sri Gopal Swaroop Chaturvedi and Sri. Anurag Khanna, learned Senior Advocates appearing for the petitioner in Writ Petition No. 8403 of 2021 and Sri. Navin Sinha, learned Senior Advocate appearing for the petitioner in Writ Petition No. 8370 of 2021 have submitted that even though the petitioners have cooperated in the investigation, the investigation is being carried out by the respondent without jurisdiction as Phensedyl New Cough Linctus Syrup is neither a Narcotic drugs nor is it a psychotropic substance and, therefore, it does not fall within the purview of the NDPS Act.

11. It is mentioned on the label affixed on the bottle of Phensedyl as also on the license of M/S Abbott Health Care Pvt. Ltd. that the prescription dosage of Phensedyl Cough Syrup is 5 ml and each dosage unit contains 10 mg of Codeine Phosphate IP, besides Chlorpheniramine Maleate I.P. Thus Phensedyl contains merely 0.2 % Codeine.

12. The petitioner has specifically pleaded that "the consignment which has been seized was sent to agencies licensed under Rule 61 (1) of the Drugs Rules, for therapeutic purposes. It is not the case of the prosecution agency that Phensedyl New Cough Linctus is a banned drug in the State of Uttar Pradesh. The same gets prescribed by various medical practitioners in normal course, which pleading has not been denied in the counter affidavit."

13. However, on 15-07-2021, the Intelligence Officer, NCB has filed a Complaint under Sections 8, 21 (c), 22, 25, 29 and 60 (3) of the NDPS Act in the Court of Special Judge, NDPS Act at Jaunpur against ten persons for the alleged illegal handling of Phensedyl Syrup. In the entire complaint, there is no averment that the alleged offending goods found with the accused persons are a narcotic substance and the accused persons were found to have committed any act which was in violation of the prohibition contained in Section 8 of the Act. Moreover, in the entire complaint there is absolutely no averment that the alleged offence falls within the purview of the NDPS Act and that it falls within the purview of jurisdiction of the Special Court. The relevant paragraphs of the

complaint which make a mention of the goods seized and of its components, are being reproduced below: -

"32. That the original Samples marked as LISI, L2Si, L3SI & L5SI have been sent to CRCL New Delhi vide letter no. NCB/LKO/III/INV/Seiz/04/2021/3670 dated 10.01.2021. The Chemical Examination report dated the samples under reference answer positive test for Codeine Phosphate."

"46. That, the Chemical report, dated 03.03.2021 vide F. No.I/ND/R/2020/CLD-1207 (N) to 1211 (N) which was received on 15.03.2021 from CRCL, New Delhi was sent to be served to the arrested above 08 accused persons individually though the Jail Superintendent Jaunpur, vide letter NCE/LKO/III/SEIZ/04/2021/4252 dated 19.03.2021. The receipt of individual arrested persons from Jail Superintendent, Jaunpur has been received vide their letter No.137/U.T./2021 dated 03.04.2021, Lucknow (U.P.) was recovered at the time of said seizure on 17.01.2021. Hence, a follow up action was conducted at this firm by the NCB Lucknow along with Drug Department, Lucknow on 19.01.2021, related documents were collected and after scrutiny of documents, summoned the owner of this firm Girjesh Kumar to join the investigation. Statement u/s 67 of NDPS Act was recorded and due to non-availability of several documents and definite lead on that day, he was allowed to go but the investigation was kept open against him. Accordingly, keeping our investigation intact, a letter was also written to the Commissioner, FSDA, with the request to conduct an enquiry against this firm and if any anomaly or deviation observed, immediately be shared. After enquiry, the drug license of this firm was cancelled by the drug department on 20.03.2021 vide letter no.....202-21/364-4 on the grounds of its conscious and voluntary collusion in the illegal sale & illicit diversion of the seized consignment of Phensedyl Syrup by resorting to the illegal modus operandi of using the number of the cancelled drug license no. LKO-2016/20B/000563, LKO-2016/21B/000563 in place of the new drug license no. UP320B002511 & UP3221B002495 and knowingly selling scheduled H drug to physically non-existent firms by resorting to illegal sale & illicit diversion of 1,19,9000 bottles of Phensedyl Syrup in a period between 01/04/20 to 18/01/21 to Balaji Agency @ Varanasi, Vaijyanti enterprises Chandauli, Kunal Pharma Agra & Maa Ambey Medical Agency in whole sale only, and on 26.03.2021. During his confessional statement he confessed his conscious & voluntary collusion in this illegal sale & illicit diversion of the seized consignment of Phensedyl Syrup by resorting to the illegal modus operandi of using the number of the cancelled drug license in place of the new drug licence and consciously involving himself in selling & illicit trafficking of restricted schedule H drug @ seized consignment of Phensedyl Syrup to physically non-existent firms in close collusion with other con-accused & the suspects".

"50. That, 01 invoice bearing number PP-003775 dated 08.01.2021 of Palak Pharma, Shop No.118, BC Medicine Market, Naya Gaon, East, Aminabad, Lucknow (U.P.) was recovered at the time of seizure on 17.01.2021. Hence, a follow up was conducted at this firm by the NCB Lucknow along with Drug Department, on 18.01.2021, collected related documents and after scrutiny of documents summoned

Pawan Singh on 27.01.2021 to join the investigation on 28.01.2021. Statement u/s 67 of NDPS Act of Pawan Singh was recorded and found that Pawan Singh is not the registered person of this firm, hence, statements of registered person were also recorded u/s 67 of NDPS Act but, due to non-availability of several documents and the leads, they were allowed to go but the investigation was kept open and a letter written to the Commissioner, FSDA with a request to conduct enquiry against firm and to share immediately if any anomaly or deviation observed. After enquiry, the drug licence of this firm was cancelled by the drug department on 20.03.2021 vide their letter no.../2020-21/364-4 on the grounds of its physical non-existence and its conscious and voluntary collusion in the illegal sale and illicit diversion of the seized consignment of Phensedyl Syrup by resorting to the illegal modus operandi of knowingly selling schedule H drug to physically non-existent firms by resorting to illegal sale and illicit diversion of 1,15,000 bottles of Phensedyl Syrup in a period between 01/04/20 to 01/02/21 to Balaji Agency @ Varanasi, Anika his father and he sent medical document regarding his treatment along with sale purchase details of Phensedyl Syrup of said invoice. 2nd notice sent on 13.04.2021 through speed post and he again sent on 30.04.2021, the medical documents regarding his treatment. 3rd notice was sent on 11.05.2021 through speed post, but again he sent medical treatment regarding his treatment along with sale purchase details of Phensedyl Syrup of said invoice. Statement of Pawan Singh was recorded on 02.06.2021. In his voluntary statement, he confessed his conscious & voluntary collusion in this illegal sale and illicit diversion of the seized consignment of Phensedyl Syrup by resorting to the illegal modus operandi of knowingly & regularly selling Phensedyl syrup in bulk, including 5000 bottles of seized Phensedyl Syrup vide invoice no. PP-0003775 dated 08.01.2021 to physically non-existent firms, Balaji Agency, Anika Pharmaceuticals and Parwati Traders."

"62. That, on the basis of seized invoices pertaining to Sachin Medicos Pharmaceuticals Distributors, Saharanpur at the time of seizure, a notice u/s 67 of NDPS was issued on 21.01.2021 to this firm with direction to report on 28.01.2021 and a follow up action conducted at Saharanpur with the help of local police, but this firm was found closed, hence, notice u/s 67 was affixed on it. A letter was received on 03.02.2021 from the owner of this firm that he had fallen ill due to cold and he would report this office immediately on recovery. 2nd notice was issued on 20.02.2021 with direction to report on 02.03.2021 and this notice was affixed on the shutter of this firm due to closure of the said firm, along with Drug Inspector, Saharanpur on 25.02.2021. Bittu Kumar, the owner of Sachin Medicos joined the investigation on 02.03.2021, but due to non-availability of several documents pertaining to the suspected transaction, the investigation was kept opn against him with direction to appear before the I.O. with all relevant documents for scrutiny & further needful action. Accordingly, 3rd notice u/s 67 was sent through DZU, but said notice was returned undelivered by DZU due to incomplete address. On 06.06.2021, a follow up action was conducted by the NCB Lucknow team at his residential address, but it was found that he left his village 05 years and is residing at an unknown place in Saharanpur City. Drug Deptt. Saharanpur after establishing his involvement in the illicit diversion of Codeine based Phensedyl Syrup, cancelled

the license of this firm. On receipt of the required sale/purchase details in r/o Sachin Medicos, it was found that G. R. Traders Company sold these batches to 35 Roorkee & Bhagwanpur based firms, but on thorough scrutiny of the documents submitted by G. R. Trading Company, Saharanpur it came to notice that the sale which was made to 06 firms, located at Bhagwanpur, through Delhi Punjab Freight Carrier on 13.01.2021 as per invoices, was further sold to Sachin Medicos, Saharanpur on the same day by all six Bhagwanpur based firms through Badri Narayan Transport. But, as per the receipts copies of the sale invoices of these six firms, submitted by G. R. Trading Company, the consignment was received on 14.01.2021 by them. Thereafter, records of sale/purchase was sought from existing firms and as per the documents, submitted by these firms, it came to notice that all these firms sold the concerned batches of Phensedyl Syrup to only one firm i.e. **Sachin Medicos Pharmaceuticals Distributors, Saharanpur through physically non-existent transport companies on the same day i.e. on 13-01-21. Accordingly, a physical verification a/w the official of drug department was conducted on 05.06.2021 and it was found that 05 firms out of 35 are not existing physically and Life Medicos, Bhagwanpur submitted fake issue/receipt vouchers. Sachin Medicos, further sold the seized bottles of Phensedyl Syrup to various non-existent firms in Sultanpur, Varanasi & Chandauli through Kartik Roadlines. The physical verification of the transport agencies, viz. Delhi, Punjab Freight Carrier & Badri Narayan Roadlines, owned by Sanjeev Kumar Rathore, S/O Laxman Singh Rathore, has revealed that both these transport companies, which were used for the transport of Phensedyl Syrup for GR Traders to 35 other medical firms on 13.01.21, and, back to Sachin Medicos, on 13.01.21 itself in a time period of 04 hours only, are physically not existing. Efforts are being made to trace and involve him in investigation. As he could not join the investigation till now, hence, investigation is kept open against him. A prayer for NBW is also being filed against him in the Hon'ble Court.**

14. But in paragraph 76 of the complaint the respondent has stated that investigation against the main suspects - including the petitioner, is proposed to be kept open so that their role in the case may be properly established and supplementary complaint, if any, may be filed against them. The respondent has categorically stated in the complaint that the petitioner has reported to the NCB office and has tendered his voluntary statement and has given all the details regarding three batches which had originated from his firm.

15. The petitioner has pleaded that he had issued a purchase order to Abbott Health Care Pvt. Ltd. and made the due payments through bank transfer. In pursuance whereof Abbott Health Care Pvt. Ltd. issued three batches of Phensedyl New Cough Linctus on 22-12-2020, 04-01-2021 and 12-01-2021. In pursuance of the aforesaid, tax invoices were also raised by Abbott Health Care Pvt. Ltd. for all the three batches. The said consignments were then transported to the petitioner's firm. The petitioner had received purchase orders from 35 firms located in Uttarakhand, all of which have a license under Rules 61 (1) and 61 (2) of the Drugs Rules and a valid

GST I.D. The petitioner raised invoices against the consignee firms and dispatched the consignments through Delhi Punjab Freight Carrier which had issued receipts to the petitioner for transporting the said consignments and had got generated E-way bills for transit of the said consignments. All the 35 firms paid the consideration amount to the petitioner through bank transfers thus establishing the legitimacy of the entire transaction. All the 35 firms have received the consignments and have made endorsements of receiving the goods on the receipts of the transport company As far as the petitioner is concerned, the transaction stood completed on the delivery of the consignments to the 35 purchaser firms which are based in Uttarakhand and if thereafter the medicines supplied by the petitioner are found at Jaunpur, the petitioner is not responsible for the same in any manner. The respondent has alleged in the Complaint filed in the Court of Special Judge, NDPS Act, Jaunpur that during physical verification, five firms namely Shruti Medical Agency Bhagwanpur, Linke Health Care Bhagwanpur, R. D. Pharma, Bhagwanpur, Surya Health Care Agency Bhagwanpur and Om Medicos Bhagwanpur were found non-existent which allegation against the petitioner seems incomprehensible in view of the facts that all these five firms hold licenses under Rule 61 of the Drugs Act, copies whereof have been filed with the Writ Petition.

16. The Intelligence Officer, NCB has filed a counter affidavit in Writ Petition N. 8403 of 2021 inter alia stating that Phensedyl Syrup is a codeine based syrup and comes under the purview of manufactured drug as such it is covered under the NDPS Act. 61,000 bottles of 100 ml. Phensedyl syrup were recovered, the total weight of the syrup recovered is 8,235 Kg. and one of the contents in the syrup is codeine phosphate, covered under the NDPS Act and the commercial quantity provided under the Act is 1 Kg and the seized quantity is much above the commercial quantity. Section 80 of the NDPS Act, provides that "The provisions of this Act or the Rules made there under shall be in addition to, and not derogation of the Drugs and Cosmetics Act, 1940 (23 of 1940) or the rules made thereunder. In light of aforesaid provision the provisions of NDPS Act shall also applicable on Drugs and Cosmetics Act. The petitioner is engaged in illicit sale, purchase and diversion of Phensedyl in violation of Section 8 of NDPS Act, which prohibits possession of narcotics substances, narcotics drugs or psychotropic substance except for medical or scientific purposes in accordance with the relevant provisions of law and as such possession, sale and purchased of codeine bases syrup for non therapeutic and non medical uses is illegal and hence provisions of NDPS Act shall be attracted. The license issued by the competent authority to the petitioner company is for the therapeutic and medical use only and not for the use of intoxication or for getting a stimulant effect. Any diversion or illegal sale, purchase and possession of narcotic drugs intended for medical uses must attract. Section 80 of NDPS Act read with Section the 2 of Drugs and Cosmetics Act provides for investigation of the case under the NDPS Act, thus, the provisions of NDPS Act can be applied along with the provisions of the Drugs and Cosmetics Act. The drug and Cosmetics Act deals with the drugs which are intended to be used for therapeutic or medical uses, and on the other hand the NDPS Act intends to curb and penalize the use of narcotic drugs which are used for

intoxication or for getting a stimulant effect. The diversion and illegal sale, purchase and possession of Phensedyl syrup which is a narcotic drug attracts the provisions of NDPS Act. According to the provisions of Section 80 of NDPS Act and Section 2 of the Drugs and Cosmetic Act, the proceeding can be initiated and the investigation can be made under the provisions of NDPS Act.

17. Sri Ashish Pandey, learned Special Public Prosecutor (NCB) has submitted that Phensedyl syrup is a Codeine based drug, therefore, it is a narcotic drug. It is a case of illegal diversion of narcotic drug, therefore, the provisions of NDPS Act would apply to the present case. The Narcotic Control Bureau, had made a seizure 6,100 bottles of Phensedyl Syrup from a godown in Jaunpur and there was no license for storage of the drug in that godown.

18. Now we proceed to examine the relevant provisions of the Narcotic Drugs and Psychotropic Substances Act, 1985 to ascertain whether Phensedyl New Cough Linctus is a Narcotic Drug, which would come under the purview of the NDPS Act.

19. The Narcotic Drugs and Psychotropic Substances Act, 1985 has been enacted with the object to "consolidate and amend the law relating to narcotic drugs, to make stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances to provide for the forfeiture of property derived from, or used in, illicit traffic in narcotic drugs and psychotropic substances, to implement the provisions of the International Convention on Narcotic Drugs and Psychotropic substances and for matters connected therewith." As the object of the Act suggests, it deals with narcotic drugs and psychotropic substances only and unless the offending substance is a narcotic drugs or a psychotropic substance, the provisions of the NDPS Act will not apply.

20. Section 2 of the NDPS Act contains definitions and the following definitions are relevant for adjudicating the dispute involved in the present case: -

(xi) **"manufactured drug"** means--

(a) all coca derivatives, medicinal cannabis, **opium derivatives** and poppy straw concentrate;

(b) any other narcotic substance or preparation which the Central Government may, having regard to the available information as to its nature or to its nature or to a decision, if any, under any International Convention, by notification in the Official Gazette, declare to be a manufactured drug,

but does not include any narcotic substance or preparation which the Central Government may, having regard to the available information as to a decision, if any, under any International Convention, by notification in the Official Gazette, declare not to be a manufactured drug;

(xiv) **"narcotic drug"** means coca leaf, cannabis (hemp), opium, poppy straw and includes all manufactured drugs;

(xv) "opium" means--

(a) the coagulated juice of the opium poppy; and

(b) any mixture, with or without any neutral material, of the coagulated juice of the opium poppy,

but does not include any preparation containing not more than 0.2 per cent of morphine;

(xvi) **"opium derivative"** means--

(a) medicinal opium, that is, opium which has undergone the processes necessary to adopt it for medicinal use in accordance with the requirements of the Indian Pharmacopoeia or any other pharmacopoeia notified in this behalf by the Central Government, whether in powder form or granulated or otherwise or mixed with neutral materials;

(b) prepared opium, that is, any product of opium obtained by any series of operations designed to transform opium into an extract suitable for smoking and the dross or other residue remaining after opium is smoked;

(c) phenanthrene alkaloids, namely, morphine, codeine, thebaine and their salts:

(d) diacetylmorphine, that is, the alkaloid also known as diamorphine or heroin and its salts; and

(e) all preparations containing more than 0.2 per cent of morphine or containing any diacetylmorphine;

8. **Prohibition of certain operations.**--No person shall--

(a) .....

(b) .....

(c) produce, manufacture, possess, sell, purchase, transport, warehouse, use, consume, import inter-State, export inter-State, import into India, export from India or tranship **any narcotic drug** or psychotropic substance,

except for medical or scientific purposes and in the manner and to the extent provided by the provisions of this Act or the rules or orders made thereunder and in a case where any such provision, imposes any requirement by way of licence, permit or authorisation also in accordance with the terms and conditions of such licence, permit or authorisation:

....."

21. The position which emerges from a combined reading of the above quoted definitions is that as per Section 2 (xvi) (c) of the Act, codeine and its salts are "opium derivatives". As per Section 2 (xi) (a), opium derivatives are included in "manufactured drugs" and as per Section 2 (xiv) all manufactured drugs are included in the definition of "narcotic drugs", unless the same falls within the exception appended to Section 2 (xi) providing that **"but does not include any narcotic substance or preparation which the Central Government may, having regard to the available information as to a decision, if any, under any International Convention, by notification in the Official Gazette, declare not to be a manufactured drug".**

22. On 14-11-1985 the Government of India had issued a notification No. 826 (E) dated 14.11.1985 and S.O. 40 (E) dated 29-01-1993 containing the list of narcotic drugs and Entry 35 thereof is as follows:-

"Methyl morphine (commonly known as "Codeine') and Ethyl morphine and their salts (including Dionine), all dilutions and preparations **except those which are compounded with one or more other ingredients and containing not more than 100 milligrams of the drug per dosage unit and with a concentration of not more than 2.5% in undivided preparations and which have been established in Therapeutic practice."**

(emphasis supplied)

23. Thus, as per the aforesaid Notification, if any drug contains not more than 100 milligrams of Methyl Morphine, which is commonly known as Codeine, per dosage unit, and in that drug Codeine is compounded with one or more other ingredients and if in the drug the concentration of Codeine is not more than 2.5% in undivided preparations and the drug has been established in Therapeutic practice, will not be a "Manufactured Drug" and, therefore, it will not be a "Narcotic Drug".

24. The prohibition contained in Section 8 of the Act is applicable to "Narcotic Drugs" and since Phensedyl New Cough Linctus contains Codeine compounded with one other ingredient, namely Chlorpheniramine Maleate and since Phensedyl New Cough Linctus contains merely 10 milligrams per dosage unit of 5 ml, which is not more than 100 milligrams of the drug per dosage unit in undivided preparations and the concentration of Codeine in Phensedyl New Cough Linctus is merely 0.2%, which obviously is not more than 2.5% and which has been established in Therapeutic practice, it is not a "Manufactured Drug" and, therefore, it is not a "Narcotic Drug", the prohibition contained in Section 8 of the Act does not apply to it.

25. Phensedyl New Cough Linctus contains Codeine which is mentioned at Serial Number 20 in Schedule H1 appended to the Drugs Rules, 1945 and a note appended to Schedule H1 provides that "Preparations containing the above drug substances and their sales excluding those intended for topical or external use (except opthalmic and ear or nose preparations) containing above substances are also covered by this Schedule". Therefore, Phensedyl New Cough Linctus is a drug covered by the Drugs and Cosmetics Act, 1940.

26. To clarify this position, on 26.10.2005 the Drug Controller General of India had written letter to all the State Drugs Controllers stating as follows:-

"As you are aware there are number of Cough preparations like Corex of M/s Pfizer Ltd. Mumbai, Phensedyl of M/s. Nicholas Piramal India Limited, Mumbai, Codokuff of M/S. German Remedies, Codeine Linctus of M/s Zydus Alidac etc. moving in inter state commerce. These preparations contain among other drugs Codeine Phosphate 10 mg as one of the ingredients. By virtue of the fact that these preparations contain Codeine and it salts they do not fall under the provisions of NDPS Act and Rules of 1985 but they fall under Schedule H of the Drugs and Cosmetics Rules and are governed by the said rules. Though stocking and sale of these drugs do not attract the provisions of NDPS Act and Rules 1985 however these formulations are prescriptions drugs and are to be dispensed on the prescriptions drug and are to be dispensed on the prescription of a registered Medical Practitioner only. Further you may be already aware that under notification number S.O. 826(E) dated 14th Nov. 1985 under the Narcotic Drugs and Psychotropic Substances Act and Rules 1985 certain preparations are exempted as manufactured drugs provided the preparations contain the Narcotic drug to the extent permitted. In

respect of Codeine under entry no.35 it is stated that Codeine and Ethyl Morphine and their salts including Dionine all dilutions and preparations are considered to be manufactured drugs except those which are compounded with one or more other ingredients and containing not more than 100 milligrams of the drug per dosage unit and with a concentration of not more than 2.5 per cent in undivided preparations and which have been established in therapeutic practice."

27. In March 2009 the Drugs Controller General (India) had issued a letter to the Associated Chambers of Commerce and Industry of India in response to a request for clarification of drug substance Cough Linctus containing codeine Phosphate stating that:-

"In this connection this Directorate had already issued a circular letter vide our letter number X-11029/27/05-D dated 26/10/2005 to all State Drugs Controllers with a copy to various associations and a copy Narcotic Control Bureau New Delhi (copy enclosed). The above circular inter alia stated that these preparations (Cough Linctus containing Codeine Phosphate) contains among other drugs Codeine Phosphate 10 mg as one of the ingredients. By virtue of the fact that these preparations contain Codeine and its salts they do not fall under the provisions of NDPS Act and the Rules of 1985 but they fall under Schedule H of the Drugs and Cosmetic Rules and are governed by the said rules. Though stocking and sale of these drugs do not attract the provisions of NDPS Act and Rules 1985, however these formulations are prescriptions drugs and are to be dispensed on the prescriptions of a registered Medical Practioner only.

Further you may be aware that under notification number S.O.826 (E) dated 14the November, 1985 under the Narcotic Drugs and Psychotropic Substances Act and Rules 1985 certain preparations are exempted as manufactured drugs provided the preparations contain the Narcotic drug to the extent permitted. In respect of Codeine under entry no. 35 it is stated that Codeine and Ethyl Morphine and their salts including Dionine all dilutions and preparations are considered to be manufactured drugs except those which are compounded with one or more other ingredients and containing not more than 100 miligrams of the drug per dosage unit and with a concentration of not more than 2.5 per cent in undivided preparations and which have been established in therapeutic practice. "

28. Learned counsel for the petitioner has placed reliance on a judgment of an Hon'ble Single Judge of this Court in **Ashok Kumar Vs. Union of India, 2014 SCC OnLine All 164111,** in which the following categorical findings have been recorded after going through all the relevant provisions of law: -

"101. Considering the above noted discussion, relevant provisions of N.D.P.S. Act and Rules, relevant provisions of D & C Act and Rules, judgments rendered by various Courts and documents appended with the petition which have neither been disputed nor controverted referred to hereinabove, this Court concludes as follows:

(i) Even if all the facts and circumstances alleged by the prosecuting agency are admitted to be correct, it cannot be said that the petitioner, who was serving as Territory Sales Manager in M/s Abbott Healthcare Pvt. Ltd. (manufacturer of

Phensedyl Cough Syrup), Division at Lucknow, in any way abetted or conspired to commit offence under section 8 of the N.D.P.S. Act as punishable under section 21 of the said Act. It was the duty of the petitioner to procure orders of Phensedyl Cough Syrup from licenced stockists or distributors and ensure its supply from licenced manufacturer viz; employer of the petitioner.

(ii) Phensedyl Cough Syrup is a Schedule "H' drug under the Drugs and Cosmetics Act; has been manufactured by M/s Abbott Healthcare Pvt. Ltd. a licenced manufacturer under the D & C Act and Rules; had been stocked by a licenced stockist viz; M/s Simran Pharma, owned by co-accused, at licenced premises.

(iii) Phensedyl Cough Syrup is a therapeutic drug containing "codeine' within specified limits, as provided under licence of the licenced manufacturer, under Drugs and Cosmetics Act.

(iv) **Phensedyl Cough Syrup, as recovered, is covered under exception provided under entry No. 35 of Central Government Notification dated 14.11.1985 issued under section 2(xi)(b) of the N.D.P.S. Act and, therefore, cannot be construed as a Narcotic Drug or Manufactured Drug, hence, section 8 of the N.D.P.S. Act would not be attracted.**

(v) The Directorate General of Health Services has issued clarification dated 26.10.2005 to specify that Phensedyl is a Schedule "H' drug under the D & C Act and Rules and although it contains "codeine' in limited prescribed quantity, would not fall under the provisions of N.D.P.S. Act and Rules.

(vi) Considering the Narcotic contents and nature of Schedule "H' drug, the manufacture and distribution of the drug has been regulated under the D & C Act and Rules. For that purpose the provisions require the manufacturer, stockist, distributor and seller etc. to obtain licence, which is issued on compliance of certain conditions. If it is ensured that these conditions are adhered and complied with and the Schedule "H' drug is sold only on prescription, there would be no misuse of the drug. The authorities therefore are required to ensure strict compliance of the conditions of licence so as to prevent its misuse.

In the case in hand, if at all, an offence has been committed, it would be under the D & C Act, committed by the stockist viz; the co-accused, for violation of the provisions of section 18-B punishable under section 28-A of the D & C Act and/or other provisions.

(vii) This Court is also persuaded in concluding as above by judgments rendered by the Punjab and Haryana High Court in *Amrik Singh v. State of Punjab*, [1996 Cr.L.J. 3329.] titled *''Rajeev Kumar v. State of Punjab'*, [1998 Cr.L.J. 1460.] titled *''Deep Kumar v. State of Punjab'*, [1997 Cr.L.J. 3104.] and judgment rendered by the Hon'ble Supreme Court of India in *Md. Sahab Uddin v. State of Assam*, decided on 5.10.2012 in Criminal Appeal No. 1602 of 2012, S.L.P.(Cri.) No. 5503 of 2012 read with judgment of Gauhati High Court in *Md. Sahab Uddin v. State of Assam* (Bail Application No. 885 and 886 of 2012, decided on 25.5.2012). Likewise the judgment rendered by the Hon'ble Supreme Court of India in *Rajesh Kumar Gupta's case* (supra) favours the legal proposition propounded on behalf of the petitioner.

(viii) This Court has also taken into account that N.D.P.S. Act and Drugs and Cosmetics Act, both are Central Legislations. N.D.P.S. Act specifically

provides exceptions whereunder a "narcotic drug' (codeine) can be used for medicinal/therapeutic purposes. Under the provisions of the Act, Central Notification dated 14.11.1985, whereunder prescribed quantity of codeine has been allowed to be included, per dosage unit, has been issued. Admittedly, Phensedyl Cough Syrup contains "codeine' within the prescribed quantity. **Thus, in the considered opinion of this Court Phensedyl Cough Syrup falls within the exception provided under the N.D.P.S. Act and, therefore, its possession with licenced stockists would not invite the penalties under N.D.P.S. Act. Phensedyl Cough Syrup, in the facts and circumstances of this case is required to be considered as a drug under the Drugs and Cosmetics Act."**

(Emphasis supplied)

29. The aforesaid decision in Ashok Kumar Vs. Union of India has been relied upon and followed in the Judgment dated 30-03-2015 passed by a Division Bench of this Court in Ram Dayal Mathur versus Union of India, Misc. Bench No. 8953 of 2013.

30. The learned Counsel for the petitioner has also placed reliance on a judgment of a Single Bench of this Court dated 25.11.2021 in **Bail No.13555 of 2021, Ajay Bajpai Vs. State of U.P.** In that case, on a search was conducted, 1,540 bottles of 100 ML each of a cough syrup were seized from a Car and three persons were apprehended. One of the FIRs was registered against them under Sections 420, 274, 275, 467, 468, 471 IPC read with Section 18/27 of the Drugs and Cosmetics Act, 1940 and the second FIR was lodged as Case Crime No.361 of 2021, under Sections 8/21/22 of the NDPS Act. In the FIR, it was alleged that the goods were apprehended and the accused were arrested on the ground that the medicine was fake medicine and on consumption thereof, it can cause damage to the public health. In sum and substance, the main contention was that the medicine being carried out were fake medicine. On the wrapper of the medicine seized, it was mentioned **"Chlorpheniramine Maleak and Codeine Phosphate Syrup (max coff)"**. The apprehension was made out and recorded in the FIR that excess consumption of Codeine can cause intoxication. Based upon the said, a case was registered against the accused under Sections 8/21/22 of the NDPS Act. Dealing with the submission of the learned A.G.A. that the recovery was of commercial quantity, this Court held that "The said argument is fallacious and deserves to be rejected outrightly as the number of bottles seized were 1540 which contained 100 ml medicine in each bottle which were manufactured in terms of the license, **being termed as commercial quantity needs to be reprimand by this Court."**

After taking into consideration the fact that the test report confirming that drugs contained Codeine Phosphate, the Court held that: -

"8. From the perusal of the FIR as well as the medical report, which are on record, this Court has no hesitation in holding that the search and seizure is clear misuse of the powers conferred upon the authorities. In the light of the specific bar of Section 58 of the NDPS Act coupled with the fact that the NDPS Act is a stringent statute providing for very stringent penal consequences and is to be interpreted strictly as also held by the Hon'ble Supreme Court in the case of Toofan Singh vs. The State of Tamil Nadu; (2021) 4 SCC 1."

After taking into consideration all the relevant provisions contained in the NDPS Act, the Court held that: -

"15. Clearly the product seized did not fall within any of the things specified as narcotic drugs under Section 2(xiv) or a narcotic substance as defined under Section 2(xxiii). Despite the seized quote being medicine, in the seizure memo, no satisfaction forming a reasonable belief was recorded prior to causing the seizure which is a sine-qua-non for exercise of powers of seizure under Section 42(c) of the Act.

16. The only thing record in the seizure memo is that excess consumption of codeine can cause intoxication. The said certainly does not qualify to be a ''reasonable belief' which is required to be recorded prior to seizure in terms of the mandate of Section 42.

17. The present case is a clear case for proceedings against the officers making the seizure in terms of the mandate of Section 58(1)(b) and (c) of the NDPS Act."

After recording the aforesaid finding, this Court issued a direction to register a case against the seizing party under the provisions of Section 58(1)(b) of the NDPS Act and to proceed in accordance with law.

31. In **State of Punjab v. Rakesh Kumar2,** it was not in dispute that the respondent-accused were found in bulk possession of manufactured drugs without any valid authorisation and they had already been convicted by the Trial Court for offences under Sections 21 and 22 of the NDPS Act. The High Court had passed an order suspending the sentence during pendency of an Appeal filed against conviction. In this factual backdrop, the Hon'ble Supreme Court proceeded to hold as follows:

"11. In the present appeals before us, the trial courts after analysing the evidence placed before them, held the respondent-accused guilty beyond reasonable doubt and convicted them for offences committed under Sections 21 and 22 of the NDPS Act.

12. The counsel for the respondent-accused have strongly supported the judgment of the High Court wherein it was held that, since the present matters deal with "manufactured drugs" the present respondents should be tried for the violation of the provisions of the Drugs and Cosmetics Act, 1940.

13. However, we are unable to agree on the conclusion reached by the High Court for reasons stated further. First, we note that Section 80 of the NDPS Act, clearly lays down that application of the Drugs and Cosmetics Act is not barred, and provisions of the NDPS Act can be applicable in addition to that of the provisions of the Drugs and Cosmetics Act. The statute further clarifies that the provisions of the NDPS Act are not in derogation of the Drugs and Cosmetics Act, 1940. This Court in *Union of India v. Sanjeev V. Deshpande3,* has held that : (SCC p. 16, para 35)

"35. ... essentially the Drugs and Cosmetics Act, 1940 deals with various operations of manufacture, sale, purchase, etc. of drugs generally *whereas Narcotic Drugs and Psychotropic Substances Act, 1985 deals with a more specific class of drugs and, therefore, a special law on the subject.* Further, the provisions of the Act operate in addition to the provisions of the 1940 Act."

(emphasis supplied)

14. The aforesaid decision in *Sanjeev V. Deshpande case* further clarifies that, the NDPS Act, should not be read in exclusion to the Drugs and Cosmetics Act, 1940. Additionally, it is the prerogative of the State to prosecute the offender in accordance with law. In the present case, since the action of the respondent-accused amounted to a prima facie violation of Section 8 of the NDPS Act, they were charged under Section 22 of the NDPS Act.

15. In light of the above observations, we find that the decision rendered by the High Court holding that the respondent-accused must be tried under the Drugs and Cosmetics Act, 1940 instead of the NDPS Act, as they were found in possession of the "manufactured drugs", does not hold good in law. Further, in the present case, the respondent-accused had approached the High Court seeking suspension of sentence. However, in granting the aforesaid relief, the High Court erroneously made observations on the merits of the case while the appeals were still pending before it."

32. However, whether Phensedyl New Cough Linctus, or any substance containing "Methyl morphine (commonly known as "Codeine') and Ethyl morphine and their salts (including Dionine), all dilutions and preparations except those which are compounded with one or more other ingredients and containing not more than 100 milligrams of the drug per dosage unit and with a concentration of not more than 2.5% in undivided preparations and which have been established in Therapeutic practice." falls within the exception to item No. 35 of the Notification dated 14-11-1985 issued by the Government of India containing the list of narcotic drugs and whether it is a "Manufactured drug' and is a "narcotic substance' was neither raised nor adjudicated in this case.

33. A recent division judgment of this Court in **Hemant Kumar Saini versus Union of India 3,** this Court was dealing with a prayer to quash the F.I.Rs. Arising out of recovery of some other Codeine bases syrups and the Court declined to interfere at this stage on the following ground: -

"35."Codeine' is derivative of opium. What is the percentage/ratio of "codeine' in the recovered and seized syrup, is not on record. The same has to be ascertained during the course of investigation/enquiry/laboratory report, as it has been shown in search memo that the samples of recovered syrup has been taken by Drug Inspector for investigation, hence in the context of seized syrups no conclusion can be drawn taking into account the said notification dated 14.11.1985, at this stage."

34. While examining the applicability of the aforesaid decisions, it would be appropriate to have a look at the law regarding application of precedents, as explained by the Hon'ble Supreme Court in **Roger Shashoua v. Mukesh Sharma 4,** in the following words: -

"55. ....It is well settled in law that the ratio decidendi of each case has to be correctly understood. In *Regional Manager v. Pawan Kumar Dubey,* a three-Judge Bench ruled: (SCC p. 338, para 7)

"7. ... It is the rule deducible from the application of law to the facts and circumstances of a case which constitutes its ratio decidendi and not some conclusion based upon facts which may appear to be

similar. **One additional or different fact can make a world of difference between conclusions in two cases even when the same principles are applied in each case to similar facts."**

56. In *Director of Settlements v. M.R. Apparao,* another three-Judge Bench, dealing with the concept whether a decision is "declared law", observed: (SCC p. 650, para 7)

"7. ... But **what is binding is the ratio of the decision and not any finding of facts.** It is the principle found out upon a reading of a judgment as a whole, in the light of the questions before the Court that forms the ratio and not any particular word or sentence. To determine whether a decision has "declared law" it cannot be said to be a law when a point is disposed of on concession and what is binding is the principle underlying a decision. A judgment of the Court has to be read in the context of questions which arose for consideration in the case in which the judgment was delivered. ..."

57. In this context, a passage from *CIT v. Sun Engg. Works (P) Ltd.* would be absolutely apt: (SCC pp. 385-86, para 39)

"39. ... It is neither desirable nor permissible to pick out a word or a sentence from the judgment of this Court, divorced from the context of the question under consideration and treat it to be the complete "law" declared by this Court. The judgment must be read as a whole and the observations from the judgment have to be considered in the light of the questions which were before this Court. **A decision of this Court takes its colour from the questions involved in the case in which it is rendered and while applying the decision to a later case, the courts must carefully try to ascertain the true principle laid down by the decision of this Court and not to pick out words or sentences from the judgment, divorced from the context of the questions under consideration by this Court, to support their reasonings. ..."**

58. In this context, we recapitulate what the Court had said in *Ambica Quarry Works v. State of Gujarat:* (SCC p. 221, para 18)

"18. ... **The ratio of any decision must be understood in the background of the facts of that case. It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it.** (See Lord Halsbury in *Quinn v. Leathem43*.) ..."

59. From the aforesaid authorities, it is quite vivid that a ratio of a judgment has the precedential value and it is obligatory on the part of the court to cogitate on the judgment regard being had to the facts exposited therein and the context in which the questions had arisen and the law has been declared. It is also necessary to read the judgment in entirety and if any principle has been laid down, it has to be considered keeping in view the questions that arose for consideration in the case. One is not expected to pick up a word or a sentence from a judgment dehors from the context and understand the ratio decidendi which has the precedential value. That apart, **the court before whom an authority is cited is required to consider what has been decided therein but not what can be deduced by following a syllogistic process."**

35. In both the aforesaid decisions in **State of Punjab v. Rakesh Kumar and Hemant Kumar Saini versus Union of India** (Supra), the question whether or not

the offending substances fell within the definitions of "manufactures drugs" and "narcotic substance" provided in Sections 2 (xi) and 2 (xiv) of the NDPS Act, was not decided. However, in the present case, the composition of the drug has been pleaded specifically and the same has not been disputed by the respondents. It is thus admitted that Phensedyl New Cough Linctus contains Codeine compounded with one other ingredient, namely Chlorpheniramine Maleate and contains merely 10 milligrams per dosage unit of 5 ml, which is not more than 100 milligrams of the drug per dosage unit in undivided preparations and the concentration of Codeine in Phensedyl New Cough Linctus is merely 0.2%, which obviously is not more than 2.5%. and the precise question involved in the case is on the basis of the aforesaid undisputed facts, whether Phensedyl New Cough Linctus falls within the exception mentioned in entry 35 of the Notification dated 14-11-1985 or not and consequently, whether the provisions of the NDPS Act would apply to it or not. Therefore, both the aforesaid judgments are not relevant for deciding the question involved in the present Writ Petition.

36. In **Hemant Kumar Saini (Supra),** this Court has found force in the argument that the case of State of Uttaranchal Vs. Rajesh Kumar Gupta5, which has been relied upon by this Court in the case of Ashok Kumar Vs. Union of India (supra), has been over ruled by the Hon'ble Supreme Court in the case of Union of India Vs. Sanjeev V. Despande (supra) and the Court while deciding the case of Ashok Kumar Vs. Union of India (Supra), decided on 15.10.2014, has not discussed the law laid down by the Hon'ble Supreme Court in the case of Union of India Vs. Sanjeev V. Despande (supra), which was decided earlier, i.e. on 12.08.2014. Therefore, the case of Ashok Kumar Vs. Union of India (supra) lost its binding effect in light of the law laid down by Hon'ble Apex Court in Union of India Vs. Sanjeev V. Despande (supra). With due respect to the aforesaid Bench of a coordinate Bench of this Court, we may state that even if we do not take into consideration the decision in Ashok Kumar versus Union of India, a bare reading of the provisions contained in Sections 2 (xi), 2 (iv) of the Act and Entry 35 of the Notification dated 14-11-1985 issued by the Central Government coupled with the undisputed composition of Phensedyl New Cough Linctus is sufficient to hold that the drug is not a Narcotic Drug and the binding effect of the decision of the decision in Ashok Kumar will not make any difference on the same.

37. Sri Ashish Pandey, learned Special Public Prosecutor for the NCB has lastly submitted that for falling within the exception carved out in entry 35 of the Notification dated 14-11-1985, the drug in question must fulfil two conditions - (1) Methyl morphine (commonly known as "Codeine') and Ethyl morphine and their salts (including Dionine), all dilutions and preparations except those which are compounded with one or more other ingredients and containing not more than 100 milligrams of the drug per dosage unit and with a concentration of not more than 2.5% in undivided preparations and (2) **it should have been established in Therapeutic practice."** He submits that although there is no dispute that the drug in question fulfils the condition no. 1, it does not fulfil the condition no. 2, namely having been established in therapeutic practice. According to him, the drug in question is being illegally diverted for non-

therapeutic uses, and, therefore, it does not fall within the exception to item No. 35 of the Notification dated 14-11-1985 issued by the Government of India and it would be subject to the provisions of the NDPS Act.

38. The expression "established in therapeutic practice" has not been interpreted in any previous decision. It is a basic rule of interpretation that the words used in the statute should be given there simple and natural meaning and neither any word should be added nor should any word be ignored while interpreting any provision. When the Government has used the expression "established in therapeutic practice" these words cannot be altered so as to read it as "used for therapeutic purposes". The phrase "established in therapeutic practice" apparently means that the compound in question has been established to be a drug in accordance with the therapeutic practices followed for establishment of new drugs. Therefore, the submission of Sri. Ashish Pandey that the drug in question does not fulfil the condition no. (2) of having been "established in therapeutic practice", is without any force.

39. Moreover, use or misuse of a drug by the end user or consumer of the same would not have any affect on the law governing the drug. Phensedyl is a drug covered by the exception contained in Article 35 of the Notification dated 14-11-1985 issued by the Central Government and it is not a narcotic drug and hence not covered by the provisions of the NDPS Act and merely because some persons may be misusing it for other than therapeutic purposes, it would not come within the purview of the NDPS Act. NDPS Act has been enacted with a specific object and the Authorities under the Act can exercise jurisdiction strictly in accordance with the provisions of the Act. The Authorities under the Act do not have sweeping powers to take action upon suspicion of any illegality or irregularity of any sort committed at any place in respect of any substance. It is settled law that penal statutes have to be interpreted in a strict manner.

40. Section 42 of the Act empowers the Authority to enter any building, conduct search and seizure **"if he has reason to believe from personal knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed"** and in absence of any material having been placed on record to substantiate that the Authority had such reason to believe that Phensedyl New Cough Linctus is a narcotic substance, the Authority had no jurisdiction to initiate action by conducting the search and seizure of the drug on 17-01-2021 and all the consequent action is also without any jurisdiction and is unsustainable in law.

41. In view of the foregoing discussion, we hold that in view of the fact that as per the composition of Phensedyl New Cough Linctus pleaded in the Writ Petitions, the prescription dosage of Phensedyl Cough Syrup is 5 ml and each dosage unit thereof contains 10 mg of Codeine Phosphate IP, besides Chlorpheniramine Maleate I.P., Phensedyl New Cough Linctus contains merely 0.2 % Codeine, and this has not

been disputed and rather has been admitted by the learned Counsel for the Respondent NCB that there is no dispute that the drug in question fulfils the first condition for falling within the exception to Entry 35 of the Notification dated 14-11-1985 issued by the Central Government containing the list of Narcotic Drugs, i.e. being "compounded with one or more other ingredients and containing not more than 100 milligrams of the drug per dosage unit and with a concentration of not more than 2.5% in undivided preparations", Phensedyl New Cough Linctus is not a Narcotic Drug and any dealing in this drug would not be subject to the provisions of the NDPS Act. The search and seizure conducted by the NCB Officials in Jaunpur on 17-01-2021 was without any authority of law and so is the complaint filed on 15-07-2021 by the Intelligence Officer, NCB under Sections 8, 21 (c), 22, 25, 29 and 60 (3) of the NDPS Act in the Court of Special Judge, NDPS Act at Jaunpur.

41. Accordingly, both the Writ Petitions are **allowed.** The proceedings of the aforesaid complaint in Case No. NCB/LZU/CR No. 04 of 2021 under Sections 8, 21 (c), 22, 25, 29 and 60 (3) of the NDPS Act pending in the Court of Special Judge, NDPS Act, Jaunpur and the investigation against the petitioners in relation to the aforesaid complaint are quashed.

(2022)01ILR A34
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 13.12.2021

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE VIVEK VARMA, J.

Criminal Appeal No. 387 of 1985

Shiv Pratap Singh & Ors. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
R.K. Singh, Anurag Kumar Singh, Ghanshyam Tripathi, ML Syal, M.L. Syal, Shashi Kiran Arya, Shishir Pradhan

Counsel for the Respondent:
Govt. Advocate

Criminal Law - Code of Criminal Procedure, 1973- Section 154- Prompt F.I.R - The F.I.R. of the incident was promptly lodged. Prior to lodging the F.I.R., there is no chance for the informant to consult anyone.

Where the F.I.R is lodged promptly then any chances of fabricating the story are ruled out and the case of the prosecution cannot be doubted on this ground.

Criminal Law - Indian Evidence Act, 1872- Section 3- Injured eye witness - It is to be kept in mind that the evidentiary value of an injured witness carries great weight-The prosecution has been successful in proving the presence of PW1 & PW2 at the time and place of incident. They are found to be trustworthy and reliable-The injury report as well as post-mortem report has fully supported the prosecution case.

The injuries of an injured witness, duly corroborated by the medical evidence and bereft of any major contradictions, establishes his presence at the time and place of the occurrence and hence testimony of an injured witness is accorded a special status.

Criminal Law - Indian Evidence Act, 1872- Section 8- The prosecution has successfully proved the motive. There was a prior long-time enmity between the deceased and the accused.

Where the prosecution establishes the motive then the defence of false implication of the accused cannot be accepted. (Para 32, 41, 42)

Criminal Appeal rejected. (E-3)

Judgements/ Case law relied upon:-

1. Mano Dutt & anr Vs. St. of U.P, (2012) 4 SCC 79

(Delivered by Hon'ble Ramesh Sinha, J.)

INTRODUCTION

(1) Six accused persons, namely, *Shiv Pratap Singh, Vijay Vikram Singh, Kali Charan, Nanhey, Ram Autar and Jaskaran* were tried by the IV Additional Sessions Judge, Hardoi in Sessions Trial No.314 of 1984 : *State Vs. Shiv Pratap Singh and others* arising out of Case Crime No.188 of 1983, under Sections 147, 148, 149, 302 I.P.C. at police station Bilgram, District Hardoi.

(2) Vide judgment and order dated 07.06.1985, the learned IV Additional Sessions Judge, Hardoi, while acquitting the accused Jaskaran from all the offences/charges levelled against him, convicted and sentenced the rest of the accused persons, namely, *Shiv Pratap Singh, Vijay Vikram Singh, Ram Autar, Kalicharan and Nanhey* in the manner as stated herein below:-

"i. Under Sections 302/149 I.P.C. to undergo life imprisonment; and

ii. Under Section 323/149 I.P.C. to undergo six months R.I."

In addition, the IV Additional Sessions Judge, Hardoi had also convicted the accused Shiv Pratap Singh, Nanhey Lal and Ram Autar under Section 148 I.P.C. and sentenced them to undergo one year's imprisonment and other two accused persons, namely, Vijay Vikram Singh and Kali Charan were convicted under Section 147 I.P.C. and sentenced them to undergo six months' R.I.

All the sentences were directed to run concurrently by the IV Additional Sessions Judge.

(3) During pendency of the instant appeal, appellant no.1-Shiv Pratap Singh, appellant no.3-Kalicharan and appellant no.5-Ram Autar died and, as such, vide order dated 13.08.2018, the instant appeal filed against the aforesaid appellants no.1, 3 and 5 stand abated.

(4) Now, the instant appeal is surviving only in respect of appellant no.2-Vijay Vikram Singh and appellant no.4-Nanhey, who are said to be in jail since 08.07.2019.

FACT

(5) Shorn off, unnecessary details the facts of the case are as under :-

On 28.10.1983, informant-Lal Bahadur Singh (PW1) and his elder brother Vijay Bahadur Singh Pradhan (deceased) had gone to Cold Store, Bilgram for taking the seed of potato and after taking it, they were returning home on their respective bicycle and when they reached near the Sorghum (Jowar) farm of one Kunwar Pal of Chakarpurwa at about 4 p.m. in the evening, accused/appellant no.1-Shiv Pratap Singh armed with Kanta and his son accused/ appellant no.2-Vijay Vikram Singh armed with Lathi challenged them (informant and his brother Vijay Bahadur Singh Pradhan) and said that "घेर कर मार डालो दुश्मन आज जाने न पाए". Thereupon,

appellant no.3-Kalicharan armed with lathi, appellant no.4-Nanhey armed with Banka, appellant no.5-Ram Autar armed with Kanta and other two other persons armed with lathi, to whom identified by him by their face but not by name, came out from Sorgum (Jowar) field and started assaulting the brother of the informant Vijay Bahadur Singh (deceased). Thereafter, informant-Lal Bahadur Singh (P.W.1) and his brother Vijay Bahadur Singh (deceased) raised alarm and on hearing their alarm, Raj Kumar, son of Hardayal and Vishwanath Singh son of Thakur Bux Singh, r/o Kuluwapur, who were ploughing their field nearby and one Ram Saroop Singh (P.W.2), son of Ujagar Singh, who was going towards his home from Bilgram, came at the place of occurrence and they all asked the accused persons not to assault Vijay Bahadur Singh (deceased) and also challenged them. Thereafter, appellant No.3-Kalicharan started assaulting the informant-Lal Bahadur Singh (P.W.1) with lathi, as a consequence of which, he also sustained injuries on his left hand wrist, elbow and arm and on right leg.

It has also been stated in the F.I.R. by the informant-Lal Bahadur Singh (P.W.1) that about five years ago from the date of the incident, his aunt Smt. Bittan Devi, who is the samdhin of appellant no.1-Shiv Pratap Singh and mother-in-law of appellant no. 2-Vijay Vikram Singh, was murdered, in which his brother Vijay Bahadur Singh (deceased) was named as accused but was later on acquitted by the competent Court. On account of the aforesaid, the appellants had a lot of animosity in their heart against informant-Lal Bahadur Singh (P.W.1) and his brother Vijay Bahadur Singh (deceased). Because of this enmity, all the appellants formed an opinion and assaulted the deceased Vijay Bahadur Singh with Kanta, Banka and Lathi.

In the F.I.R., it has also been stated that Vijay Bahadur Singh (deceased) fell on the spot and died and injuries of Kanta, Banka and Lathi were appearing on his body. On challenging by the informant Lal Bahadur Singh (P.W.1) and other persons, all seven accused persons ran towards the southern direction. The informant P.W.1-Lal Bahadur Singh and other witnesses, who were present there, saw the accused persons assaulting the deceased and they identified the two unknown persons by their face and they can recognize them when they came in front of him.

(6) The informant Lal Bahadur Singh (P.W.1) got the written report (Ext. Ka. 1) scribed by himself at Bilgram Chauraha. He, thereafter, put his signature on it. He, then, proceeded to Police Station Bilgram, district Hardoi and lodged it.

(7) The evidence of PW4-Ishtiyaq Mohammad shows that he was posted as Head Constable, police station Bilgram on 28.10.1983. On the date itself i.e. on 28.10.1983, Lal Bahadur Singh (P.W.1) gave a written report (Ex. Ka-1) at the police station at about 4.30 p.m., on the basis of which, he prepared Chik Report (Ex. Ka-2) and made entry to this effect in GD (Ex. Ka-3). The recovered items from the place of incident was received in a sealed condition at 1.05 p.m. on 29.10.1983 at police station, which was submitted in *Malkhana* and entry of it was made in GD as No.15 and the signed copy (Ex. Ka-4) of the same was submitted to the Court. The recovered material related to this case was sent to Sadar *Malkhana*, Hardoi in a sealed condition through Constable Ajay Singh on 08.11.1983 and the entry of the same was made in GD and copy of the same is submitted to the Court as Ex. Ka-5.

In cross-examination, P.W.4-Ishtiyaq Mohammad denied the suggestion that the report of the case was written by him after Sub-Inspector returned from the place of incident and after taking opinion of the people.

(8) The evidence of P.W.9-R.K. Tiwari shows that in the month of October, 1983, he was posted as Station Officer, Bilgram. The case of the incident was lodged in his presence. He started the investigation of the case on the date itself. He recorded the statement of informant-Lal Bahadur Singh (PW1) and sent him for medical examination. Thereafter, he went to the place of occurrence. The evidence of PW9 R.K. Tiwari further shows that after sending the informant for medical examination, he went to the place of the incident and found that the dead body of the deceased Vijay Bahadur Singh was lying in the field of Kunwar Pal. Thereafter, he prepared the Panchayatnama (Ex. Ka-7) of the dead body of deceased and also prepared the photo lash (Ext. Ka.8), challan lash (Ext. Ka.7), letters to C.M.O. (Ext. Ka. 10 and 11). Thereafter, he sealed the deadbody of the deceased and sent it for post-mortem at District Hospital, Hardoi along with Constable Ishtiaq Ali and Constable Harnath Singh.

PW9 R.K. Tiwari further deposed that before sealing the dead body of the deceased, he took in occupancy the blood stained muffler, sadri and kurta from the body of the deceased and sealed it and prepared recovery memo of the same (Ex. Ka-13). He found from the pocket of sadari of Vijay Bahadur Singh (deceased) two currency note of One denomination each, stamp by the name of Vijay Bahadur Singh (Pradhan), one fountain pen, tobacco in box and prepared recovery memo of the said articles (Ex. Ka-14). He, then, collected samples of blood stained earth, parts of blood stained sorghum (Jowar) plant, plain earth, plain sorghum (Jowar) plant from the place of occurrence and sealed them in separate containers and prepared memo Ext. Ka-15. At the place of incident, he also found a cycle and a pair of slippers and which were given to the son of deceased and memo of the same was prepared as Ex. Ka-16. On the pointing out of witnesses he prepared Site Plan (Ex. Ka-17). He next deposed that on 29.10.1983 he arrested accused Jaskaran and Nanhey, and recorded their statement. Accused Nanhey has stated that he will help in the recovery of Banka, which was used in the murder of deceased Vijay Bahadur Singh. Thereafter, he took both the accused in jeep to Kutuapur village, from where witnesses Umaar and Khetai were taken also accompanied them. Accused Nanhey in front of witnesses took out Banka from the bushes of Acacia (Babool) and grass, which was blood stained. The recovery memo (Ex. Ka-18) of the Banka was prepared by Hari Mohan Shukla on his dictation.

After preparing recovery memo (Ex. Ka-18) of the Banka, PW9 R.K. Tiwari, then, sent the recovered material and both the accused appellants, Jaskaran and Nanhey, to the police station through H.C. Hari Mohan, Constable Radhey Shyam, Constable Gurdayal and Constable Chandra Pal. He then prepared site plan of the place where recovery was made (Ex. Ka-19). He then went on for search of other accused and when they were not found he came back to the police station. Inspector S.N. Mishra also investigated the case in the meantime. He recorded the statement of complainant/ informant PW1 once again. Accused appellant Ramautar and Kalicharan were arrested by Sub-Inspector Lallu Singh and he recorded their statement. Thereafter, investigation of this case was again done by him.

On 03.11.1983 accused Vijay Vikram Singh surrendered before the Court. He sent the recovered materials for chemical examination to Agra. After completing the investigation he filed the charge sheet against the accused appellants on 12.11.1983 (Ex. Ka-20).

In his cross-examination, P.W.9 deposed that he started the investigation of the case fifteen minutes after the case was registered. He made a copy of the report in his Case Diary and also made copy of GD which took him ten minutes. It took him about five to seven minutes to record the statement of PW1 informant Lal Bahadur Singh. He reached at the place of the incident at 17:20 hour. The time of panchayatnama was written as 16:00 hour. He further stated that the dot (.) occurring after 16 hour was overwriting and on this, he put his signature. He denied the suggestion that FIR was not written till the time of writing the Panchayatnama and also that he got the written report prepared with his own advise. He further deposed that thickness between two crops of Sorghum (Jowar) was around one feet. The Sorghum (Jowar) crops in the field of Sudarshan was 8 to 10 feet tall but the Sorghum (Jowar) crops in the field of Kunwarpal was not that tall. Accused Jaskaran, Nanhey and brother of accused Shiv Pratap met in Gonda. Gun and cartridges were recovered from accused Jaskaran and that is why he too was arrested. Only Nanhey told him about the Banka. He denied the suggestion that Banka was not recovered at the pointing out of Nanhey and he prepared its fake memo. He did not detected about the tractor and trolly but he saw in the register that deceased Vijay Bahadur Singh came to cold storage and got potatoes.

(9) P.W.6 Constable Ajay Singh in his deposition before the trial Court stated that on 08.11.1983 he took the recovered material related to this case and deposited the same in Sadar *Malkhana*, Hardoi in a sealed and packed condition. The recovery material was deposited in the same condition as was received by him.

(10) P.W.7 Ram Pal deposed before trial Court that he was posted as Constable, polce station Bilgram, Hardoi and on 07.12.1983 he took the sealed packed recovered material for examination to CMO office and after receiving the letter from the office of CMO he took the same to Agra for further examination of the recovered material.

(11) P.W.8 Dammar in his deposition before the trial Court deposed that around one year and 2½ months ago, he and Khetai were going to Bilgram. The police met them near *Dakshina Usar* of his village and the police, who were in jeep, called them. Accused Nanhey and one other person was also there in the police jeep. Accused Nanhey talked to them and told them that he will hand over the Banka used in the murder of Vijay Bahadur Singh to the police. Accused Nanhey was followed by P.W.9 R.K. Tiwari, Dammar, Khetai and other policemen. After some distance accused Nanhey took out Banka from the bushes of acacia (babool) and grass, which was blood stained. The Banka was recovered near the Paddy fields of Ishwar Chand. Recovery memo of the said Banka was prepared by P.W.9 R.K. Tiwari and it was 11 o' clock at that time. After doing the paper work P.W.9 R.K. Tiwari affixed thumb impression of his and Khetai and also sealed the Banka.

In his cross-examination, PW8 Dammar deposed that apart from accused Nanhey, accused Jaskaran was also present in

the police jeep and they both are known to him and all of them are resident of village Kutuapur. Banka was not buried in the soil but was covered with grass. Except the field belonging to Ishwarchand no other field is present nearby and there is only jungle. In the paddy fields of Ishwarchand many people were working, who came on spot and whose name he does not know. People working in the field of Ishwarchand did not affix their thumb impression on the memo but in front of those people, accused Nanhey took out Banka from the bushes. He further denied the suggestion that PW9 R.K. Tiwari called him in police station to affix his thumb impression on recovery memo. He did not remember whether Bittana's bail was taken in the murder case of Vijay Bahadur's case or not. PW9 R.K. Tiwari met him after 12 to 14 days of recovery of Banka. PW9 R.K. Tiwari did not investigate anything further from him and did his paper work from where the Banka was recovered and further he does not remember whether he made any copy of it or not. When he saw accused Nanhey and accused Jaskaran sitting in the jeep, he saw that they were tied with rope. He denied the suggestions that he belonged to Vijay Bahadur's party and that accused Nanhey did not take out the Banka and also that PW9 R.K. Tiwari called him in police station and he affixed his thumb impression on recovery memo thereon.

(12) P.W.11 Eqtada Hussain deposed before the trial Court on 02.02.1983 that in the month of October, 1983 he was posted as Supervisor National Cold Storage, Bilgram, District Hardoi and that he has brought delivery register of the year 1983. He stated that whenever any material is delivered its entry is being made in the register. On 28.10.1983 deceased Vijay Bahadur Singh got the delivery of 41 sacks of potato in two parts, payment of which was made two nights earlier. He had entered this delivery in two serial nos. 951 and 952 in his delivery register. Deceased Vijay Bahadur Singh had made his signature in the said entry. Copy of the said delivery register has been entered as Ex. Ka-22 and the original is with him.

In his cross-examination, PW11 deposed that timing is never mentioned in the delivery register, but from his memory he stated that potatoes were taken out from the cold storage at around 4 p.m. in the evening. After that he could not tell whether deceased Vijay Bahadur Singh left with his potatoes immediately or later.

(13) P.W.12-Surendra Nath Bajpai has stated in his deposition before the trial Court that on 23.02.1978, he was posted as Petition Clerk in the Court of District Magistrate. On the said date, an application has been submitted before the Court by a person named as Vijay Bahadur whose address has been mentioned in the application. He received the said application, in which his signature and seal of District Magistrate appeared. The duplicate copy of the said application (Ext. Ka.23) was sent for inquiry. There is no order of the District Magistrate on the duplicate copy of the said application. This peititon was with regard to peace. He further deposed that he did not know the applicant personally nor he could say that who has submitted the said application.

(14) Going backwards, the injuries of the informant PW1-Lal Bahadur Singh was examined on 28.10.1983 at 5:00 P.M. by PW5-Dr. S.N. Mishra, who, after examining him, found the following injuries (Ext. Ka. 6) on his person :-

"Injuries of informant-Lal Bahadur Singh (P.W.1)

(I) An abraded contusion of 6 cms x 2 cms present on the dorsomedial aspect of the left wrist joint and above on the left fore-arm. Reddish in colour.

(II) A transmative swelling with contusion of 4

cms. x 2 cms. present on the dorsal aspect of

the left elbow joint. Reddish in colour.

(III) A superficial lacerated wound of 1.5 cms. x 0.5 cm present on the anterior aspect of the Rt. leg 22 cms. above from the Rt. medial malecus. The aspect of the Rt. Leg 22 cms. above from the medial malecus. The wound is skin deep and the marigs are lacerated and irregular. Complaint of pain on the left shoulder without any mark of apparent Injury present on the part.

As per the opinion of PW5-Dr. S.N. Mishra, all the injuries are simple in nature and could be caused by blunt weapons.

(15) It is significant to mention that P.W.5-Dr. S. N. Mishra has reiterated the aforesaid cause of injuries on the person of P.W.1-Lal Bahadur Singh before the trial Court and deposed before the trial Court that on 28.10.1983, he was posted as Medical Officer, PHC, Bilgram, Hardoi. On 28.10.1983 in the evening at about 5 p.m. he examined the body of injured Lal Bahadur Singh (P.W.1) and prepared the injury report (Ext. Ka.6). He stated that all the injuries could be attributable to the injured/informant Lal Bahadur Singh (P.W.1) on 28.10.1983 at about 4:00 p.m.

In cross-examination, P.W.5-Dr. S.N. Mishra has deposed that it is wrong to say that there was no injury on the body of the injured and all the injuries could not be attributable by its own. He denied the suggestion that he had prepared the injury report on the dictate of Hari Shanker Tiwari, M.L.A.

(16) P.W.3 Har Nath Singh, who was posted as Constable at police station Bilgram, District Hardoi, has deposed before the trial Court that on 28.10.1983, at about 7 p.m., R.K. Tiwari (P.W.9) handed over him the dead body of deceased Vijay Bahadur Singh in a sealed condition and also relevant documents in the field of Kunwarpal for the purpose of post-mortem. He brought the dead body of deceased Vijay Bahadur Singh at Police Lines, Hardoi at 1.30 a.m. in the morning, got its entry done and after taking letter from R.I. he produced papers in front of C.M.O. and after obtaining orders from there, he took the dead body and relevant papers and produced it before the doctor. He further deposed that the body was in a sealed condition till the time it was with him and did not sustain any injury or loss.

P.W.3 Har Nath Singh further deposed that after the post mortem was conducted by the doctor, he brought the post mortem report and sealed belongings found on the dead body of the deceased to the police station and did its entry.

In his cross-examination, PW3 Har Nath Singh has deposed that he left the place of occurrence with the dead body at around 7 p.m. in the evening and the same reached at police line at around 1.30 a.m. in the night. He met PW10 Dr. P.K. Gangwar at around 8 a.m. and he asked him to get the post mortem of the body conducted. He denied the suggestion that he produced the relevant documents relating to post mortem before the doctor at around 1:00 p.m. and also denied that he took the dead body from the place of occurrence in the morning.

(17) The post-mortem of the corpse of the deceased Vijay Bahadur Singh was conducted on 29.10.1983 at about 03:15

p.m. at District Hospital, Hardoi by PW10 Dr. P.K. Gangwar, who, found the following ante mortem injuries on the dead body of the deceased Vijay Bahadur Singh:-

"Ante-mortem injuries of deceased Vijay Bahadur Singh :

1. Incised wond 14 cm x 2 cm x muscle deep on Rt. side of face semi front of Rt.Ear

2. Incised wound 3 cm x 1 cm x Trachea deep on the front of neck at Layeal proumace Trachea cut.

3. Incised wound 4 cm x 1.5 cm x muscle deep on Lt. side of neck just below and mandible cut.

4. Incised wound 7 cm x 2 cm x bone deep on the Lt. Side of face at chin, mandible cut.

5. Incised wound 10 cm x 2 cm x bone deep on the Lt. Side of face, upper jaw, lower jaw present, Lip cut.

6. Incised wound 14 cm x 3 cm x bone deep on the Lt. Side face eye brow to nose, eye damaged maxilla x zygoumatra bone cut.

7. Incised wound 8 cm x 2 cm x bone deep just front of left ear, Temporal bone cut.

8. Incised wound 5 cm x 1 cm x muscle deep on the Lt. ear. Pippa cut nuddle.

9. Incised wound 5 cm x 2 cm x bone deep on the Lt. side of head 04 cm above the Lt. eye brow frontal bone fractured.

10. Incised wound 10 cm x 0.5 cm x skin deep on the Lt. side of Lt. shoulder and tail facing downward.

11. Incised wound 10 cm x 0.5 cm c skin deep on the Lt. side of chest just on the Lt. nipple.

12. Incised wound 6 cm x 2 cm x muscle deep on 10 cm above Lt. wrist joint on it, fore- arm back.

13. Two abrasion on the back of left arm back 4 cm. above the Elbow joint size 2 x 1 cm and

14. Incised wound 3 x 1 cm x muscle on the inner side of Lt. hand palm 4 cm below wrist joint.

15. Incised wound 6 cm x .5 cm x skin on Lt. arm back just above axilla.

16. Incised wound 6 cm x .5 cm x skin deep on the Lt. side back just above axilla.

17. Contusion 15 x 2 cm on the Lt. side of ABD. 12 cm below Lt., nipple 6 O'clk.

18. Contusion 12 x 2 cm on the Lt. side of ABD 2 cm below the Inj. No.17

19. Contusion 14 cm x 2 cm on the Lt. side of ABD 20 cm below the Lt. nipple.

20. Incised wound 2 x 1 cm x bone deep on back on Rt. Index fingure fractured 4 cm above tip.

21. Incised wound 2 x 1 cm x bone deep on the back of Rt. middle fingure fractured 5 cm above tip.

22. Abrassion 1 x 1 cm on the Lt. knee joint."

As per the opinion of Dr. P.K. Gangwar (P.W.10), deceased died due to shock and haemorrhage due to ante-mortem injuries sustained by him.

(18) It is significant to mention that P.W.10-Dr. P.K. Gangwar has reiterated the cause of death of the deceased and has stated in his deposititon before the trial Court that on 29.01.1983, he was posted at District Hospital, Hardoi and on that date, at about 03:15 p.m., he conducted the post-mortem of the deceased Vijay Bahadur Singh. He further stated that Constables Harnath Singh and Ishtiyaq Ali had brought the sealed deadbody of the deceased Vijay Bahadur Singh for post-mortem. They had

also identified the deadbody of deceased Vijay Bahadur Singh before him. He also deposed that on internal examination, he found that membrane of the brain of the deceased was torned; blood was oozing out from there; the brain of the deceased was also torned; four ounces of indigestive food was present in the stomach of the deceased; the deceased was died one day before; the death of the deceased could be attributable on 25.10.1983 at 4:00 p.m.; and he prepared the post-mortem report (Ext. Ka. 21) by itself.

In cross-examination, P.W.10 Dr. P.K. Gangwar has stated that documents relating to post-mortem was received by him on 29.10.1983 at about 01:00 p.m. He further deposed that injuries no. 13 and 22 could be attributable by felling on a hard object. Injuries no.17, 18 and 19 could not be attributable when a man gone through bicycle. There could be a difference of six hours of the duration of both side.

(19) The case was committed to the Court of Session by the Munsif Magistrate (West), Hardoi on 13.06.1984. The learned Sessions Court framed charges against accused/appellants Shiv Pratap Singh, Nanhey and Ram Autar under Section 148 I.P.C.; against all accused/ appellants under Sections 302/149 I.P.C.; against accused/appellants Shiv Pratap Singh, Nanhey, Ram Autar, Vijay Vikram Singh and Jai Karan under Section 323 I.P.C.; against accused/appellants Vijay Vikram Singh, Kali Charan and Jai Karan under Section 147 I.P.C. They pleaded not guilty to the charges and claimed to be tried. Their defence was of denial.

(20) During trial, in all, the prosecution examined 12 witnesses. Two of them, namely, the informant Lal Bahadur Singh (P.W. 1) and Ram Saroop Singh (P.W.2) were examined as eye-witnesses. Constable Harnath Singh, who handed over the sealed deadbody of the deceased for post-mortem, was examined as P.W.3; H.C. Ishtiyaq Mohammad, who had written the chik FIR on the basis of the written report, was examined as P.W.4; Dr. S.N. Misra, who medically examined the injured/informant Lal Bahadur Singh (P.W.1), was examined as P.W.5; CP Aajay Singh, who deposited the recovered articles to *Malkhana*, was examined as P.W.6; CP Ram Pal, who brought the recovered articles from *Malkhana* for chemical examination to Agra, was examined as P.W.7; Dammar, who is witness of recovery of Banka on the pointing out of accused Nanhey, was examined as P.W.8; R. K. Tiwari, who is the Investigating Officer of the case, was examined as P.W.9; Dr. P.K. Gangwar, who conducted the post-mortem of the deceased, was examined as P.W.10; Eqtada Hussain, who was the Supervisor of National Cold Storage, Bilgram, was examined as P.W.11 to prove the fact that on 28.10.1983, deceased Vijay Bahadur Singh came at Cold Storage for purchasing the potatoes; and Surendra Nath Bajpai, who was posted as Petition Clerk in the office of District Magistrate, was examined as P.W.12.

From the side of defense, Ramesh Chandra Dwivedi, who was the Deputy Inspector of School, Hardoi, was examined as DW-1.

(21) P.W.1-Lal Bahadur Singh, in his examination-in-chief, has stated before the trial Court that around 1 and 1½ months ago from today (10.12.1984), at about 3-4 p.m., he and his brother Vijay Bahadur was going from Bilgram to his village Kulluwapur and when they reached in between the field of Kuwarpal and Sudarshan,

accused Shiv Pratap Singh and Vijay Vikram Singh came out from the field of Jawar of Kuwarpal. Accused Shiv Pratap was having Kanta and accused Vijay Vikram Singh was having lathi. They told them that "घेर लो सालों को मार डालो जाने न पाये।" Vijay Bahadur was in front of him (P.W.1). On this statement, Kalicharan armed with lathi, Nanhey armed with Banka, Ram Autar armed with Kanta and two other persons to whom he did not recognize armed with lathi, came out from the field of Kuwarpal and when they challenged, then, his brother Vijay Bahadur and he went towards north direction and raised alarm and Vijay Bahadur tried to run. Thereafter, in the field of Kunwarpal, 2-3 lathi blow was occurred upon Vijay Bahadur, as a consequence of which, Vijay Bahadur fell down. Thereafter, accused armed with Kanta and Banka assaulted Vijay Bahadur. He was assaulted by Kalicharan with lathi. This incident was also seen by Ram Swaroop (P.W.2), Rajkumari and Vishwanath. His brother Vijay Bahadur died on the spot. On his hue and cry, the aforesaid witnesses and several other persons were came there and thereafter, accused ran towards south direction.

P.W.1 has further deposed that his grand-father was Gajraj Singh. The brother of his father was Netrapal Singh. Smt. Bittan Devi was the wife of Netrapal. Prior to 5-6 years ago, Smt Bittan Devi was murdered and a case in this regard was lodged against his brother Vijay Bahadur, Raj Kumar, Munne and Hardayal, in which they were acquitted. The report of the case was lodged by accused Shiv Pratap. Vitana and Netrapal had no son and they had three daughters, namely, Prem Kumari, Jaidevi and Sail Kumari. He further deposed that Sail Kumari was married with accused Vijay Vikram. A case in respect of assets of Netrapal was lodged by Prem Kumari and Jaidevi against Vitana.

P.W.1 has also stated in his deposition before the trial Court that Vijay Vikram was the son of Shiv Pratap, whereas other accused were beloging to his party. Prior to this murder, a case under Section 107 Cr.P.C. was instituted between his brother Vijay Bahadur and accused Shiv Pratap and others. He further stated that he scribed the F.I.R. of the incident at Bilgram Chauraha and also lodged the report at police station Bilgram on the date of the incident itself.

In cross-examination, P.W.1 has deposed that he was stayed at about 08-10 minutes at the place of the incident. He did not go to his village Kulluwapur for giving information. He had also not sent anyone to his village for giving information. The distance between the place of occurrence and Bilgram Chauraha was about three mile. He lodged the written report of the incident at police station at about 4-4½. He had received a duplicate copy of the F.I.R. from the police station. He further stated that he was studying at Class-VIII. Since report has to be scribed, therefore, he scribed the report at Bilgram Chauraha and did not go at police station directly. He denied the suggesstion that Ext. Ka.1 was not written by him nor his signature was there.

P.W.1 has also stated that the Inspector has recorded his statement and he was sent for medical. He was stayed at police station about 6-7 minutes. He reached in the hospital from police station about 5-6 minutes. After reaching the hospital, 2-4 mintues took place to meet the doctor. After reaching the hospital, he ate medicine, took injuection and after 2-4 minutes, doctor told him to go home and the doctor handed over the documents to the constable. After returning from hospital, he went to the place of

occurrence, where his brother died. He reached at the place of occurrence at about 06:00-05:45 p.m. When he reached at the place of occurrence, the deadbody was lying in the field; Inspector was there and was preparing the documents relating to the incident; and after five minutes when he reached there, the Inspector sealed the deadbody of his brother.

(22) P.W.2 Ram Swaroop Singh, in his examintion-in-chief, has stated that he known to all the accused persons. He also known to Vijay Bahadur Singh. Prior to 1 year and 1½ months from today (11.12.1984), Vijay Bahadur was murdered. He was going from Bilgram to his house through bicycle and in front of him, Vijay Bahadur Singh and Lal Bahadur Singh was going through bicycles. When Vijay Bahadur and Lal Bahadur reached between the field of Kuwarpal and Sudharshan, he reached near the tree of Pakariaya. He listened the voice of Vijay Bahadur and his brother. At that time, it was 03:45 p.m. He immediately reached there and saw that Shiv Pratap Singh, Vijay, Kalicharan, Nanhey, Ram Autar and other two unknown persons were assaulting Vijay Bahadur with Kanta, Lathi and Banka in the field of Kunwarpal. Out of these persons, Shiv Pratap, Ram Autar were having Kanta and Vijay Vikram, Kalicharan and two other unknown persons were having lathis and Nanhey was having Banka. Apart from him, Raj Kumar and Vishwa Nath Singh were also came there and they also saw the incident. When they challenged, Kalicharan had assaulted 2-3 lathi blows upon Lal Bahadur. Thereafter, accused ran towards the south direction of the field of Kunwarpal. Vijay Bahadur Singh died on the spot. The bicycle and slipper of Vijay Bahadur Singh were there.

In cross-examination, P.W.2 has stated that when the family members of the deceased came there, then, he went with his bicycle to home. At that time, son of Vijay Bahadur and several other villager came there on listening hue and cry. He further stated that there was no need to stay there as he brought articles from market and the same had to go home. When the family members were reached there, then, there was no need to stay there for him. He was coming from Bilgram. The distance from Bilgram to place of incident was about 1½ kosh and the distance from the place of incident to his village was about one mile. He further staed that he was not having any weapon at that time.

P.W. 2 has further stated that the uncle of Vijay Bahadur, namely, Netrapal was murdered. In this case, he was sentenced to undergo life imprisonment. Visjwa Nath was the witness of this case and his father Thakur was awarded capital punishment.

(23) The defense has produced Ramesh Chandra Bajpai, who was the Deputy Inspector of School, Hardoi, as D.W.1. He, in his examination-in-chief, has deposed before the trial Court on 27.03.1985 that the attendance register of teachers of Suratipur Junior High School was in front of him, in which, the presence of Shiv Pratap Singh on 28.10.1983 has been mentioned in the register. The timing of the school was 10:00 am to 04:00 pm. He further stated that on 28.10.1983, he inspected the school. He reached in the school at about 02:30 p.m. and was present there till 04:00 p.m.

(24) The learned trial Judge believed the evidence of Lal Bahadur Singh (P.W.1) and Ram Saroop Singh (P.W.2) and found the appellants Shiv Pratap Singh, Vijay Vikram Singh, Ram Autar, Kalicharan and Nanhey guilty for the offences punishable

under Sections 302/149 and 323/149 I.P.C., whereas appellants Shiv Pratap Singh, Nanhey and Ram Autar for the offences under Section 148 I.P.C. and appellants Vijay Vikram Singh and Kalicharan for the offence under Section 147 I.P.C. and, accordingly, convicted and sentenced the appellants in the manner stated in paragraph 2. The trial Court, however, acquitted the appellant Jaskaran from all the offences.

(25) It is pertinent to mention that the State of U.P. has not filed any appeal against the acquittal of accused Jaskaran by preferring an appeal under Section 378 (1) of the Code of Criminal Procedure.

(26) As mentioned earlier, aggrieved by their convictions and sentences appellants preferred the instant appeal and during the pendency of this appeal, appellant nos. 1, 3 and 5 died and their instant appeal stand abated. The present appeal is surviving on behalf of the appellant no.2 and 4, thus this Court proceeds to hear the appeal of behalf of the said two appellants, namely, appellant no.2-Vijay Vikram Singh and appellant no.4-Nanhey.

APPELLANTS' ARGUMENTS

(27) On behalf of appellant no.2-Vijay Vikram Singh, Shri M.L. Sayal, learned Counsel has argued as under :-

A) There were six accused persons, namely, Shiv Pratap Singh, Vijay Vikram Singh, Kali Charan, Nanhey, Ram Autar, Jaskaran armed with Kanta, Lathi, Lathi, Banka, Kanta respectively, and one unknown person. Out of the said accused persons, four accused, namely, Vijay Vikram Singh, Kali Charan, Jaskaran and one unknown person were armed with lathi. The deceased Vijay Bahadur Singh sustained three contusions i.e. injury nos.17, 18, 19, which could be a result of injury from lathi and perusal of the said injuries shows that they were on the left side of abdomen and no internal damage was caused. Moreover, out of the four accused who were armed with lathi the appellant Vijay Vikram Singh along with Kali Charan have been convicted, whereas Jaskaran, who was armed with lathi, and one of the unknown person whose whereabouts could not be traced out, were acquitted by the trial court. He further argued that out of the four accused persons, who were armed with lathi, the surviving appellant Vijay Vikram Singh, whether he caused injuries to the deceased or not, is doubtful. He submitted that even if the injuries were caused by the appellant Vijay Vikram Singh to the deceased, then the injury nos.17, 18, 19, which are contusions, were not fatal for his death, hence, the appellant Vijay Vikram Singh is entitled for a lesser punishment and the conviction and sentence awarded by the trial Court is too severe.

B) No independent witness in whose field the incident had taken place, has been produced by the prosecution and the evidence of PW2 Ram Swaroop Singh, who is a chance witness, is unworthy to be believed as he was inimical to the appellants as he was related to one Bittan Devi, who was mother-in-law of accused Vijay Vikram Singh and he had an interest in the property of Smt. Bittan Devi, hence, he falsely deposed against the appellant Vijay Vikram Singh.

C) It was further submitted that the injured witness Lal Bahadur Singh who

happens to be real brother of the deceased, his presence at the place of occurrence is also doubtful and further he happens to be a highly interested partisan witness as his brother Vijay Bahadur Singh was an accused in the murder case of Bittan Devi and that Vijay Bahadur Singh was acquitted by the trial Court from the said murder case of Bittan Devi. He also argued that the trial Court have failed to record the finding that the appellant-Vijay Vikram Singh along with other co-accused had formed an unlawful assembly for committing the murder of the deceased Vijay Bahadur Singh. He lastly submitted that the circumstances of the prosecution case has not been rightly put to the appellant-Vijay Vikram Singh in his statement under Section 313 Cr.P.C. which has prejudice his right to lead an effective evidence. Thus he submitted that the conviction and the sentence of the appellant-Vijay Vikram Singh by the trial court is liable to be set aside by this Court and the appellant-Vijay Vikram Singh be acquitted.

(28) On behalf of appellant no.4-Nanhey, Shri Shishir Pradhan, learned Counsel has argued as under :-

A) Appellant No.4 Nanhey had no motive to commit the murder of deceased Vijay Bahadur Singh as the motive to commit the crime was with the co-accused appellant no.2 -Vijay Vikram Singh and his father appellant no.1-Shiv Pratap Singh as the deceased Vijay Bahadur Singh was acquitted from the murder charge of Bittan Devi. He next argued that the appellant-Nanhey was armed with banka, whereas co-accused Shiv Pratap singh and Ram Autar were armed with kanta and the injuries which have been sustained by the deceased of sharp edged weapon is of Kanta. He submitted that the dimension of the injuries which have been sustained by the deceased as is evident from the Post Mortem report as it shows that it is not of Banka which is a heavy cutting weapon as it appears to be that of kanta.

B) Besides the aforesaid argument, he has adopted the argument of learned counsel for the appellant no.2 Vijay Vikram Singh.

RESPONDENT/STATE

(29) On behalf of respondent/State, Shri Arunendra, learned AGA has vehemently opposed the arguments of learned counsel for the appellants no. 2 and 4 and submitted that the incident has taken place at 4 p.m. in the evening and the FIR of the incident was lodged on the same day promptly at 4.30 p.m. at police station Bilgram, District Hardoi which was at a distance of three miles away from the place of occurrence by Lal Bahadur Singh who is the brother of the deceased and also an injured witness. He argued that deceased Vijay Bahadur Singh was acquitted from the murder charge of Bittan Devi due to which appellant no.2 Vijay Vikram Singh, who was her son-in-law, was annoyed hence he along with his father Shiv Pratap Singh and three other accused persons namely, Kali Charan, Nanhey and Ram Autar, formed an unlawful assembly along with one unknown person and with a common object in the said unlawful assembly committed the murder of the deceased on 28.10.1983 at 4 p.m. in the evening and the brother of the deceased, namely, PW1 Lal Bahadur Singh, who was accompanying the deceased when tried to save his brother was also assaulted by the appellants and other co-accused persons, who were armed with lathi and blunt object like banka and kanta. The deceased sustained as many as 22 ante-mortem injuries on his

person out of which 13 were incised wound whereas three contusion and one abrasion. The deceased received ante-mortem injuries by the aforesaid weapons and the cause of death as per the post mortem report was shock and hemorrhage due to ante-mortem injuries. He argued that the PW1 who is an informant as well as injured witness has categorically narrated the prosecution case which has taken place in his presence and the ocular testimony of the said injured witness fully corroborates with the post-mortem report of the deceased as well as the injury report of PW1. So far as PW2 is concerned, he is also an eye witness of the occurrence and from his evidence too it is apparent that the ocular testimony corroborates the prosecution case as it is established by the medical evidence. The trial Court after going through the prosecution evidence has rightly convicted and sentenced the appellants hence the present appeal is liable to be dismissed by this Court.

ANALYSIS

(30) We have heard the learned counsel for the respective parties at length and have carefully gone through the judgment and order of conviction and sentenced passed by the learned trial Court. We have also re-appreciated the entire evidence on record, more particularly the depositions of PW1 and PW2 and have also considered the injuries found on the dead body of the deceased as well as injuries found on the body of the injured/informant Lal Bahadur Singh (P.W.1).

(31) As per the prosecution case, on 28.10.1983, P.W.1-Lal Bahadur Singh and his brother deceased Vijay Bahadur Singh were returning from Cold Storage, Bilgram to home through their respective bicycles after purchasing seed of potatoes. The deceased Vijay Bahadur Singh was riding bicycle in front of P.W.1- Lal Bahadur Singh and when they reached in the midst of fields of Kuwarpal and Sudarshan at 4:00 p.m., accused/appellant no.1-Shiv Pratap Singh armed with Kanta and his son accused/appellant no.2-Vijay Vikram Singh armed with lathi came inside the field of jawar of Kunwar Pal Singh and told that "घेर लो सालों को मार डालों जाने न पाये।" and on this, accused Kalicharan armed with lathi, accused Nanhey armed with Banka, accused Ram Autar armed with Kanta and other two unknown persons armed with lathis, also came out from the field of Kunwarpal. Thereafter, accused persons challenged the deceased Vijay Bahadur, to which deceased Vijay Bahadur came out from bicycle; raised alarm and also tried to ran from there. Thereafter, 2-3 lathies were blown upon the deceased Vijay Bahadur, as a consequence of which, the deceased Vijay Bahadur fell down and thereupon, accused persons Shiv Pratap Singh and Ram Autar armed with kanta and accused Nanhey armed with banka assaulted the deceased Vijay Bahadur. At that relevant time, P.W.2-Ram Saroop Singh, who was also coming from Bilgram to his home and just behind the informant Lal Bahadur Singh and the deceased Vijay Bahadur Singh, seen the incident. Accused Kalicharn armed with lathi had also assauled the informant Lal Bahadur Singh (P.W.1). Thereafter, on hue and cry, several persons came there and on seeing this, accused persons ran from there towards southern direction. The deceased Vijay Bahadur Singh was found dead on the spot.

(32) The incident was occurred on 28.10.1983 at 4:00 p.m. The F.I.R. of the

incident was lodged by the informant P.W.1-Lal Bahadur Singh on the date of the incident i.e. on 28.10.1983 at 4:30 p.m. at police station Bilgram, district Hardoi, which is three miles from the place of the incident. Immediately after lodging the FIR, injured/informant P.W.1 Lal Bahadur Singh was sent for medical examination at Sadar Hospital, Hardoi, which is situated nearby the police station Bilgram, where his medical examination was conducted at 5:00 p.m. In these circumstances, it can safely be said that prior to lodging the F.I.R., there is no chance for the informant to consult anyone. The F.I.R. of the incident was promptly lodged.

(33) The P.W.1-Lal Bahadur Singh and P.W.2-Ram Saroop Singh are the eye-witnesses of the incident. They have categorcially stated before the trial Court that at the time of incident, accused Shiv Pratap Singh and Ram Autar were armed with kanta, whereas accused Vijay Vikram Singh and Kalicharan were armed with lathi and accused Nanhey was armed with Banka.

(34) The post-mortem report of the deceased Vijay Bahadur Singh shows that the deceased sustained twenty-two ante-mortem injuries and as per the opinion of P.W.10-Dr.P.K. Gangwar, who conducted the post-mortem of the deceased, the deceased died due to shock and haemorrhage as a result of ante-mortem injuries sustained by him. The post-mortem report also shows that out of twenty-two ante-mortem injuries, the deceased sustained seventeen incised wound; three contusions; and two abrasions. P.W.10-Dr. P.K. Gangwar in the statement before the trial Court has deposed that deceased could have died on 28.10.1983 at 04:00 p.m.

(35) P.W.2-Dr. S.N. Mishra, who conducted the medical examination of the injured/informant P.W.1 Lal Bahadur Singh, has categorcially stated that he medically examined the injured/informant P.W.1 Lal Bahadur Singh at 05:00 p.m. in Bilgram and after exmination, he found three injuries on the person of injured Lal Bahadur Singh. As per his opinion, all the injuries are simple in nature and caused by blunt weapon like lathi.

(36) A bare persual of the impugned judgment and order passed by the learned trial Court shows that while convicting the accused, the court has heavily relied upon the depositions of PW1 and PW2. PW1 and PW2 are stated to be the eye-witnesses to the incident. Having gone through the entire depositions of PW1 & PW2 and even the cross-examination of the aforesaid two witnesses, we are of the firm opinion that both, PW1 & PW2 are trustworthy and reliable witnesses. Their presence at the time of incident with the deceased has been established and proved by the prosecution.

(37) The presence of PW1 and even PW2 at the time of incident is natural. PW1 is the brother of the deceased who accompanied the deceased at the time of the incident and both were returning from Bilgram through their respective bicycles. Similarly, PW2 also was going towards his home from Bilgram through bicycle and he was behind the P.W.1 and the deceased and thereafter he saw the incident. Both the witnesses have been fully and thoroughly cross-examined.

(38) There may be some minor contradictions, however, as held by the 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.

(39) In the present case, both the aforesaid witnesses are thoroughly cross-examined on each and every aspect pointed out by the defence. From the entire evidence on record, it is established and proved that the deceased and PW1 went to the Cold Store Bilgram and thereafter while returning from Cold Store Bilgram, the incident had taken place. The place of incident has been established and proved by the prosecution.

(40) P.W.1-Lal Bahadur Singh is an injured eye witness. 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**, the Apex Court 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 - 1988 Supp SCC 241, 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 -(2009) 10 SCC 477, 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-(2006) 12 SCC 459. 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."

(41) Considering the entire deposition as a whole, we are of the opinion that the prosecution has been successful in proving the presence of PW1 & PW2 at the time and place of incident. They are found to be trustworthy and reliable. The injury report as well as post-mortem report has fully supported the prosecution case.

(42) The prosecution has successfully proved the motive. There was a prior long-time enmity between the deceased and the accused. P.W.2-Ram Saroop Singh has stated before the trial Court that the uncle of the deceased Vijay Bahadur, namely, Netrapal was murdered and in this case, he was awarded life imprisonment. P.W.2 has admitted the fact that the father of Vishwa Nath, namely, Thakur, was awarded capital punishment. He further deposed the Netrapal had no son and he had three daughters, out of which, his one daughter was married with Vijay Vikram. The wife of Netrapal was Smt. Bittan Devi, who was also murdered. Thus, it is established that there is enmity between the accused and prosecution for grabbing the property of the Netrapal. The defence has failed to prove any circumstances by which it can be said that they are falsely implicated in the case.

(43) In view of the above and for the reasons stated hereinabove, no interference of this Court is called for in the instant appeal as the learned trial Court has rightly convicted the appellants by the impugned judgment.

(44) The instant appeal fails and deserves to be dismissed and is, accordingly, **dismissed**. The appellants, who are in jail, shall serve the sentence as awarded by the trial Court.

(45) Let a certified copy of this order as well as lower Court record be transmitted to the Court concerned for necessary information and compliance forthwith.

(2022)01ILR A50
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 20.01.2022

BEFORE

THE HON'BLE ATTAU RAHMAN MASOODI, J.
THE HON'BLE MANISH KUMAR, J.

Criminal Appeal No. 464 of 1982

Bhikha & Ors. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Shankar Sharma, K.N. Singh, Nagendra Mohan, S.K. Dixit

Counsel for the Respondent:
Govt. Advocate

Criminal Law - Code of Criminal Procedure, 1973- Section 154- Indian Evidence Act, 1872- Section 155(3)- FIR is not an encyclopedia of entire incident and need not contain an exhaustive account of the incident though it is correct that such

a significant thing was left to be mentioned in the FIR and during the statement recorded under Section 161 Cr.P.C. but at the same time, which cannot be denied as per the medical evidence that deceased had got one injury by knife. By not mentioning or disclosing about the assault by knife by Awantika either in the FIR or in the statement recorded under Section 161 Cr.P.C. and PWs for the first time stated before the trial court, this omission may amount to contradiction and may raise a doubt about the veracity of the statement of the witnesses. The FIR is, that is why, not considered a substantive evidence and its evidentiary value is limited to corroboration and contradiction of the evidences. In the present case assault took place inside the house, therefore, in case it was missed by the witnesses about the knife blow cannot be attached undue weight so as to demolish the whole prosecution story, which is corroborated by other facts and circumstances on the record.

Although FIR is not an encyclopaedia and can be used only for the purpose of corroboration hence absence of a relevant fact in the FIR as well as previous statements u/s 161 CrPc will amount to a contradiction but the same will not demolish the entire case of the prosecution where the occurrence is corroborated by other evidence.

Criminal Law - Indian Evidence Act, 1872- Section 3- Related Witnesses - Falsus in Uno, Falsus in Omnibus- Maxim not applicable in India- Principle of false in one thing, false in everything is not applicable in India and it is the duty of the Court to separate the grain from the chaff. Credibility of the witnesses, who are near relatives or family members, his/her version should be tested based on his/her version and they cannot be termed as interested witnesses. The prosecution witnesses cannot be discredited merely on the ground that they are relative, they may still not be termed as interested witnesses in all cases. Their statements has also to be scrutinized on merits and if found reliable, their testimony can be believed and acted upon. It is true that sometimes there are contradictions, omissions and subsequent embellishments in the statement of prosecution witnesses, but it is not necessary that they must be disbelieved in toto, irrespective of other facts and circumstances of the case. Such omissions and embellishments can well be explained by other corroborative evidence on the important parts of the prosecution story.

As the maxim of falsus in uno, falsus in omnibus is not applicable in India hence the entire testimony of a prosecution witness cannot be discarded merely because he is related and his testimony is partly false. It is the duty of the court in such a situation to scrutinise the said testimony and separate the grain from the chaff by seeking corroboration from other evidence and material while ignoring minor embellishments and omissions which do not go to the core of the case of the prosecution.

Criminal Law - Indian Evidence Act, 1872 – Section 106- Burden of Proof- Where an offence like murder is committed in secrecy inside a house then there will be a corresponding burden on the inmates of the house to give cogent explanation.

Settled law that the evidential burden of proving a fact especially within the knowledge of the accused, lies upon the accused and failure to offer a satisfactory explanation about the said fact will raise an adverse inference against him. (Para 19, 21, 22, 29, 30, 31, 36)

Criminal Appeal rejected. (E-3)

Judgements/ Case law cited/Relied upon:-

1. Harbans Kaur & anr Vs St. of Har, 2005 SCC (Cri) 1213(cited)

2. Maloth Somaraju Vs St. of A.P, (2011) 3 SCC (Cri) 531(cited)

3. Prabhu Dayal Vs St. of Raj. 2018 2 JIC 642 (SC) (cited)

4. Gangadhar Behera Vs St. of Orissa, 2002 8 SCC 381(relied)

5. St. of Raj. Vs Chandgi Ram, 2014 CRLJ 4571(relied)

6. Trimukh Maroti Kirkan Vs St. of Maha., 2006 10 SCC 681(relied)

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

1. The present criminal appeal has been preferred against the judgment and order dated 5.6.1982 passed by the III Additional Sessions Judge, Lucknow in Sessions Trial number 298 of 1979 (State versus Bhikha and three others) under section 302/34 of the Indian Penal Code (hereinafter referred to as, the IPC), Police Station Mohanlal Ganj, District Lucknow, whereby the appellant no. 1- Bhikha was convicted under section 302 IPC simplicitor and the other co-accused persons namely Ram Khelawan, Avantika and Ramphal were convicted under section 302 read with section 34 of IPC. All the aforesaid appellants were sentenced to undergo rigorous imprisonment for life.

2. We have heard Sri Nagendra Mohan, learned counsel for the appellants and Sri Umesh Verma, learned Additional Government Advocate appearing for the State respondents and perused the record meticulously.

3. According to the prosecution case, on 01.9.1979, an FIR was lodged under section 302 IPC by the complainant, namely Ram Adhar, PW- 1 mentioning therein that on the ocassion of marriage of one Raj Rani, Bhikha i.e. appellant no. 1, had fired shot with his country made pistol, which had hit to one of the Barati causing him injury. Report of that incident was lodged by one Sia Ram (not examined), cousin brother of Ram Adhar PW-1 against the accused appellant no. 1 Bhikha, thus, a case was registered under section 307 Cr.P.C., due to which, Bhikha was keeping enmity with the complainant Ram Adhar and his other relatives. The deceased Phool Chand was originally a resident of village Sarwan Nagar, Police Station Banthra,District Lucknow. Smt. Sarjoo Dei, a widow having no issue (not examined) was the cousin sister (maternal uncle's daughter) of Ram Adhar PW1. She had brought up Phool Chand (deceased) since his childhood and given her property to him. Due to the said reasons, appellant no. 1 namely Bhikha was keeping enmity with the deceased.

4. It is further stated in the F.I.R. that on the fateful day i.e. 01.09.1979, at about 11 A.M., the deceased Phool Chand accompanying the complainant were returning back from their fields. The Phool Chand deceased was a bit ahead of the complainant. They had to pass through the house of Bhikha appellant no. 1. When the deceased was near to the house of the Bhikha, all the accused appellants i.e. Bhikha armed with gun, Ram Khelawan and Ram Phal carrying Lathi the Avantika having Danda came out of the house of Bhikha and pounced upon the deceased dragging him in the house of Bhikha by exhorting kill him today.

5. On hearing cries of Phool Chand (deceased) and Ram Adhar PW-1, witnesses Ram Karan and Bhajan Lal (both not examined) reached on the spot and by that time Smt. Jamuna PW-2 and Smt. Raj Rani (not examined) niece of Ram Adhaar had also reached to the spot. They saw the

alleged incident through window and door of the house of Bhikha. While Phool Chand-deceased was resisting, the accused persons were beating him and thereafter, Ram Khelawan, Avantika and Ramphal caught hold of Phool Chand (deceased) and Bhikha fired on him. In the meantime, Ram Khelawan came out and hit on the lower limb of Smt. Jamuna and thereafter the accused persons ran away.

6. After investigation, a charge sheet was filed on 04.10.1979 against the present appellants. Thereafter the charge against the appellant no. 1 Bhikha was framed under section 302 IPC and charge against the rest of the appellants was framed under Sections 302 read with Section 34 IPC in furtherance of common intention with Bhikha to commit the murder of Phool Chand.

7. The prosecution, in order to bring home the accusation against the appellants had produced two prosecuting witnesses of fact namely Ram Adhar, eye witness/complainant as PW-1 and Smt. Jamuna claiming herself an injured eye witness as PW-2. The prosecution has also produced as many as five formal witnesses namely Dr. R.S. Chaudhary (PW-3), who medically examined the injured witness PW-2, Dr. Ved Prakash Gupta, who conducted the post mortem of deceased Phool Chand as PW-4, Arshad Ali, the Head Constable, who proved the chik FIR as PW-5, Bheem Singh Tomar as PW-6 and Raj Kumar, Constable, who brought the dead body to mortuary for post mortem as PW-7.

8. As documentary evidences, the prosecution has proved the copy of FIR as Ext. Ka-1, Post Mortem Report as Ext. Ka-3, General Diary as Ext.Ka-5, Chitthi Majroobi as Ext. Ka-6, Special Report sent to the C.O. to be forwarded to the Magistrate on 01.09.1979 as Ext. Ka-7, Inquest Report as Ext. Ka-8, dead body diagram as Ext. Ka-9, dead body challan as Ext. Ka-10, sample seal as Ext. Ka-11, the Baniyan and blood stained bed sheets as Ext. Ka-14, Earth as Ext. Ka-15, site plan as Ext.Ka-16, Charge sheet as Ext. Ka-17.

9. The trial Court has mainly relied on Ext. Ka-1 (FIR), Exhibit Ka-8 (Inquest Report) and Ext. Ka-16 (Site Plan) in its judgment.

10. After closure of the evidence of the prosecution, the statement under section 313 of Cr.P.C of all the four accused persons were recorded wherein they denied their involvement in the alleged incident and claimed that they have been falsely implicated.

11. All the accused persons were committed to the Court of Sessions by the Chief Judicial Magistrate, Lucknow vide its order dated 13.11.1979.

12. The trial court, on appreciation of evidence placed before it, had found that the incident was of the broad daylight and the eye witnesses had seen the occurrence and under such circumstances, presence of motive is not material. It has further been held that no lacuna or infirmity was there in the statement of Smt. Jamuna and held that she has, in a most natural way, described in minutest details about the manner in which the incident took place and all these facts have mostly been corroborated by Ram Adhar PW-1.

13. The trial court did not accept the submissions raised by the learned counsel for the accused appellants that the story of assaulting the deceased Phool Chand using knife by Avantika has not been mentioned either in the FIR or in the statements recorded under section 161 Cr.P.C and it was stated for the first time in their examination in chief. The trial court observed that defence had specifically put questions to Ram Adhar, who satisfactorily replied the same in his cross-examination and this clinches the evidence against the accused persons and shows that the accused appellants were also conscious of this fact, otherwise, they would not have been asked this question from the witnesses.

14. It is further held by the learned trial court that non disclosure of the aforesaid fact in detail in written report also does not lead us to infer about the falsity of it. An F.I.R is a document, which sets the prosecution machinery in motion. The evidence of the case was proved against the accused appellants, thus, the trial court convicted and sentenced them as aforesaid.

15. The first submission advanced on behalf of the appellants is that in the FIR, the role of the lathi was assigned to other accused persons except the appellant no.1, Bikha, who had been assigned the role of shot from his firearm, due to which, the deceased Phool Chand died. For the first time, the story was set up by the prosecution assigning the role of assault by using knife by co-accused/appellant Avantika during the examination in chief and in the cross-examination. If Avantika assaulted the deceased by knife, the same ought to have been mentioned either in the FIR or at the time of statement given under section 161 of Cr.P.C and the same amounts to improvisation of case at the stage of examination in chief and during the cross examination to falsely implicate the present appellants. Therefore, the prosecution at the stage of evidence has overturned the very premise of the case that goes to vitiate the trial and the conviction and sentence for life imprisonment ruled by the trial court.

16. Learned AGA, on the other hand has submitted that section 3 of the Evidence Act, 1872 (hereinafter referred to as, the Act of 1872) defines evidence, which includes all statements, which the court permits or requires to be made before it by witnesses in relation to matters of fact under enquiry, such statements are called oral statements. The oral statements given by the prosecution witnesses before the court are bound to read as a whole for deriving a conclusion.

17. It is further submitted that as per the charge framed against the other co-accused persons except Bhikha i.e. under section 302 read with section 34 IPC i.e. common intention of the accused persons to kill Phool Chand and relied on the FIR which makes out the case against the appellants under section 302 read with section 34 IPC and any addition at the stage of evidence may have a fall out on the memory of the witness due to upsetting circumstances but it does not vitiate the trial altogether. In support of his submissions, learned AGA relied upon the judgement rendered by Hon'ble Supreme Court in the case of ***Harbans Kaur and another Vs. State of Haryana reported in 2005 SCC (Cri) 1213.***

18. Learned AGA has further submitted that it is not improvisation by the prosecution rather it is an evidence recorded before the court and as per

Section 3 of the Act of 1972, it is admissible and does not falsify the prosecution story. In support thereof, he placed reliance upon the judgement of the Hon'ble Supreme Court rendered in the case of ***Maloth Somaraju Vs. State of Andhra Pradesh reported in (2011) 3 SCC (Cri) 531***. Reliance has also been placed on the case of ***Prabhu Dayal versus State of Rajasthan reported in 2018 2 JIC 642 (SC).***

19. After hearing the learned counsel for the respective parties, the position which emerges out is that the FIR is not an encyclopedia of entire incident and need not contain an exhaustive account of the incident though it is correct that such a significant thing was left to be mentioned in the FIR and during the statement recorded under Section 161 Cr.P.C. but at the same time, which cannot be denied as per the medical evidence that deceased had got one injury by knife. But it is to be seen how this fact alone can demolish the prosecution case in the background of other facts and circumstances on the record of the case.

20. By not mentioning or disclosing about the assault by knife by Awantika either in the FIR or in the statement recorded under Section 161 Cr.P.C. and PWs for the first time stated before the trial court, this omission may amount to contradiction and may raise a doubt about the veracity of the statement of the witnesses. It has further been revealed from the records that there are some contradictions here and there in the testimony of PW-1 and 2.

21. It is the established principle of law that the primary object of the FIR is to set the criminal investigation into motion. It may not set out the case in every minute detail with unmistakable precision. It is not the encyclopedia of all the facts and circumstances of the case on which prosecution relies. The FIR is, that is why, not considered a substantive evidence and its evidentiary value is limited to corroboration and contradiction of the evidences. In the present case assault took place inside the house, therefore, in case it was missed by the witnesses about the knife blow cannot be attached undue weight so as to demolish the whole prosecution story, which is corroborated by other facts and circumstances on the record.

22. It has been held by Hon'ble Apex Court in the case of Gangadhar Behera Vs. State of Orissa reported in 2002 8 SCC 381 that principle of false in one thing, false in everything is not applicable in India and it is the duty of the Court to separate the grain from the chaff. The relevant portion of the said judgment is being quoted hereunder for ready

" 15. To the same effect is the decision in State of Punjab v. Jagir Singh [(1974) 3 SCC 277 : 1973 SCC (Cri) 886 : AIR 1973 SC 2407] and Lehna v. State of Haryana[(2002) 3 SCC 76 : 2002 SCC (Cri) 526] . Stress was laid by the accused-appellants on the non-acceptance of evidence tendered by some witnesses to contend about desirability to throw out the entire prosecution case. In essence prayer is to apply the principle of "falsus in uno, falsus in omnibus" (false in one thing, false in everything). This plea is clearly untenable. Even if a major portion of the evidence is found to be deficient, in case residue is sufficient to prove guilt of an

accused, notwithstanding acquittal of a number of other co-accused persons, his conviction can be maintained. It is the duty of the court to separate the grain from the chaff. Where chaff can be separated from the grain, it would be open to the court to convict an accused notwithstanding the fact that evidence has been found to be deficient to prove guilt of other accused persons. Falsity of a particular material witness or material particular would not ruin it from the beginning to end. The maxim "falsus in uno, falsus in omnibus" has no application in India and the witnesses cannot be branded as liars. ..... It is merely a rule of caution. All that it amounts to, is that in such cases testimony may be disregarded, and not that it must be disregarded. The doctrine merely involves the question of weight of evidence which a court may apply in a given set of circumstances, but it is not what may be called "a mandatory rule of evidence" ..... The doctrine is a dangerous one specially in India for if a whole body of the testimony were to be rejected, because a witness was evidently speaking an untruth in some aspect, it is to be feared that administration of criminal justice would come to a dead stop. Witnesses just cannot help in giving embroidery to a story, however, true in the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of acceptance, and merely because in some respects the court considers the same to be insufficient for placing reliance on the testimony of a witness, it does not necessarily follow as a matter of law that it must be disregarded in all respects as well. The evidence has to be sifted with care. The aforesaid dictum is not a sound rule for the reason that one hardly comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroideries or embellishment. (See Sohrab v. State of M.P. [(1972) 3 SCC 751 : 1972 SCC (Cri) 819] and Ugar Ahir v. State of Bihar [AIR 1965 SC 277 : (1965) 1 Cri LJ 256] .) An attempt has to be made to, as noted above, in terms of felicitous metaphor, separate the grain from the chaff, truth from falsehood. Where it is not feasible to separate the truth from falsehood, because grain and chaff are inextricably mixed up, and in the process of separation an absolutely new case has to be reconstructed by divorcing essential details presented by the prosecution completely from the context and the background against which they are made, the only available course to be made is to discard the evidence in toto. (See Zwinglee Ariel v. State of M.P. [AIR 1954 SC 15 : 1954 Cri LJ 230] and Balaka Singh v. State of Punjab [(1975) 4 SCC 511 : 1975 SCC (Cri) 601 : AIR 1975 SC 1962] .) As observed by this Court in State of Rajasthan v. Kalki [(1981) 2 SCC 752 : 1981 SCC (Cri) 593 : AIR 1981 SC 1390] normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not normal, and not expected of a normal person."

23. Here in the present case, version in the FIR or at the time of framing of the charges and up till cross-examination, the name of the accused persons, the time, the place of occurrence of incident and the role to the appellants/convicts were consistent throughout, except role of assault by knife added along with lathi has been assigned to Awantika-accused appellant later at the time of exam-in-chief. Otherwise, the

evidence of witnesses including an injured eye-witness had also been corroborated with the documentary evidence.

24. The second submission raised by the learned counsel for the appellants is that PW-2 was introduced in order to support the case of prosecution and shown her as an injured witness, whereas, she was neither present nor received any injury.

25. It is further submitted that if she was assaulted by lathi by one of the accused appellants then why the medical examination was conducted with delay, especially under the circumstance, when the primary health center is hardly 1 km from the police station. Both the witnesses are relative of the deceased, hence, they are interested witnesses. They could not be relied blindly and more caution was required, which has not been taken by the learned trial court.

26. On the other hand, learned AGA has submitted that there is no delay in the medical examination of the injured witness and injury was found which corroborates with the prosecution story and confirms that PW-2 was present at the time of occurrence of the incident, as an eyewitness.

27. It is further submitted that merely the fact that the prosecution witness is the relative and their evidence or testimony cannot be relied is a misconceived submission. In support of his submission, he relied upon the judgment passed by the Hon'ble Supreme Court in the case of ***State of Rajasthan Vs. Chandgi Ram reported in 2014 CRLJ 4571.***

28. After hearing the learned counsel for the parties, it has come out from the records that the delay in conducting the medical examination has duly/properly been explained. The incident was of about at 11 A.M. and the FIR was lodged at about 1.30 P.M. and the medical examination was conducted at 5 P.M. and the delay of few hours was for the reason that doctor who had to conduct the medical examination was not available and the said reason does not make the prosecution story doubtful. The medical examination was held without there being any delay and whatever delay, as alleged, has been explained properly.

29. As far as submissions relating to that the prosecution witnesses were the near relatives of the deceased, thus, the credibility of them for weighing the truthfulness is very less and shall not be relied, is also not tenable. It is a settled law that credibility of the witnesses, who are near relatives or family members, his/her version should be tested based on his/her version and they cannot be termed as interested witnesses. The para no. 17 of the case of ***Chandgi Ram (supra)*** is relevant, which reads as under:-

"It was contended that all the witnesses were family members of the deceased and being interested witnesses, their version cannot be relied upon in toto. When we consider the same, we fail to understand as to why the evidence of the witnesses should be discarded solely on the ground that the said witnesses are related to the deceased. It is well settled that the credibility of a witness and his/her version should be tested based on his/her testimony vis-a-vis the occurrence with reference to

which the testimonies are deposed before the Court. As the evidence is tendered invariably before the Court, the Court will be in the position to assess the truthfulness or otherwise of the witness while deposing about the evidence and the persons on whom any such evidence is tendered. As every witness is bound to face the cross-examination by the defence side, the falsity, if any, deposed by the witness can be easily exposed in that process. The trial Court will be able to assess the quality of witnesses irrespective of the fact whether the witness is related or not. Pithily stated,if the version of the witness is credible, reliable, trustworthy, admissible and the veracity of the statement does not give scope to any doubt, there is no reason to reject the testimony of the said witness, simply because the witness is related to the deceased or any of the parties. In this context, reference can be made to the decision of this court reported in Mano Dutt and another vs. State of Uttar Pradesh - (2012) 4 SCC 79. Paragraph 24 is relevant which reads as under:-

"24. Another contention raised on behalf of the appellant-accused is that only family members of the deceased were examined as witnesses and they being interested witnesses cannot be relied upon. Furthermore, the prosecution did not examine any independent witnesses and, therefore, the prosecution has failed to establish its case beyond reasonable doubt. This argument is again without much substance. Firstly, there is no bar in law in examining family members, or any other person, as witnesses. More often than not, in such cases involving family members of both sides, it is a member of the family or a friend who comes to rescue the injured. Those alone are the people who take the risk of sustaining injuries by jumping into such a quarrel and trying to defuse the crisis. Besides, when the statement of witnesses, who are relatives, or are parties known to the affected party, is credible, reliable, trustworthy, admissible in accordance with the law and corroborated by other witnesses or documentary evidence of the prosecution, there would hardly be any reason for the Court to reject such evidence merely on the ground that the witness was a family member or an interested witness or a person known to the affected party." (emphasis added).

30. The prosecution witnesses cannot be discredited merely on the ground that they are relative, they may still not be termed as interested witnesses in all cases. Their statements has also to be scrutinized on merits and if found reliable, their testimony can be believed and acted upon. It is true that sometimes there are contradictions, omissions and subsequent embellishments in the statement of prosecution witnesses, but it is not necessary that they must be disbelieved in toto, irrespective of other facts and circumstances of the case. Such omissions and embellishments can well be explained by other corroborative evidence on the important parts of the prosecution story.

31. In the present case the evidence of PWs definitely stating that the deceased was dragged inside the house and was assaulted therein is heavily corroborated by the fact that the dead body was recovered from inside the house of the appellant namely, Bhikha, which fact is not denied by the accused persons rather stands admitted, it out-ways some contradictions and omissions here and there or any embellishments subsequently made by the witnesses. Their testimonies are well corroborated on other vital facts. If a witness is found to have made some

embellishments and contradictions, it does not follow that his statement is to be disbelieved as a whole, as argued by the learned counsel for the appellants in view of the principle of *"falsus in uno, falsus in omnibus"* (false in one thing, false in everything). The said principle is not applicable in the present case, as it has already been discussed earlier.

32. In the case in hand, the body was found from inside the house of Bhikha-appellant no. 1 and in defense, the appellants come with a case that they were not present at home at the time of occurrence of the incident and stated that the deceased-Phool Chand would have been assaulted by some person and on seeing the house of the Bhikha-appellant no. 1open, the deceased-Phool Chand entered into the house.

33. In so far the submission of learned counsel for the appellants that the deceased may have entered in the house finding it open, is not tenable. As per the defence case that no one was present at the home then why the doors were opened.

34. So far as the submissions raised by the learned counsel for the appellants that someone else would have assaulted the deceased and he ran into the house and died, is also not tenable. As per the ante-mortem injuries found on the body of the deceased, it is clear that the deceased would have been bleeding profusely but there was no trail of blood found and according to the testimony of PW-6/Investigating Officer, only blood was found near the body of the deceased recovered from inside the house of Bhikha-appellant no. 1. The ante-mortem injuries found on the body of the deceased are as follows:-

1. Gunshot wound 2½ cm X 1½ cm X bone fractured underneath ½ below the medial canthus of right eye. Direction obliquely downward and

posteriorly. Blackening & pg. torn and burning present. Wadding removed from the wound. Only entry wound present.

2. Gunshot wound 1.5 cm X1 cm X chest cavity deep on the right side of front of chest 6 cm below the right nipple at 4'0 clock position.

3. Incised wound 5 cm X3 cm X abdominal cavity with small intestine coming out. Tailing towards left side, on the front of abdomen in mid line 5 cm above the umbilicus.

4. Abraded contusion multiple in numbers in an area of 8 cm X5 cm on tip of left shoulder joint.

5. Abraded contusion 4 cm X2 cm on the front of left elbow joint.

6. Abraded contusion multiple in number in an area of 10 cm X 5 cm on th front of left knee and lower 1/3 of left thigh 28 cm below the anterior

superior illiac spine.

7. Abraded contusion 2 cm X 1 cm on the back of middle 1/3 of right leg 15 cm below the back of right knee joint.

35. The Hon'ble Supreme Court in the case of ***Trimukh Maroti Kirkan Vs. State of Maharashtra reported in 2006 10 SCC 681*** has held that where an offence like murder is committed in secrecy inside a house then there will be a corresponding burden on the inmates of the house to give cogent explanation. The relevant extract of the said judgment is being quoted hereunder:-

"15. Where an offence like murder is committed in secrecy inside a house, the

initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of Section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation."

36. Thus, recovery of body from inside the house of the Bhikha i.e. appellant no. 1 is a clinching circumstance for which no plausible and reasonable explanation was given by the appellants, as discussed hereinabove.

37. So the recovery of body from inside the house of Bhikha-appellant no. 1 overweigh all other omission or subsequent embellishments, as discussed earlier.

38. In a nut shell, the defence put forth by the appellants does not lead us to take a different view from as taken by the trial court.

39. The criminal appeal is accordingly dismissed.

40. The record reveals that during pendency of the present appeal, the appellant nos. 1 and 4 namely, Bhikha and Ram Phal had died and as a consequence thereof, the appeal was abated on their behalf vide order dated 14.12.2018. The proceedings survive on behalf of the appellant nos. 2 and 3 namely Avantika and Ram Khelawan, who are presently on bail.

41. As a consequence of the dismissal of the present appeal as above, the bail bonds submitted by the appellants nos. 2 and 3 namely Avantika and Ram Khelawan are hereby cancelled and the sureties are discharged.

42. The appellant nos. 2 and 3 namely Avantika and Ram Khelawan may surrender before the Chief Judicial Magistrate, Lucknow within a period of two weeks from today failing which the Chief Judicial Magistrate, Lucknow shall proceed to take them into custody forthwith without any delay to serve the remaining sentence in terms of the judgment and order dated 05.06.1982 passed by the learned trial court.

(2022)01ILR A60
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.01.2022

BEFORE

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

Criminal Appeal No. 875 of 2010
and
Criminal Appeal No. 876 of 2010

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

Counsel for the Appellant:
Sri Dharmendra Mishra, Sri Araf Khan, Sri Chandrakesh Misra, Sri D.S. Misra, Sri Dwijendra Prasad, Sri Lihazur Rahman Khan, Sri Omvir Babu, Sri Rajesh Kumar Dubey, Sri S.S. Shukla, Sri Vikrant Neeraj, Sri Yadvesh Yadav

Counsel for the Respondent:
A.G.A.

Criminal Law – Indian Penal Code, 1860 – Section 302 -Both Applicants convicted u/s 302 IPC-life imprisonment-Last seen evidence-within couple of hours from recovery of dead body-section 106 Evidence Act- Appellants under obligation to provide explanation –failed to provide any-Appellants took deceased from home and within an hour and a half-deceased found dead at a short distance-from where he was taken by the Appellant-injuries on body-motive present-abscondence of the Appealant-Dinesh-circumstances proved.

Appeals dismissed. (E-9)

List of Cases cited:

1. Satpal Vs St. of Har.(2018) 6 SCC 610

2. Digamber Vaishnav & anr. Vs St. of Chhattisgarh (2019) 4 SCC 522

3. C. Muniappan & ors.s Vs St. of T.N. (2010) 9 SCC 567

4. Shaikh Maqsood Vs St. of Maharashtra (2009) 6 SCC 583

5. Manoj Suryavanshi Vs St. of Chhatisgarh (2020) 4 SCC 451

6. Sharad Birdhichand Sarda Vs St. of Mah. (1984) 4 SCC 116

7. St. of Raj. Vs Kashi Ram (206) 12 SCC 254

(Delivered by Hon'ble Sameer Jain, J.)

1. As both the appeals arise out of a common judgment and order dated 11.1.2010 passed by Additional District and Sessions Judge/Fast Track, Court No.3, Aligarh in Sessions Trial No. 903 of 2005 and Sessions Trial No.1010 of 2005, they have been heard together and are being decided by a common judgment.

2. Criminal Appeal No. 875 of 2010 and Criminal Appeal No.876 of 2010 have been preferred by the appellants against the judgement and order dated 11.1.2010 passed by Additional District and Sessions Judge/FTC, Aligarh in Sessions Trial No.903 of 2005 and Sessions Trial No.1010 of 2005 by which the appellants have been convicted under Section 302 IPC and awarded life imprisonment with a fine of Rs.10,000/- and in default six months additional simple imprisonment.

3. We have heard Sri Araf Khan, learned counsel for the appellants in both the appeals; and Sri H.M.B.Sinha, learned AGA for the State and perused the record of the case.

4. The prosecution story in a nutshell is that on 12.3.2005 at about 22.30 hours, Narayan Singh (PW-1) lodged FIR of the present case under Section 302 IPC against appellants at Police Station Quarsi, District Aligarh vide Case Crime No. 193 of 2005 with the allegation that in the evening of 12.3.2005, at about 7.30 PM, the appellants took away his son Suresh @ Sanju (deceased) and they returned back at about 8.30 PM without the deceased; and that when they were asked about the deceased, they provided no satisfactory answer. As a result, the informant (PW-1) along with his sons Mukesh Kumar (PW-2), Pawan (PW-3) and others made a search for the deceased. On search, dead body of the deceased was found, at about 9.00 PM, in the wheat field of Vijai Pal. The body had several visible injuries. In the FIR it was alleged that informant's son Suresh @

Sanju was murdered by the appellants. The motive disclosed in the FIR was that the accused (appellants) had suspicion that the deceased was in an illicit relationship with Vimlesh, the sister of Dinesh (appellant of Criminal Appeal No.875 of 2010).

5. After FIR, during the course of investigation, on 13.3.2005, the Investigating Officer prepared a recovery memo (Ex. Ka-3) with regard to a love letter (material Ext.1) from the wallet of deceased found in his pocket. This letter is alleged to have been written by Vimlesh, the sister of Dinesh (appellant of Criminal Appeal No.875 of 2010). The Investigating Officer also recovered cash of Rs. 154/- from the wallet of the deceased, which was handed over to the mother of the deceased in respect of which, a separate recovery memo (Ex. Ka-2) was prepared. On the same day i.e., on 13.3.2005, one 'Lota', Glass (Tumbler) and slippers were also recovered from the place of the incident in respect of which, the Investigating Officer prepared a recovery memo (Ex. Ka-4). Recovery memo (Ex. Ka-5) was with regard to recovery of bloodstained and plain soil.

6. During investigation, on 1.4.2005 co-accused Bhoora (appellant no.2 of Criminal Appeal No.876 of 2010) was taken to police custody remand and on his pointing out bloodstained rope and a wooden stick (danda) was recovered from near a temple in respect of which, the Investigating Officer prepared recovery memo (Ex. Ka-8). After investigation, charge sheet was submitted against the appellants on which cognizance was taken and the case was committed to the Court of Session. The trial court framed charges on 15.12.2005 against the appellants. Appellants did not plead guilty and claimed trial.

7. During trial, prosecution examined six witnesses. PW-1 (Narayan Singh), PW-2 (Mukesh Kumar) and PW-3 (Pawan) are the witnesses of fact whereas rest of the prosecution witnesses are formal witnesses. After recording the prosecution evidence, trial court examined the appellants under Section 313 Cr.P.C. and convicted them under Section 302 IPC on the basis of evidence produced by the prosecution.

8. Learned counsel for the appellants contended that without a proper appreciation of the evidence available on record, trial court convicted the appellants. He further contended that there are material contradictions and omissions in the ocular version of all the three witnesses of facts, namely, Narayan Singh (PW-1), Mukesh Kumar (PW-2) and Pawan (PW-3). According to him, the testimony of Narayan Singh (the informant) (PW-1) and Mukesh Kumar (PW-2), is of the deceased being last seen with accused whereas, on the other hand, Pawan (PW-3) claims to be a witness of the appellants causing injuries to the deceased Suresh @ Sanju. The defence counsel submits that the testimony of PW-3, namely, Pawan, runs contrary to the version of the FIR as well as the version of PW-1 (the informant) Narayan Singh and PW-2 (Mukesh Kumar). Similarly, the testimony of PW-1 and PW-2 is contrary to the testimony of Pawan (PW-3). Therefore, on the basis of such contradictory evidence, lower court committed grave error in convicting the appellants.

9. Learned defence counsel further argued that according to Pawan (PW-3), Mahipal had also witnessed the appellants assaulting the deceased Suresh @ Sanju but prosecution did not produce Mahipal, this casts a serious doubt on the prosecution case. Further, the incriminating circumstance of the deceased being last seen with the accused was not put by the

trial court to any of the appellants while recording their statement under Section 313 Cr.P.C. and, therefore, the conviction of the appellants is bad and order of conviction is liable to be set-aside.

10. Per contra, learned AGA for the State contended that the prosecution has proved its case beyond reasonable doubt and there is no material contradiction or omission in the testimony of PW-1, PW-2 and PW-3 and, as murder weapon was also recovered on the pointing out of one of the accused, therefore, trial court rightly convicted the appellants on the basis of testimony of PW-1 (Narayan Singh) (the informant) PW-2 (Mukesh Kumar) and PW-3 (Pawan). Similarly, on the basis of the evidence of PW-3 (Pawan), the testimonies of PW-1 (Narayan Singh) and PW-2 (Mukesh Kumar) cannot be discarded.

11. Learned AGA further submitted that even if the circumstance of last seen was not put while recording the statement of appellants under Sections 313 Cr.P.C., no prejudice was caused to them and, therefore, on this ground, conviction of the appellants would not vitiate.

12. Before analysing the prosecution evidence in detail, it is necessary to briefly notice the testimony of prosecution witnesses examined before the trial court.

Prosecution witnesses

13. Prosecution has examined Narayan Singh as PW-1, who is the informant of the present case and father of deceased Suresh @ Sanju. This witness stated before the trial court that on 12.3.2005 at about 7.00 PM in the evening appellants took away his son, Suresh @ Sanju (deceased), from his house in his presence and all the appellants returned back at about 8.00 PM, but his son Suresh @ Sanju did not return back, when he asked the appellants about his son, they did not provide any satisfactory answer and, therefore, he started searching for his son, Suresh @ Sanju, along with his other sons, namely, Mukesh Kumar (PW-2) and Pawan (PW-3), and other villagers; upon search, at about 9.00 PM, dead body of Suresh @ Sanju was found lying in the wheat field of Vijay Pal. This witness almost repeated the version of FIR. In his statement, he further stated that about three years before, accused Bhura along with others had caused fire arm injuries to his son, Suresh @ Sanju (deceased). This witness proved written report (Ext. Ka-1). This witness also stated that after the FIR police arrived at the spot but as it had got late, inquest was conducted in the morning and during inquest, from the pocket of his son Suresh @ Sanju (deceased), a love letter (material Ex.-1) and Rs.154/- were recovered. The recovered letter was of Vimlesh, who addressed it to his son, Suresh @ Sanju (deceased). This witness in his cross examination stated that Vimlesh is the sister of accused persons, namely, Perveen, Bhura and Dinesh. This witness proved recovered love letter as material Ex.1. During his cross-examination this witness identified the 'lota', glass (tumbler) and slippers of his deceased son (Suresh @ Sanju) and proved the same as material Exts. 2 to 6.

14. In his cross-examination, this witness stated that co-accused Parveen @ Bachcha and Dinesh are real brothers whereas Bhura is their cousin and Satyaveer is brother-in-law (Bahoni) of Bhura and that Satyaveer is a resident of Bulandshahar and his village is about 40 KM away. PW-1 denied the suggestion that after the case under Section 307 IPC, and before the present case, relationship with the appellant was cordial. This witness further stated that when his son went along with the appellants then, at that time, he and Mukesh Kumar (PW-2) and other family members were at home.

15. In his cross-examination, this witness stated that none of his family members including his son Suresh @ Sanju (deceased) had dinner but he cannot say whether Sanju ate during day. He stated that generally he and his family members have dinner at about 9.00 PM. This witness also disclosed that dead body of his son Suresh @ Sanju was found lying in a field which was about ¼ kilometer away from his house. According to him, the field where body was found had standing crop of wheat, which was around 1-2 meters in height and that Pawan (PW-3) and one Shiv Kumar (not examined) were the first to notice the body.

16. In his cross-examination, this witness stated that after discovering the body, he returned back and got the report written from one Subhash Chandra and left his house at about 9.30 PM to lodge the report with the police and arrived at the Police Station at about 10.30 PM. This witness also stated that body of his son was taken away by the police, at about 11.30 PM in the night, to the police post by 'Jugad' (a type of vehicle), which belonged to Keshav Dev. He stated that he and his family members as well as other villagers went to the Police Post (Police Chowki) with the body. In reply to a question as to whether the inquest report was prepared on 13.3.2005 or not, this witness answered that in his presence, in the night of 12.3.2005, the Police had arrived and some documentation was done and in that night body was taken away and on that night he had put his thumb impression on the inquest report.

17. This witness denied the suggestion that in the night, at about 9-10 PM, he gave a report against unknown persons. This witness upon suggestion with regard to his enmity with others, stated that he contested a case with other villagers, namely, Sahab Singh, Sarnam Singh and Binnami Singh and in that case accused persons were convicted. Those persons had committed murder of his daughter. This witness stated that he was not aware about the name of Vimlesh tattooed on the arm of his deceased son.

18. Next witness examined by the prosecution was Mukesh Kumar (PW-2), who is elder brother of the deceased Suresh. This witness almost repeated the same version as stated by his father Narayan Singh, the informant, (PW-1). This witness also stated that appellants had taken away the deceased Suresh at about 7.30 PM and on search, at about 9.00 PM, the body of the deceased was found lying in the wheat field of Vijay Pal. This witness added by stating that 3-4 years ago, appellant- Bhura and one Rajveer and Guddu had opened fire upon Suresh (deceased) as the sister of appellant-Bhura, namely, Vimlesh, used to visit his house to meet the deceased Suresh @ Sanju. As per this witness, in this regard, a case was registered, which is still pending; and due to this, the appellants killed his brother Suresh.

This witness stated that on the date of incident, his brother Suresh (deceased) had not taken food and he did not consume any food in the morning. This witness stated that he, his father (PW-1), his brother Pawan Kumar (PW-3) and his mother went in search of Suresh (deceased). PW-2 stated that the written report of the present case was written by a Police Constable at the Police Station on the dictation of his father (PW-1). This witness also stated that 'Daroga ji' has taken away the dead body at about 11.00 PM in the night. He stated that he went along with dead body and the dead body was taken away to Patwari Nagla, which is about 3 KM away from his village, and at Patwari Nagla the body was kept for about 5 hours where he remained with the Police. The body was kept at Police Post (Chowki) of Patwari Nagla and from Patwari Nagla, the body was dispatched at about 4.00 AM in the morning. The dead body was taken on a 'Jugad' (type of local vehicle) which was of his uncle Keshav Dev. He stated that from Patwari Nagla the body was taken on Jugad to Aligarh, where it reached by about 4.30 PM. This witness also, denied the suggestion that after recovery of dead body, somebody informed the Police that unknown persons have committed the murder of his brother Suresh @ Sanju and that the FIR was lodged later. This witness in his cross-examination stated that his brother Pawan (PW-3) was not aware about the death of Sanju (deceased) and that Pawan (PW-3) did not inform him about the incident, rather Mahipal gave information about the incident at about 8.00 PM. On suggestion, this witness stated that it is true that Mahipal (not examined) informed him that the appellants committed murder of his brother Sanju (deceased) and the body was lying in the field of Vijai Pal and after information he reached the place where dead body was lying.

19. Pawan was examined by the prosecution as PW-3. He is another brother of Suresh @ Sanju (deceased). He claimed himself to be eye witness of the incident. According to him, on 12.3.2005, at about 8 to 8.30 PM, when he and Mahipal were roaming in the forest and arrived near the field of Vijai Pal, they witnessed that appellants were beating his brother Suresh @ Sanju (deceased) and putting a rope on his neck. This witness stated that the appellants threatened him and warned him to go away otherwise they would kill him.

20. According to this witness, when he was returning back to his home, on the way, he met his parents and brother Mukesh Kumar (PW-2). He informed them that the deceased was lying in the field of Vijai Pal. Then they arrived at the spot.

21. This witness stated that Suresh @ Sanju (deceased) was his elder brother and Mahipal (not examined) is also related. In his cross examination, this witness stated that he did not make any attempt to save his brother Suresh @ Sanju (deceased) and his parents met him about 100-150 steps away. This witness stated that the police had taken away the body in a police jeep. According to this witness, he did not accompany the body. However, his father (PW-1) and brother (PW-2) went along with the dead body. This witness in his cross examination, stated that he informed the police that he witnessed the incident and if this fact is not mentioned in his statement recorded by the Investigating Officer, then he cannot give any reason. This witness also stated that the village of appellant Satyaveer is 45-50 kilometer away from his village. This witness further stated that as there was relationship

between his brother (deceased) and Vimlesh (the sister of appellants), therefore, his brother was murdered by the appellants.

22. Dr. V.K. Singh was examined as PW-4. He is the person who conducted the post mortem of the body of deceased Suresh @ Sanju on 13.03.2005 at about 3.45 PM. According to this witness, deceased died about a day before and rigor mortis was present on both upper and lower extremities. He found following ante motrem injuries on the body of the deceased Suresh @ Sanju:-

"(1) One lacerated wound 2cm x 1cm bone deep over left side just below ear.

(2) One abraded contusion 8cm x 6cm on left side of temporo parietal region.

(3) One lacerated wound 1cm x 0.5cm bone deep over left side of mandible in middle area.

(4) One abraded contusion 6cm x 4cm on left side of neck extending over left angle of mandible."

23. According to doctor, left side of mandible was fractured and death was due to coma as a result of ante mortem head injury. The stomach contained 60 ml. food material and small and large intestines were filled with gases, fluids. Doctor also found underlying fracture on temporal parietal bone of the skull. This witness proved the post mortem report as (Ext. Ka-6).

24. According to this witness, the deceased consumed some edible item about 3-4 hours before his death. PW-4 further stated that estimated time of death was about 24 hours before, which may vary either side by six hours.

25. Prosecution examined head constable Bhoop Singh as PW-5. This witness proved chik FIR as (Ext. Ka-7) and also proved G.D. entry of the case as (Ext.Ka-8).

26. Prosecution next examined Senior Sub-Inspector, Manohar Singh Yadav as PW-6, who is the Investigating Officer of the present case. He stated that on information he arrived at the spot and found the dead body in the field of Vijay Pal. This witness stated that due to non arrangement of light, inquest report could not be prepared at night and was prepared on the next day i.e. on 13.05.005 in the morning. This witness proved inquest report and other documents like photonash etc. as (Ext. Ka-9 to Ka-14) This witness also stated that from the pocket of deceased, a love letter (material Ex.1) was recovered. He prepared the recovery memo (Ex. Ka-3) of the said letter and copied the same in the case diary. This witness also stated that from the place of incident, one Lota, Gilas and slipper of the deceased were recovered and in respect of all these items, recovery memo (Ext. Ka-4) was prepared. He also stated that from the spot, plain and blood stained soil was recovered and its recovery memo (Ext. Ka-5) was prepared.

27. According to this witness, he recorded the statements of witnesses and on 01.04.2005 he got the police custody remand of accused Bhoora and on his pointing out one rope and a wooden stick (danda) was recovered from the field of one Khumani Singh near the tubewell. After recovery, the recovery memo was prepared and this witness proved the same as (Ext. Ka-18). This witness also initiated proceedings under Section 82/83 Cr.P.C. against accused Dinesh, as he was absconding, and, after investigation, on 16.04.2005 submitted charge-sheet against

accused Parveen @ Bachcha, Bhura and Satyaveer and on 16.07.2005, he filed charge-sheet against accused Dinesh. Till submission of charge-sheet, appellant Dinesh could not be arrested and, therefore, charge-sheet was submitted against him as an absconder. This witness proved both the charge-sheets as (Ext. Ka-19 and Ka-20). This witness stated that during investigation he did not make any inquiry from Vimlesh, the sister of appellants Parveen and Dinesh. According to this witness, he submitted charge-sheet on the basis of circumstantial evidence collected by him during investigation including the statement of Pawan (PW-3), who claimed himself to be an eye witness of the incident. This witness further stated that till third day of the incident, no eye witness came forward except Mahipal (not examined). This witness denied the suggestion that the dead body was taken away in the night from the field of Vijay Pal to police post (chauki) Nagla and kept there for about five hours. According to this witness, Pawan (PW-3) in his statement recorded under Section 161 Cr.P.C. stated that he witnessed that all the appellants were beating his brother (deceased).

28. After the statement of prosecution witnesses, trial court recorded the statement of the appellants under Section 313 Cr.P.C. All the appellants denied allegations made against them. Appellant Parveen @ Bachcha stated in reply to question no. 10 that Vimlesh was not his sister. Appellant, Bhura in his statement stated that earlier also informant lodged a false case against him, in which, after investigation, final report was submitted. This appellant (Bhura) did not state that Vimlesh is not his sister. As per appellant Satyaveer, he was implicated in the present case only because he was brother-in-law (Bahnoi) of appellant Bhura. Appellant Dinesh also denied that Vimlesh is his sister. Trial court did not put any question with regard to the appellant/accused persons having taken away the deceased Suresh @ Sanju on 12.03.2005 at about 7.30 PM from his house and that when they returned back at about 8.30 PM, Suresh @ Sanju (deceased) did not return with them.

29. After recording the statements of appellants under Section 313 Cr.P.C., trial court on the basis of evidence on record found the appellants guilty for the death of Suresh @ Sanju and convicted them under Section 302 IPC.

Analysis

30. In the present case, prosecution examined three witnesses of fact, namely, Narayan Singh (PW-1) informant (father of deceased), Mukesh Kumar (PW-2) and Pawan (PW-3) brothers of deceased. Rest of the prosecution witnesses are formal witnesses.

31. As per the FIR and statements of PW-1 Narayan Singh (informant) and PW-2 Mukesh Kumar, the case was based on circumstantial evidence, but, later, as per the testimony of Pawan Kumar (PW-3), there came direct evidence as, according to him, he witnessed the deceased Suresh @ Sanju being assaulted by the appellants on 12.03.2005 between 8.00 PM and 8.30 PM.

32. Therefore, first we examine the testimony of PW-3, who claimed himself to be an eye witness.

33. Pawan Kumar (PW-3) is the brother of deceased Suresh @ Sanju. According to this

witness, on 12.03.2005, at about 8.30 PM, he along with one Mahipal (not examined) were loitering and when he arrived near the field of Vijay Pal, he witnessed the appellants Parveen, Dinesh, Bhura and Satyaveer beating his brother Suresh @ Sanju (deceased). He also stated that the appellants threatened him and when he was returning home, on the way, he met his father (PW-1) and his brother Mukesh Kumar (PW-2). He informed them that Suresh @ Sanju (deceased) was lying in the field of Vijay Pal. This witness further stated that when they arrived at the field of Vijay Pal, they saw the dead body of Suresh @ Sanju (deceased) lying there. This witness nowhere states that Suresh @ Sanju (deceased) went along with appellants on 12.03.2005, at about 7.30 PM, as stated by Narayan Singh (PW-1) the informant and Mukesh Kumar (PW-2). The testimonies of PW-1 Narayan Singh and PW-2 Mukesh Kumar is to the effect that the deceased Suresh @ Sanju was taken away by the appellants on 12.03.2005 at 7.30 PM from home and when, after about one hour, all the appellants returned back but the deceased Suresh @ Sanju did not return, they started searching for him. As per the statement of PW-1 Narayan Singh and PW-2 Mukesh Kumar, during search, PW-3 Pawan Kumar accompanied them. This fact is also mentioned in the FIR. If, PW-3 Pawan Kumar was also searching for the deceased Suresh @ Sanju along with his family members, the possibility of him having witnessed the accused assaulting the deceased is not probable as then he would have informed his family members and they all would have rushed to the spot. Thus, the testimony of PW-3 does not inspire confidence to the extent he claims that he witnessed the deceased being assaulted by the accused-appellants.

34. If we exclude the testimony of Pawan (PW-3), the statements of PW-1 Narayan Singh (informant) and PW-2 Mukesh Kumar remains and, as per their evidence, they are witnesses of the circumstance that the deceased was taken from home and soon thereafter, the deceased was found dead.

35. As to when conviction can be recorded on circumstantial evidence, the law is well settled. The Supreme Court in its celebrated decision in the case of **Sharad Birdhichand Sarda Vs. State of Maharashtra (1984) 4 SCC 116** has held:-

"153. xxxxx

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

xxxxx

(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."

36. Keeping these conditions in mind, we shall examine the case in hand. In the present case, prosecution had relied upon following circumstances:-

(A) Last seen evidence i.e. appellants taking the deceased from home and in a short time thereafter, the deceased was found dead with several ante mortem injuries.

(B) Appellants failed to offer any explanation in respect of the manner in which the deceased sustained injuries resulting in his death.

(C) Motive

(D) Long abscondence of appellant Dinesh

(E) Recovery of rope and wooden stick on the pointing out of appellant Bhoora

Last seen evidence

37. The theory of last seen comes into picture where the time gap between the point of time when accused and deceased were last seen together and when the victim is found dead, is so small that possibility of any other person except the accused being the perpetrator of crime becomes impossible. However, ordinarily, last seen evidence is a weak piece of evidence and it requires some corroboration by other evidence.

38. The three Judges Bench of Apex Court in case of **Satpal Vs. State of Haryana (2018) 6 SCC 610** in para 6 observed as:-

"6. xxxxx

Criminal jurispredence and the plethora of judicial precedents leave little room for reconsideration of the basic principles for invocation of the last seen theory as a facet of circumstantial evidence. Succinctly stated, it may be a weak kind of evidence by itself to found conviction upon the same singularly. But when it is coupled with other circumstances such as the time when the deceased was last seen with the accused, and the recovery of the corpse being in very close proximity of time, the accused owes an explanation under Section 106 of the Evidence Act with regard to the circumstances under which death may have taken place. If the accused offers no explanation, or furnishes a wrong explanation, absconds, motive is established, and there is corroborative evidence available inter alia in the form of recovery or otherwise forming a chain of circumstances leading to the only inference for guilt of the accused, incompatible with any possible hypothesis of innocence, conviction can be based on the same. If there be any doubt or break in the link of chain of circumstances, the benefit of doubt must go to the accused."

39. Again three Judges Bench of Hon'ble Supreme Court in case of **Digamber Vaishnav and another Vs. State of Chhattisgarh (2019) 4 SCC 522** observed in paragraph No.40 as follows:-

" 40. xxxxxx

It is settled that the circumstance of last seen together cannot by itself form the basis of holding accused guilty of offence. If there is any credible evidence that just before or immediately prior to the death of the victims, they were last seen along with the accused at or near about the place of occurrence, the needle of suspicion would certainly point to the accused being the culprits and this would be one of the strong factors or circumstances inculpating them with the alleged crime purported on the victims. However, if the last seen evidence does not inspire the confidence or is not trustworty, there can be no conviction. To constitute the last seen together factor as an incriminating circumstance, there must be close

proximity between the time of seeing and recovery of dead body"

40. In the present case, Narayan Singh PW-1 is the informant and father of Suresh @ Sanju (deceased). This witness stated that on 12.03.2005 Suresh @ Sanju (deceased) was taken by the appellants from his house at about 7.30 PM in front of him and when, at about 8.30 PM, appellants returned back and his son Suresh @ Sanju (deceased) did not return, then, when he, despite inquiry, did not receive proper reply from the appellants, he started search for his son along with Mukesh Kumar (PW-2), Pawan (PW-3) and other family members and at about 9.00 PM, the dead body of Suresh @ Sanju was found in a field which was about ¼ Kilometer away from his house.

41. Similar statement has been given by Mukesh Kumar (PW-2), who is the elder brother of deceased Suresh @ Sanju (deceased). These two prosecution witnesses, namely, Narayan Singh PW-1 and Mukesh Kumar PW-2 not only proved the theory of last seen but they withstood gruelling cross-examination and remained intact.

42. Thus, from the statements of Narayan Singh (PW-1) and Mukesh Kumar (PW-2), it is proved that appellants took away the deceased Suresh @ Sanju from his house on 12.03.2005 at about 7.30 PM and within an hour, they returned back without Suresh @ Sanju (deceased) and failed to offer any explanation in this regard to the informant Narayan Singh (PW-1) and at about 9.00 PM i.e. within 1 and ½ hour dead body of Suresh @ Sanju was recovered from a field which was only ¼ Kilometer away from his house i.e. the place where appellants were last seen together with the deceased.

43. The prosecution therefore succeeded in proving the circumstance of last seen against the appellants beyond reasonable doubt and as the proximity of the time between the deceased being last seen together with the appellants and the death of the deceased is so close that it completely rules out involvement of any other person to have committed the crime than the appellants. Therefore, last seen circumstance/evidence in the present case is a clinching circumstance against the appellants which was duly proved by the prosecution.

Motive

44. The motive in case of circumstantial evidence has its own importance and it creates additional link against the accused.

45. In the case at hand, prosecution has established the motive. From the very beginning since lodging of the FIR, it is the case of the prosecution that Vimlesh, the sister of appellants, used to visit the house of Suresh @ Sanju (deceased) and, therefore, the appellants eliminated him as they suspected that deceased Suresh @ Sanju was having an affair with Vimlesh.

46. Prosecution in the present case also relied upon recovery of a love letter, written by Vimlesh, from the pocket of deceased Suresh @ Sanju to prove that Vimlesh was having love affair with deceased Suresh @ Sanju. However, as Vimlesh was not examined before the trial court and there is no evidence to prove that the letter was written by her, the evidence

of recovery of letter from the pocket of deceased, in our view, cannot be used against the appellants.

47. However, PW-1 Narayan Singh, the informant (father of deceased) and PW-2 Mukesh Kumar (elder brother of deceased) through their testimony established that Vimlesh, sister of appellant Bhura and cousin sister of appellants Parveen and Dinesh, used to visit their house to meet Suresh @ Sanju (deceased) and due to this reason the appellants committed murder of Suresh @ Sanju as they were having suspicion that there was a relationship between them.

48. There is one more clinching circumstance that surfaced during investigation that is when the body of Suresh @ Sanju (deceased) was found, on his arm, the name of Vimlesh was embossed by a tattoo. This fact was proved by Narayan Singh PW-1 as well as Mukesh Kumar PW-2 in their testimonies and also by PW-6 Manohar Singh Yadav, the Investigating Officer. This also suggests that deceased and Vimlesh were in some sort of a relationship with each other, sufficient to arouse suspicion.

49. Thus, in our view, prosecution has been successful in proving the motive for the crime against the appellants.

Abscondence

50. One more incriminating circumstance in the present case is that appellant, Dinesh was absconding for a long period and charge-sheet was filed against him by PW-6 Manohar Singh Yadav as absconder and during investigation process under Section 82/83 Cr.P.C. was also issued against him. This fact is an additional circumstance, which also completes the chain of circumstances, at least, in respect of appellant Dinesh. As per the judgment of Supreme Court in case of Satpal (supra) if last seen evidence is coupled with other circumstances, such as abscondence of accused persons, then, in absence of proper explanation, on the basis of last seen evidence, conviction can be recorded.

Laches on the part of Investigating Officer

51. Learned counsel for the appellants vehemently argued that from the perusal of the statements of all the prosecution witnesses, namely, Narayan Singh (PW-1), Mukesh Kumar (PW-2) and Pawan (PW-3), it is apparent that police after registration of the FIR arrived at the spot in the night of 12.03.2005 and in the night they took away the body of deceased to police post (Chowki) from the place of incident. These witnesses also stated that they accompanied the dead body up to the police post, but, PW-6, the Investigating Officer, namely, Manohar Singh Yadav, states that police did not take away the body in the night of 12.03.2005 and the body was lying at the place of incident in the field of Vijay Pal till the morning and, thereafter, in the morning, the inquest report was prepared, therefore, this shows that prosecution has not come with clean hand hence no reliance can be placed on such prosecution evidence.

52. The law is well settled that no benefit can be given to the accused merely on the ground of laches of Investigating

Officer or any illegality committed by him, if evidence of prosecution witnesses is reliable and does not suffer from any infirmity. Supreme Court in the case of **C. Muniappan and others Vs. State of Tamil Nadu (2010) 9 SCC 567** held that defect in investigation by itself cannot be a ground of acquittal.

53. In the present case, as prosecution case is based on circumstantial evidence, therefore, if, any illegality or laches in respect of taking away the dead body has been committed by the Investigating Officer, it hardly affects the prosecution case and does not cause any prejudice to the appellants.

Recovery of rope and wooden stick

54. The prosecution case also relies upon the circumstance of recovery by claiming that on 01.04.2005, when appellant Bhura was taken by the police on remand, on his pointing out a rope and wooden stick was recovered, which was alleged to have been used in commission of the crime. But as this recovery was made from open field of Arhar crop, accessible and visible to all, and both the recovered articles are common and found in every household, in absence of forensic evidence linking the articles to the crime, in our view, recovery of rope and wooden stick is of no significance and cannot be utilised as an incriminating circumstance against appellant Bhura.

55. Learned counsel for the appellants during the course of argument further submitted that although in the evidence of prosecution witnesses, it has surfaced that Vimlesh is the real sister of Bhoora and cousin sister of accused/appellants Parveen @ Bachcha and Dinesh, but in their statements recorded under Section 313 Cr.P.C. appellants Parveen and Dinesh denied this fact. From the perusal of the statements of appellants Parveen @ Bachcha and Dinesh under Section 313 Cr.P.C., it appears that although, in reply to question number 10, they denied that Vimlesh is not their sister, but appellant Bhura did not deny that Vimlesh is not his sister, therefore, this argument advanced by learned defence counsel would be of no help as Bhura is cousin brother of appellants Parveen @ Bachcha and Dinesh and, therefore, Vimlesh would be their cousin sister.

Statement under Section 313 Cr.P.C.

56. Learned counsel for the appellants submitted that as the evidence in respect of last seen was not put to any of the appellant while recording their statement under Section 313 Cr.P.C, therefore, it cannot be used against them. In this regard, learned counsel for the appellants placed reliance on the judgment of Supreme Court in case of **Shaikh Maqsood Vs. State of Maharashtra (2009) 6 SCC 583**. In this case, the Supreme Court in paragraph no.9 held that as no question was put to the accused that he was author of the crime, the accused cannot be convicted. Here, the questions put did indicate that the accused-appellants were the author of the crime.

57. The law in respect of Section 313 Cr.P.C. is now well settled. Ordinarily, an incriminating circumstance appearing against an accused if not put to him during his examination, under Section 313 Cr.P.C., is to be eschewed from consideration, but if facts of the case suggest that no prejudice was caused by not putting such circumstance to the accused

while recording his statement under Section 313 Cr.P.C., then no benefit is to be extended to him.

58. Apex Court in case of **State of Rajasthan Vs. Kashi Ram (206) 12 SCC 254** in paragraph no. 25 observed that if any question in respect of last seen evidence was not put to the accused in his statement recorded under Section 313 Cr.P.C. and if record of the case shows that prosecution witnesses were extensively cross examined by the defence counsel in presence of accused, then mere omission to put such question while recording the statement under Section 313 Cr.P.C. would not cause any prejudice to the accused particularly, when they are fully aware as to what is the incriminating circumstance being relied upon by the prosecution against them.

59. In the present case, we find that all the prosecution witnesses of fact, namely, Narayan Singh PW-1, Mukesh Kumar PW-2 and Pawan PW-3, were extensively cross examined by the defence and a suggestion was also put to Narayan Singh PW-1, during his cross-examination, that deceased Suresh @ Sanju did not go with the appellants, which was denied by him, therefore, in our view, the appellants were fully aware of the incriminating circumstance with regard to the last seen theory and they could have offered their explanation. Hence, if question in respect of last seen theory was not put to appellants during their examination under Section 313 Cr.P.C., this, by itself, did not cause any prejudice to them and, therefore, this evidence cannot be excluded from consideration.

60. Recently, a three Judges Bench of Apex Court in case of **Manoj Suryavanshi Vs. State of Chhatisgarh (2020) 4 SCC 451**, in paragraph no. 19, held that if while recording the statement of accused under Section 313 Cr.P.C. the deposition of the witness, who provides the evidence of last seen, is specifically referred to the accused, then not asking a specific question in respect of last seen evidence appearing in the said deposition would not prove fatal to the prosecution case.

61. In the present case, while recording the statement under Section 313 Cr.P.C. of the appellants, trial court referred the evidence of PW-1 Narayan Singh and PW-2 Mukesh Kumar as well as the FIR to all the appellants, therefore, in view of the judgment in Manoj Suryavanshi case (supra), no benefit can be extended to the accused/appellants merely because no specific question in respect of last seen circumstance emanating therefrom was put to the appellants.

62. One more circumstance exist in the present case against the appellants, that is the appellants failed to offer any explanation as to how and when they departed company of the deceased. As prosecution has proved that appellants and deceased were last seen together alive within couple of hours from recovery of dead body of the deceased, as per section 106 Evidence Act, the appellants were under an obligation to provide explanation in this regard, as this fact was exclusively in their knowledge. The Supreme Court in the case of Kashi Ram (supra) elaborately discussed this aspect and observed in para 23 as follows:-

"23. xxxxx

The principle is well settled. The provisions of Section 106 of the Evidence Act itself are unambiguous and categoric in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an explanation which appears to the Court to be probable and satisfactory. If he does so he must be held to have discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act. In a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatiable with his innocence, the Court can consider his failure to adduce any explanation, as an additional link which completes the chain. xxxxxx"

Thus, failure on the part of the appellants to offer an explanation as to how and when they parted company of the deceased provides an additional link to the chain of circumstances pointing towards the guilt of the appellants.

63. The situation emerges thus, that there is clear evidence of the accused-appellants having taken the deceased from home and within 1 and ½ hour thereafter, just few hundred meters away, the body of the deceased, with multiple injuries is found, and that there is no explanation on the part of appellants either in respect of the circumstances that led to infliction of those injuries resulting in the death of deceased Suresh @ Sanju or as to how and when they (the appellants) parted the company of the deceased.

64 In the present case although we noticed some contradictions and omissions in the testimonies of prosecution witnesses but as these contradictions and omissions do not shake the foundation of the prosecution case and, in our considered view, are not material therefore, much importance cannot be attached to them.

65. In view of the discussion made above, in our considered view, prosecution has been successful in proving the following circumstances against appellants beyond reasonable doubt:-

(i) Appellants took the deceased from home and within an hour and a half, the deceased was found dead at a short distance, from where he was taken by the appellants, with injuries on his body suggesting a case of homicide.

(ii) Appellants failed to provide any explanation as to how and when they parted company of the deceased and as to the manner in which the deceased suffered injuries.

(iii) Motive for commission of crime; and

(iv) Abscondence of appellant Dinesh.

66. In our considered view, all the above circumstances proved by the prosecution form a chain of circumstances

against the appellants on the basis of which, it can safely be concluded that appellants were the persons, who committed the murder of deceased Suresh @ Sanju and except their guilt no other hypothesis can be inferred.

67. Consequently, both the appeals are **dismissed.** The judgment and order of conviction and sentence passed by the trial court is affirmed. The appellants are in jail and they will serve out the sentence awarded by the trial court.

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

(2022)01ILR A75
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 28.01.2022

BEFORE

THE HON'BLE SURESH KUMAR GUPTA, J.

Criminal Appeal No. 982 of 2021

Anwar Ali ...Appellant
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Appellant:
Mohit Tiwari

Counsel for the Respondents:
G.A., Parijaat Mishra Belaura

The Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989- Section 14 (A) (2)- Appeal- Normally bail should have been granted unless there exist circumstances/factors justifying denial thereof.

Settled law that grant of bail is normally the rule while denial thereof is an exception. Consideration of period of incarceration along with gravity of the offence, role assigned to the accused and the chances of his absconding or tampering with the prosecution witnesses, as well as previous criminal antecedents are some of the factors to be taken into account by the Court while granting bail. (Para 7)

Appeal allowed. (E-3)

Judgements/ Case law relied upon:-

1. St. thru C.B.I. Vs Amar Mani Tripathi 2005 (8) SCC 21

2. Rajesh Ranjan Yadav @ Pappu Yadav Vs Cbi Thru Its Director, 2007 (1) SCC 70

(Delivered by Hon'ble Suresh Kumar Gupta, J.)

1. Heard learned counsel for the applicant/appellant, learned A.G.A. for the State and perused the material available on record.

2. This is the second bail appeal/application of the applicant. First bail appeal/application of the applicant was rejected by this Court on 11.7.2019 with observation that the appellant would be at at liberty to revive his application after recording statement of Ram Bodh and Arjun Prasad.

3. This appeal has been preferred under Section 14 (A) (2) of the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 against impugned order dated 25.02.2021 passed by Special Judge, (SC/ST Act), Sultanpur in second bail application 496 of 2021 arising out of Case Crime No. 9 of 2018, under Sections 147, 148, 149, 34, 302 IPC and Section 3(2)(v) of SC/ST Act, Police Station- Munshiganj, District- Amethi, whereby the

bail application of the appellant/applicant has been rejected.

4. Learned counsel for appellant submits that the appellant is innocent and has falsely been implicated in the aforesaid crime. Learned counsel for appellant further submits that the statement of Ram Bodh and Arjun Prasad was already recorded by the trial court, a certified copy of which has been annexed with this appeal. As per the statement, the applicant was armed with lathi and danda which is not a dangerous weapon. Learned counsel further submits that the co-accused namely Subhash Chandra Srivastava has already been granted bail by this Court in Criminal Appeal No. 765 of 2020. Therefore, the present applicant is also entitle for bail.

5. Learned counsel further submits that the appellant has no previous criminal history and he is in jail since 25.02.2018. Learned counsel further submits that if the appellant is released on bail, he would not misuse liberty of bail and is ready to co-operate in the trial.

6. Learned A.G.A. though opposed the prayer for bail but could not place anything before this Court so as to bring any circumstance existing, justifying denial of bail to accused-applicant when he is already in jail for a long time.

7. Supreme Court in ***State through C.B.I. Vs. Amar Mani Tripathi 2005 (8) SCC 21*** has also observed that normally bail should have been granted unless there exist circumstances/factors justifying denial thereof. Some of such circumstances have been stated as under:

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

(ii) nature and gravity of the charge;

(iii) severity of the punishment in the event of conviction;

(iv) danger of accused absconding or fleeing if released on bail;

(v) character, behaviour, means, position and standing of the accused;

(vi) likelihood of the offence being repeated;

(vii) reasonable apprehension of the witnesses being tampered with; and

(viii) danger, of course, of justice being thwarted by grant of bail."

8. In ***Rajesh Ranjan Yadav @ Pappu Yadav vs Cbi Through Its Director, 2007 (1) SCC 70*** while recognizing that personal liberty is a valuable constitutional right recognized under Article 21, Court observed that while considering question of bail, judicial approach balancing personal liberty as well as interest of the society and also other relevant factors must be observed. Court further held that personal liberty of an accused or convict is also a fundamental right but if the circumstances so justify, it can be eclipsed. The length for which an accused has remained in jail before conviction, i.e., during investigation or trial, is a relevant consideration for the reason that in case ultimately the incumbent is found not guilty, i.e. having not committed any offence, it would be a travesty of justice to keep such a person in jail for years together and denial of personal liberty in such a case though may be mitigated by awarding appropriate compensation but cannot appropriately be compensated at all. Simply because Court takes a long time in trial, it will not be justified to keep a person in jail on the ground that Court or the prosecution is not efficient enough in completing trial in a reasonably short period and the incumbent

must remain in jail, even though ultimately he may be found innocent. In fact, if a person is acquitted after a long and delayed trial, though incumbent was throughout in jail, even Judicial Officer would be having a feeling of contrition facing a situation where a person has served sufficiently a long term in imprisonment though, is found innocent and ultimately acquitted. No uniform principle can be laid down since every matter would depend on the circumstances of each case and it cannot be said that a person has remained in jail for long time, for that reason alone bail must be granted, but the period during which an incumbent has been remained in jail, during investigation or trial is a relevant factor. These are certain guidelines laid down in ***State through C.B.I. v. Amar Mani Tripathi*** (supra) were reiterated in ***Rajesh Ranjan Yadav @ Pappu Yadav vs CBI*** (supra).

9. In view of the above, after hearing the rival submissions of the parties, and perused the record, without expressing any opinion on merits, I find that it is a fit case for grant of bail of appellant/applicant.

10. Impugned order dated 25.02.2021 is hereby set aside.

11. The appeal is hereby **allowed.**

12. Let appellant- **Anwar Ali** be enlarged on bail in the aforesaid case crime number on his furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned subject to following additional conditions, which are being imposed in the interest of justice:-

(i) The appellant shall not tamper with the evidence of witnesses and shall not commit any offence.

(ii) The appellant shall file an undertaking to the effect that he shall not seek any adjournment on the dates fixed for evidence when the witnesses are present in court. In case of default of this condition, it shall be open for the trial court to treat it as abuse of liberty of bail and pass orders in accordance with law.

(iii) The appellant shall remain present before the trial court on each date fixed, either personally or through her 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.

(iv) In case, the appellant misuses the liberty of bail during trial and in order to secure his presence proclamation under Section 82 Cr.P.C. is issued and the appellant 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.

(v) The appellant shall remain present, in person, before the trial court on the dates fixed for (i) opening of the case, (ii) framing of charge and (iii) recording of statement under Section 313 Cr.P.C. If in the opinion of the trial court absence of the appellant is deliberate or without sufficient cause, then it shall be open for the trial court to treat such default as abuse of liberty of bail and proceed against him in accordance with law.

(vi) The accused/appellant shall file computer generated copy of such order downloaded from the official website of High Court Allahabad.

(vii) The computer generated copy of such order shall be self attested by the counsel of the party concerned.

(viii) 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.

(2022)01ILR A78
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.12.2016

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.

First Appeal Defective No. 172 of 2015

Fundan & Ors. ...Appellants
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Appellants:
Sri S.K. Tyagi

Counsel for the Respondents:

Limitation Act, 1963 – Section 5 - Condonation of delay - sufficient cause - if some person has taken a relief approaching Court immediately after the cause of action had arisen, other persons cannot take benefit thereof approaching the Court at a belated stage - Petitioners who are not vigilant but content to be dormant and chose to sit on the fence till somebody else's case came to be decided, can not re-agitate claims which they had not pursued for several years (Para 19)

Land of the appellant acquired in the year 1980 - S.L.O. gave award on 31.03.1986 - Appeal filed beyond limitation after 28 years, on coming to know that a higher compensation has been awarded to some persons - *Held* - appellants cannot be permitted to take impetus of the judgment passed at the behest of some diligent person - Inordinate delay of 28 years in filing appeal on the ground of some judgment of the High Court awarding higher compensation, is not sufficient cause for condonation of delay - delay condonation application rejected & appeal dismissed with cost of Rs.5,000/- (Para 5, 19)

Dismissed.(E-5)

List of Cases cited :

1. Rup Diamonds Vs U.O.I. 1989 (2) SCC 356

2. St.of Orrisa Vs Mamta Mohanty 2011 (3) SCC 436

3. St. of Karn. Vs. S.M. Kotrayya (1996) 6 SCC 267

4. Mafata lal Industries Ltd. Vs U.O.I. 1997 (5) SCC 536

5. Basawaraj & anr. Vs Special Land Acquisition Officer (2013) 14 SCC 81

6. Brijesh Kumar & ors. Vs St. of Har. & ors. 2014 (11) SCC 351

7. Jagdish Lal Vs St. of Har. 1997 (6) SCC 538

8. U.O.I. & anr. vs Raghubir Singh (Dead) By Lrs. Etc 1989 (2) SCC 754

9. Pundlik Jalam Patil Vs Executive Engineer, Jalgaon Medium Project, (2008) 17 SCC 448

10. Simrat Kaur & ors. Vs. St. of Har. & ors. (2015) 13 SCC 563

11. Esha Bhattacharjee Vs Raghunathpur Nafar Academy & Ors. (2013) 12 SCC 649

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

1. Heard Sri S.K. Tyagi, learned counsel for the applicants/ appellants.

2. This appeal has been filed beyond limitation 28 years and 355 days along with

an application for leave to appeal and a delay condonation application. The deponent of the affidavit is one Sri Amit Nagar, aged about 27 years and has claimed himself to be grandson of appellant no.1/2.

3. From the perusal of the impugned judgment, it appears that land of one Sri Fundan son of Chhote of village Gejha Tilpatabad, Tehsil Dadri, District Gautam Budha Nagar was acquired by notification under Section 4(1) of the Land Acquisition Act, 1894 (hereinafter referred to as 'the Act') dated 01.09.1977. The S.L.A.O. made the award on 15.12.1981. At the instance of the Executive Engineer Irrigation, Construction Division, Ghaziabad, the acquisition was made for total area of 33-12-13 bighas for construction of main drain in the area of NOIDA. The aforesaid acquired land includes the land of Sri Fundan. Several references were made at the instance of the tenure holders including L.A.R. No.127 of 1982 filed by the aforesaid Sri Fundan and all the references were decided by the court of III Additional District Judge, Ghaziabad by judgment dated 31.03.1986 awarding compensation @ Rs. 12,000/- per bigha along with other benefits under the Act. As per affidavit of the applicant, the aforesaid, Sri Fundan died in the year 1992. In the affidavit accompanying the delay condonation application, the applicant has stated as under:-

1. "That the deponent is grandson of appellant no.2, as such he is well acquainted with the facts deposed to below.

2. That the present appeal has been preferred by the appellants for enhancement of compensation given in the award dated 31.03.1986 passed by Additional District Judge, Ghaziabad now Gautam Budh Nagar.

3. That the land of the appellant Sri Fundan acquired in the year 1980 and S.L.O. given the award on 31.03.1986.

4. That the total area of the land acquired by State Government was only 2-7-7 and S.L.O. only awarded the compensation of Rs.16,107.35.

5. That the appellant Sri Fundan was are very poor and illiterate farmer and he was not given proper advice, thus the appellant Sri Fundan could not preferred the appeal against the award dated 31.03.1986.

6. That the appellant had no other source of income and therefore he could not file the appeal and was not able to spent huge amount in filing the appeal in the Hon'ble High Court.

7. That the appellant Sri Fundan had no son and he had only one daughter Smt. Ramwati who was married in the village Milakh Lakkshi, Ghaziabad now Gautam Budh Nagar.

8. That the appellant no.1 Sri Fundan died in the year 1992 and daughter of Sri Fundan thereafter had no connection and link with the village Gejha Tilpatabad.

9. That daughter of Sri Fundan is now 72 years old and her entire family is living out of village Gejha Tilpatabad therefore he did not get any knowledge about the litigation for compensation on behalf of other farmers of the village.

10. That the deponent recently met to one of the farmer of village Gejha Tilpatabad Sri Ram Kumar Tyagi and during discussion Sri Ram Kumar Tyagi informed the deponent about the judgment of Hon'ble High Court regarding enhancement of compensation of the farmers of villag Gejha Tilpatabad.

11. That Sri Ram Kumar Tyagi also informed that their maternal grandfather Sri Fundan was also having agricultural land in village Gejha Tilpatabad which was acquired by the State Government for construction of canal along with land of other farmers.

12. That the deponent thus contacted the counsel of Hon'ble High Court and upon his direction obtained certified copy of Judgment and Decree and filing the present appeal.

13. That therefore the Hon'ble Court may be pleased to condone the delay of 28 years in filing the present appeal on the facts and circumstances stated above, so that the appellant may get some compensation for their land as has been given to other tenure holders for their land during the same period in the interest of justice."

4. All the paragraphs of the affidavit have been sworn by the deponent i.e. Sri Amit Nagar on personal knowledge who is 27 years old and his birth year may be approximately the year 1988. Therefore, he can not have personal knowledge of the matters as stated in paras 3, 4, 5 and 6 of the affidavit which are of periods much before his birth. That apart, according to the case of the applicant, the tenure holder, Sri Fundan died in the year 1992. Therefore, the limitation for filing the appeal under Section 54 of the Act, had expired much before his death. Sri Fundan had accepted the impugned judgment which attained finality. Even the daughter of the aforesaid, Sri Fundan had not preferred any appeal. Now after about 29 years, this appeal has been filed along with a delay condonation application for condonation of delay without disclosing any sufficient cause.

5. From perusal of the aforequoted affidavit, particularly para 10 thereof indicates that the appellant has filed this appeal beyond limitation by 28 years and 355 days on coming to know that a higher compensation has been awarded to some persons who diligently filed first appeal before the High Court and contested it. Delay in such matters can not be condoned.

6. In **Rup Diamonds Vs. Union of India, 1989 (2) SCC 356** (para-8) Hon'ble Supreme Court laid down the law that petitioners who were not vigilant but were dormant and chose to sit on the fence till somebody else's case came to be decided, then their case cannot be considered on the analogy of one where a law had been declared unconstitutional and void by a court, so as to enable persons to recover monies paid under the compulsion of a law later so declared void. Hon'ble Supreme Court rejected the petition on the ground of delay and latches observing as under:

"8. ..... there is one more ground which basically sets the present case apart. Petitioners are re-agitating claims which they had not pursued for several years. Petitioners were not vigilant but were content to be dormant and chose to sit on the fence till somebody else's case came to be decided....."

(Emphasis supplied by me)

7. In the case of **State of Orrisa Vs. Mamta Mohanty, 2011 (3) SCC 436** (para-54), Hon'ble Supreme Court rejected the delay condonation application holding that where the petitioner approached the Court after coming to know of the relief granted in a similar case as the same cannot furnish a proper explanation for delay and laches.

8. In the case of State of **Karnataka Vs. S.M. Kotrayya, (1996) 6 SCC 267**, while considering the provisions of limitation under Section 21 of the Central Administrative Tribunal Act, 1985, Hon'ble Supreme Court held that the explanation offered was that the applicants/ petitioners came to know of the relief granted by the Tribunal in August 1989 and that they filed the petition immediately thereafter, is not a proper explanation at all. What was required of them to explain under sub-sections (1) and (2) of Section 21 was as to why they could not avail of the remedy of redressal of their grievances before the expiry of the period prescribed under sub-section (1) or (2). It was held that the Tribunal was wholly unjustified in condoning the delay

9. In the case of **Mafata lal Industries Ltd. vs. Union Of India, 1997 (5) SCC 536** (para-79), nine Judges Constitution Bench of Hon'ble Supreme Court, held as under:

"79.We may now consider a situation where a manufacturer pays a duty unquestioningly - or he questions the levy but fails before the original authority and keeps quiet. It may also be a case where he files an appeal, the appeal goes against him and he keeps quiet. It may also be a case where he files a second appeal/revision, fails and then keeps quiet. The orders in any of the situations have become final against him. Then what happens is that after a year, five years, ten years, twenty years or even much later, a decision is rendered by a High Court or the Supreme Court in the case of another person holding that duty was not payable or was payable at a lesser rate in such a case. *(We must reiterate and emphasize that while dealing with this situation we are keeping out the situation where the provision under which the duty is levied is declared unconstitutional by a court; that is a separate category and the discussion in this paragraph does not include that situation. In other words, we are dealing with a case where the duty was paid on account of misconstruction, misapplication or wrong interpretation of a provision of law, rule, notification or regulation, as the case may be.)* ***Is it open to the manufacturer to say that the decision of a High Court or the Supreme Court, as the case may be, in the case of another person has made him aware of the mistake of law and, therefore, he is entitled to refund of the duty paid by him?*** *Can he invoke Section 72 of the Contract Act in such a case and claim refund and whether in such a case, it can be held that reading Section 72 of the Contract Act along with Section 17 (1)(c) of the Limitation Act, 1963, the period of limitation for making such a claim for refund, whether by way of a suit or by way of a writ petition, is three years from the date of discovery of such mistake of law? Kanhaiya Lal is understood as saying that such a course is permissible.* ***Later decisions commencing from Bhailal Bhai have held that the period of limitation in such cases is three years from the date of discovery of the mistake of law. With the greatest respect to the learned Judges who said so, we find ourselves unable to agree with the said proposition. Acceptance of the said proposition would do violence to several well accepted concepts of law. One of the important principles of law, based upon public policy, is the sanctity attaching to the finality of any proceeding, be it a suit or any other proceeding.***

.....

.... ***Once this is so, it is ununderstandable how an assessment/adjudication made under the Act levying or affirming the duty can be ignored because some years later another view of law is taken by another court in another person's case. Nor is there any provision in the Act for reopening the concluded proceedings on the aforesaid basis.*** *We must reiterate that the provisions of the Central Excise Act also constitute "law" within the meaning of Article 265 and any collection or retention of tax in accordance or pursuant to the said provisions is collection or retention under "the authority of law" within the meaning of the said article. In short, no claim for refund is permissible except under and in accordance with Rule 11 and Section 11-B.* ***An order or decree of a court does not become ineffective or unenforceable simply because at a later point of time, a different view of law is taken. If this theory is applied universally, it will lead to unimaginable*** *chaos. It is, however, suggested that this result follows only in tax matters because of Article 265. The explanation offered is untenable, as demonstrated hereinbefore. As a matter of fact, the situation today is chaotic because of the principles supposedly emerging from Kanhaiya Lal and other decisions following it.* ***Every decision of this Court and of the High Courts on a question of law in favour of the assessee is giving rise to a wave of refund claims all over the country in respect of matters which have become final and are closed long number of years ago. We are not shown that such a thing is happening anywhere else in the world.*** *Article 265 surely could not have been meant to provide for this.* ***We are, therefore, of the clear and considered opinion that the theory of mistake of law and the consequent period of limitation of three years from the date of discovery of such mistake of law cannot be invoked by an assessee taking advantage of the decision in another assessee's case.*** *All claims for refund ought to be,l and ought to have been, filed only under and in accordance with Rule 11/ Section 11-B and under no other provision and in no other forum. An assessee must succeed or fail in his own proceedings and the finality of the proceedings in his own case cannot be ignored and refund ordered in his favour just because in another assessee's case, a similar point is decided in favour of the manufacturer/assessee. (See the pertinent observations of Hidayatullah, C.J. In Tilokchand Motichand extracted in para 46.)* ***The decisions of this Court saying to the contrary must be held to have been decided wrongly and are accordingly overruled herewith."***

(Emphasis supplied by me)

LAW OF LIMITATION:-

10. The "law of limitation' is enshrined in the legal maxim *"interest reipublicae up sit finis litium'* which means that it is for the general welfare that a period be put to litigation. Rules of limitation are not meant to destroy the rights of the parties, rather the idea is that every legal remedy must be kept alive for a legislatively fixed period of time.

11. Meaning of the word "sufficient' is "adequate' or "enough', inasmuch as may be necessary to answer the purpose intended. The words "sufficient cause' mean that the parties should not have acted in a negligent manner or there was a want of bona fide on his part in view of the facts and circumstances of a case or it cannot be alleged that the party has not acted diligently or remained inactive. The applicant must satisfy the Court that he was

prevented by any "sufficient cause" from prosecuting his case, and unless a satisfactory explanation is furnished, the Court cannot allow the application for condonation of delay. The court has to examine whether the mistake is bona fide or was merely a device to cover an ulterior purpose. The expression "sufficient cause" should normally be given a liberal interpretation to ensure that substantial justice is done, but only so long as negligence, inaction or lack of bona fides cannot be imputed to the party concerned. Whether or not sufficient cause has been furnished, can be decided on the facts of a particular case and no straitjacket formula is possible. It is a settled legal proposition that law of limitation may harshly affect a particular party but it has to be applied with all its rigour when the statute so prescribes. The Court has no power to extend the period of limitation on equitable grounds. The statutory provision may cause hardship or inconvenience to a particular party but the Court has no choice but to enforce it giving full effect to the same. The legal maxim *"dura lex sed lex"* which means "the law is hard but it is the law", stands attracted in such a situation.

12. Where a case has been presented as the present appeal in the court beyond limitation, the applicant has to explain the court as to what was the "sufficient cause' which means "adequate and enough reason" which prevented him to approach the court within limitation. **In case a party is found to be negligent, or for want of bonafide on his part in the facts and circumstances of the case, or found to have not acted diligently or remained inactive, there cannot be a justified ground to condone the delay.** In such circumstances, no court could be justified in condoning an inordinate delay by imposing any condition whatsoever.

13. In the case of **Basawaraj and another Vs. Special Land Acquisition Officer, (2013) 14 SCC 81,** Hon'ble Supreme Court considered the order of the High Court and rejected the application for condonation of delay of five and a half years in filing an appeal under Section 54 of the Act before the High Court on the ground of illness of one of the appellant. After referring to the judgments in the case of **Manindra Land and Building Corporation Ltd. v. Bhootnath Banerjee & Ors., AIR 1964 SC 1336; Lala Matadin v. A. Narayanan, AIR 1970 SC 1953; Parimal v. Veena @ Bharti (2011) 3 SCC 545, and Maniben Devraj Shah v. Municipal Corporation of Brihan Mumbai (2012) 5 SCC 157, Arjun Singh v. Mohindra Kumar, AIR 1964 SC 993, Madanlal v. Shyamlal, (2002) (1) SCC 535; and Ram Nath Sao v. Gobardhan Sao & Ors., (2002) 3 SCC 195, Popat and Kotecha Property v. State Bank of India Staff Assn. (2005) 7 SCC 510; Rajendar Singh & Ors. v. Santa Singh & Ors., (1973) 2 SCC 705, Pundlik Jalam Patil v. Executive Engineer, Jalgaon Medium Project, (2008) 17 SCC 448**, it upheld the judgment of the High Court and dismissed the Civil Appeal observing in paras-14 & 15 as under:

*"14. In P. Ramachandra Rao v. State of Karnataka, (2002) 4 SCC 578, this Court held that **judicially engrafting principles of limitation amounts to legislating** and would fly in the face of law laid down by the Constitution Bench in Abdul Rehman Antulay v. R.S. Nayak, (1992) 1 SCC 225.*

15. The law on the issue can be summarised to the effect that where a case

has been presented in the court beyond limitation, the applicant has to explain the court as to what was the "sufficient cause" which means an adequate and enough reason which prevented him to approach the court within limitation. In case a party is found to be negligent, or for want of bonafide on his part in the facts and circumstances of the case, or found to have not acted diligently or remained inactive, there cannot be a justified ground to condone the delay. No court could be justified in condoning such an inordinate delay by imposing any condition whatsoever. The application is to be decided only within the parameters laid down by this court in regard to the condonation of delay. ***In case there was no sufficient cause to prevent a litigant to approach the court on time condoning the delay without any justification, putting any condition whatsoever, amounts to passing an order in violation of the*** **statutory provisions and it tantamounts to showing utter disregard to the legislature."**

(Emaphasis supplied by me)

14. In the case of **Brijesh Kumar and others Vs. State of Haryana and others, 2014 (11) SCC 351**, a claimant/ tenure holder filed S.L.P. challenging the order of the High Court refusing to condone the delay of ten years and two months and 29 days in filing the appeal by **the claimant under Section 54 of the Act inspite of the fact that other persons who had preferred appeals in time had been given a higher compensation.** Hon'ble Supreme Court referred to various judgments and held as under:

"11. It is also a well settled principle of law that if some person has taken a relief approaching the Court just or immediately after the cause of action had arisen, other persons cannot take benefit thereof approaching the court at a belated stage for the reason that they cannot be permitted to take the impetus of the order passed at the behest of some diligent person.

15. In the instant case, after considering the facts and circumstances and the reasons for inordinate delay of 10 years 2 months and 29 days, the High Court did not find sufficient grounds to condone the delay.

16. In view of the facts of the case and the above-cited judgments, we do not find any fault with the impugned judgment (Brijesh Kumar v. State of Haryana, RFA No.5793 of 2012, decided on 22.11.2013). The petitions lack merit and are accordingly dismissed."

(Emphasis supplied by me)

15. In the case of **Jagdish Lal Vs. State of Haryana, 1997 (6) SCC 538,** Hon'ble Supreme Court held has under:

"18. ..... Suffice it to state that the appellants kept sleeping over their rights for long and elected to wake up when they had the impetus from Union of India Vs. Virpal Singh Chauhan (1995) 6 SCC 684 and Ajit Singh's (1996) 2 SCC 715) ratios. But Vir Pal Chauhan and Sabharwal's [R.K. Sabharwal Vs. State of Punjab, (1995) 2 SCC 745] cases, kept at rest the promotion already made by that date, and declared them as valid; they were limited to the question of future promotions given by applying the rule of reservation, to all the persons prior to the date of judgment in Sabharwal's case, which required to examined in the light of the law laid in Sabharwal's case. Thus earlier promotions cannot be reopened. Only those cases arising after that date would be examined in the light of the law laid down in

Sabharwal case Vir Pal Chauhan case and equally Ajit Singh case. If the candidate has already been further promoted to the higher echelons of service, his seniority is not open to be reviewed. In A.B.S. Karamchari Sangh [(1996) 6 SCC 65] case, a Bench of two Judges to which two of us, K. Ramaswamy and G.B. Pattanik, JJ. were members, had reiterated the above view and it was also held that all the prior promotions are not open to judicial review. In Chander Pal & Ors. v. State of Haryana, (1997) 10 SCC 474, a Bench of two judges consisting of S.C. Agrawal and G.T. Nanavati, JJ. considered the effect of Vir Pal Chauhan, Ajit Singh, Sabharwal and A.B.S Karmachari Sangh cases and held that the seniority of those respondents who had already retired or promoted to higher posts could not be disturbed. The seniority of the petitioner therein and the respondents who were holding the post in the same level or in the same cadre would be adjusted keeping in view the ratio in Vir Pal Chauhan and Ajit Singh's cases; but promotion, if any, had been given to any of them during the pendency of this writ petition, was directed not to be disturbed. Therein, the candidates appointed on the basis of economic backwardness, social status or occupation etc. were eligible for appointment against the post reserved for backward classes if their income did not exceed Rs. 18,000/- per annum and they were given accelerated promotions on the basis of reservation. In that backdrop, the above directions came to be issued. In fact, it did not touch upon Article 16(4) or 16(4-A). ***Therefore, desperate attempts of the appellants to redo the seniority had by them in various cadres/grades though in the same services according to the 1974 Rules or 1980 Rules, are not amenable to judicial review at this belated stage. The High Court, therefore, has rightly dismissed the writ petition on the ground of delay as well."***

(Emphasis supplied by me)

16. The Constitution Bench of Hon'ble Supreme Court in **Union Of India & Anr vs Raghubir Singh (Dead) By Lrs. Etc, 1989 (2) SCC 754 (paras-8, 9 & 28)**, considered the doctrine of binding precedent and held as under:

"8. Taking note of the hierarchical character of the judicial system in India, it is of paramount importance that the law declared by this Court should be certain, clear and consistent. It is commonly known that most decisions of the courts are of significance not merely because they constitute an adjudication on the rights of the parties and resolve the dispute between them, but also because in doing so they embody a declaration of law operating as a binding principle in future cases. In this latter aspect lies their particular value in developing the jurisprudence of the law.

9. ***The doctrine of binding precedent has the merit of promoting a certainty and consistency in judicial decisions, and enables an organic development of the law, besides providing assurance to the individual as to the consequence of transactions forming part of his daily affairs. And, therefore, the need for a clear and consistent enunciation of legal principle in the decisions of a Court.***

28. We are of opinion that a pronouncement of law by a Division Bench of this Court is binding on a Division Bench of the same or a smaller number of Judges, and in order that such decision be binding, it is not necessary that it should be a decision rendered by the Full Court or a

Constitution Bench of the Court. We would, however, like to think that for the purpose of imparting certainty and endowing due authority decisions of this Court in the future should be rendered by Division Benches of at least three Judges unless, for compelling reasons, that is not conveniently possible."

(Emphasis supplied by me)

17. In the case of **Pundlik Jalam Patil v. Executive Engineer, Jalgaon Medium Project** (supra), Hon'ble Supreme Court considered the order of the High Court condoning the delay of 1724 days in preferring an appeal by the State under Section 54 of the Act against the enhancement of compensation by the reference court and held as under:

*"**14. It is true that the power to condone the delay rests with the court in which the application was filed beyond time and decide whether there is sufficient cause for condoning the delay and ordinarily the superior court may not interfere with such discretion even if some error is to be found in the discretion so exercised by the court** but where there is no sufficient cause for condoning the delay but the delay was condoned, it is a case of discretion not being exercised judicially and the order becomes vulnerable and susceptible for its correction by the superior court. **The High Court having found that the respondent in its application made incorrect submission that it had no knowledge of the award passed by the Reference Court ought to have refused to exercise its discretion. The High Court exercised its discretion on wrong principles. In that view of the matter we cannot sustain the exercise of discretion in the manner done by the High Court.***

15. Whether the respondent had satisfied the court that it had sufficient cause for not preferring the appeals within the prescribed time? Section 5 of the Limitation Act provides for extension of prescribed period of limitation in certain cases and confers jurisdiction upon the court to admit any application or any appeal after the prescribed period if it is satisfied that the appellant or the applicant had sufficient cause for not preferring such appeal or application within the prescribed period.

*20. **The respondent beneficiary of the acquisition did not initiate any steps whatsoever before the expiry of limitation and no circumstances are placed before the court that steps were taken to file appeals but it was not possible to file the appeals within time.***

23. On the facts and in the circumstances, we are of the opinion that the respondent beneficiary was not diligent in availing the remedy of appeal. The averments made in the application seeking condonation of delay in filing appeals do not show any acceptable cause much less sufficient cause to exercise courts' discretion in its favour.

24. Learned senior counsel for the respondent also placed reliance upon the decision of this court in Union of India vs. Sube Ram and others [(1997) 9 SCC 69]. This court condoned delay of 3379 days in preferring the appeals by Special Leave. The said decision is mostly confined to the facts of that case and does not lay down any law as such requiring us to make any further analysis of the judgment.

29. It needs no restatement at our hands that the object for fixing time limit for litigation is based on public policy fixing a life span for legal remedy for the purpose of general welfare. They are meant to see that the parties do not

resort to dilatory tactics but avail their legal remedies promptly. Salmond in his jurisprudence states that the laws come to the assistance of the vigilant and not of the sleepy.

(Emphasis supplied by me)"

18. In the case of **Simrat Kaur and others Vs. State of Haryana and others, (2015) 13 SCC 563 (paras-10, 11 & 12)**, Hon'ble Supreme Court referred to its judgments in the case of **Mewa Ram Vs. State of Haryana, (1986) 4 SCC 151, State of Nagaland vs Lipokao and others, (2005) 3 SCC 752, D. Gopnathan Pillai Vs. State of Kerla, (2007) 2 SCC 322** and observed as under:

"Hon'ble the Supreme Court opined that when mandatory provision is not complied and the delay is not properly, satisfactorily and convincingly explained, the Court cannot condone the delay on sympathetic ground only."

19. From the above discussion, it is clear that in the case of **Brijesh Kumar and others (supra), Rup Diamonds (supra) and Mafat Lal Ind. (supra)**, Hon'ble Supreme Court has stated the law that if some person has taken a relief approaching the court just or immediately after the cause of action had arisen, other persons cannot take benefit thereof approaching the court at a belated stage for the reason that they cannot be permitted to take impetus of the order passed at the behest of some diligent person. Petitioners who were not vigilant but content to be dormant and chose to sit on the fence till somebody else's case came to be decided, can not re-agitate claims which they had not pursued for several years. These principles of law are judicially en-grafted principles and are binding in view of the law laid down by Hon'ble Supreme Court in the case of **Basawaraj and another (supra)** and the Constitution Bench judgment in the case of **Union of India and another Vs. Raghubir Singh (dead) by LRs (supra).** This squarely concludes the controversy. Therefore, the appellants cannot be permitted to take impetus of the judgment passed at the behest of some diligent person. Inordinate delay of 28 years and 355 days in filing this appeal on the ground of some judgment of the High Court awarding higher compensation, is not sufficient cause for condonation of delay.

20. The affidavit does not disclose "sufficient cause" indicating an adequate and enough reason which prevented the appellant to approach the court within limitation. In any case, the appellant was totally negligent and not bona fide and remained inactive for about 29 years and, therefore, it is not justified to condone such an inordinate delay. In fact the attempt of the appellant in filing these appeals is a device to cover an ulterior purpose which itself is reflected from the facts as noted above. The argument of learned counsel for the appellant that in the facts of the case, the concept of liberal approach should be adopted, deserves to be rejected inasmuch as the concept of liberal approach has to encapsulate the concept of reasonableness and it cannot be allowed an unfettered free play. The conduct, behaviour and attitude of the appellants relating to their inaction, negligence, lack of bonafides as has been discussed in detail above; dis-entitles them for condonation of inordinate delay of about 29 years. In the case of **Esha Bhattacharjee v. Raghunathpur Nafar Academy & Ors. (2013) 12 SCC 649,** Hon'ble Supreme Court held that increasing tendency to perceive delay as a non-serious matter and, hence, lackadaisical propensity exhibited in a nonchalant manner requires to be curbed, of course, within legal parameters.

21. In any case, the appellants kept sleeping over their rights for about 29 years and allegedly elected to wake up on the basis of some judgment of the High Court relating to a different acquisition and the village, and therefore, at this belated stage, the impugned judgment cannot be made amenable to judicial review. The appellant wants to re-agitate the claims which they had not pursued for about 29 years and remained dormant and not vigilant and, therefore, the inordinate delay of 28 years and 355 days in filing the appeal without there being any sufficient cause, cannot be condoned.

22. In similar circumstances, this Court has considered in detail the question of condonation of delay and filing of such types of appeal after expiry of 27-28 years of limitation and dismissed the appeal by judgment dated 09.12.2016 passed in First Appeal No.126 of 2016 (Hari Singh Vs. State of U.P.).

23. In view of the aforesaid, the application for leave to appeal as well as the delay condonation application are rejected. Consequently, this appeal is also dismissed with cost of Rs.5,000/-, which shall be deposited by the appellant within a month from today with the Legal Cell Authority, High Court, Allahabad.

(2022)01ILR A88
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.12.2021

BEFORE

THE HON'BLE SYED AFTAB HUSAIN RIZVI, J.

Second Appeal No. 1718 of 1988

Laxman Das Sindhi ...Appellant
Versus
Ganesh Prasad Sen & Ors. ...Respondents

Counsel for the Appellant:
Sri S.M. Chaturvedi, Sri A.N. Bhargava, Anita Misra, Sri S.M. Dayal, Sri Saurabh Kumar Tiwari

Counsel for the Respondents:
Sri R.P. Tewari, Sri K.P. Tewari, Sri Rama Nand Gupta, Sri Rishikesh Tripathi, Sri S.S. Sengar

A. Tenancy Rights - Suit for partition of tenancy rights - Maintainability - tenancy rights between joint tenants can be subject to partition - suit for partition is maintainable for partition of tenancy rights - Joint tenants have right to partition in the tenancy rights - mode of partition - What will be the mode of partition may depend upon the nature of tenanted property which can be looked into in final decree proceedings (Para 10)

B. Surrender of tenancy by one tenant - Effect - surrender by one of the joint tenants will not amount to surrender by remaining joint tenants & it will not be binding on the remaining joint tenants - A joint tenant can surrender only his rights - Remaining tenants, who have not surrendered the tenancy right, their rights of tenancy will exist (Para 13)

Chiranji Lal was the original tenant - after his death his legal heirs became joint tenants of the disputed shop, however only one of the joint tenants i.e. defendant no. 1 was in actual and exclusive possession of the disputed shop - During pendency of the case defendant no. 1 surrendered the tenancy rights & gave possession to the landlord who after taking possession let it to the appellant (defendant no. 5) - now appellant is sole tenant in possession of the disputed shop - *Held* - subject matter of the suit was tenancy rights in the disputed shop which is no more in-existence and the tenanted shop is in exclusive possession of the newly inducted tenant the appellant. Hence, the suit has become infructuous and now no decree for partition of tenancy rights can be passed (Para 13)

Allowed.(E-5)

List of Cases cited :

1. Mohammad Bakhsh & ors. Vs Mana & ors. 1896 ILR 18 All 334

2. Dilip Kumar Vs Om Parkash & ors., R.F.A. No. 73 of 2010 dt 13.8.2015 (Delhi High Court)

3. Iresh Duggal Vs Virender Kumar Seth MANU/DE/3068/2014

4. Bharat Insulation Co. Vs Suraj Prakash MANU/DE/1761/2015

5. H.C. Pandey Vs G. C. Paul 1989 Law Suit (SC) 264

6. Arya Kumar Ghosh & ors. Vs. IInd Addl. District Judge, Allahabad & ors. 1979 ARC 242

(Delivered by Hon'ble Syed Aftab Husain Rizvi, J.)

1. This second appeal has been filed against the judgment and decree dated 18.7.1988 passed by Civil Judge, Jhansi in Civil Appeal No. 201 of 1985 (Ganesh Prasad and others vs. Ramesh Singh and others). Learned appellate court has allowed the appeal filed against the judgment and decree dated 30.9.1985 in Original Suit No. 70 of 1976 (Ganesh Prasad and others Vs. Ramesh Singh and others) set-aside the judgment and decree of the trial court by which the original suit was dismissed and has decreed the suit of plaintiff for partition for a share of 3/8 in the disputed shop.

2, In brief the facts are as follows:-

Ganesh Prasad and others filed a suit for partition before the trial court. It was pleaded that Chiranji Lal, father of plaintiff nos. 1 and 2 and defendant no. 1 and husband of plaintiff no. 3 was tenant in possession of shop no. 393/2 Chamanganj Sipri Bazar, Jhansi and was running a barber shop. Defendant no. 1 also worked with him. Plaintiff was employed in railway and whenever he got time and opportunity he also performed the hair cutting work and plaintiff no. 2 also cooperated in the said vocation. Chiranji Lal died on 23.8.1974. After the death of Chiranji Lal plaintiffs and defendant no. 1 became tenants of the shop and came in possession. Defendant no. 1 with malafide intention of getting exclusive possession stopped giving the accounts of income. Plaintiffs have 3/4 share in the tenancy of the shop. The length of the alleged shop is 16 fit and width 8 fit and it can be partitioned between the parties.

3. Defendants in their written statements denied that plaintiffs are tenant of the disputed shop. They further pleaded that tenancy rights can not be partitioned. It was further alleged in the written statement that plaintiff no. 1 is an employee of railway while plaintiff no. 2 is a teacher. Plaintiff no. 3 being a woman of the plaintiff are not doing vocation of hair cutting. If the disputed shop is partitioned and any construction is erected then the landlord will evict him. Lastly it was also pleaded that tenancy rights can be acquired by succession but it cannot be partitioned. Defendant no. 5 filed separate written statement in which he denied the plaint case and further pleaded that plaintiffs and other defendants have no concern with the disputed shop. They are not entitled to get possession of the disputed shop. No permanent partition can be made. The owner of the disputed shop is Sri 1008 Raghunathji temple and answering defendants is its tenant on a monthly rent of Rs. 75/- and in possession of the disputed

shop. After getting the disputed shop on rent the answering defendant has invested a lot of money in it and got it reconstructed. He is regularly paying the rent to the landlord and running hotel business in it. He also pays the electricity and water tax dues. Plaintiff has not arrayed Sri Raghunathji temple who is necessary party while plaintiff nos. 1 to 4 have been wrongly impleaded. Neither plaintiffs nor defendant nos. 1 to 4 are in possession of the disputed shop. They are also not tenant of the disputed shop, hence, the plaintiffs have no right to get the disputed shop partitioned.

4. Learned trial court framed 12 issues and after taking evidence from both the parties held that plaintiffs have failed to prove that they have 3/4 share as co-tenants in the shop in dispute. It further held that tenancy rights can not be partitioned. Tenants have only right to use the tenanted property, hence, suit for partition is not maintainable. On the basis of the aforesaid findings the learned trial court dismissed the suit by the judgment and order dated 30.9.1985.

5. Aggrieved by the aforesaid judgment and decree plaintiffs filed Civil Appeal No. 201 of 1985. The learned first appellate court reversed the findings of the trial court and held that plaintiffs being joint tenants have 3/8 share in the disputed shop and further that tenancy rights can be subject to partition. Learned first appellate court set-aside the judgment and decree of the trial court and decreed the plaintiffs suit in the terms that plaintiffs having title in the disputed shop, have right to get possession of 3/8 share of the disputed shop and use it and has ordered to prepare preliminary decree in the aforesaid terms.

6. Following substantial questions of law are involved in the second appeal:

i) Whether the tenancy rights can be subject to partition and suit for partition is maintainable for partition of tenancy rights ?

ii) What will be the effect of surrender of tenancy right of respondent no. 4 (defendant no.1) being in exclusive possession of the disputed shop and possession being delivered to the landlord and thereafter to appellant (defendant no. 5).

7. Learned counsel for the appellant (defendant no. 5) vehemently contended that suit for partition was not maintainable. No partition by metes and bounds of disputed shop can be made between the tenants as it will involve construction which will come in the category of material alteration, not permitted by the Rent Control Act and also can be a ground for eviction of the tenant. Learned counsel also contended that the disputed shop is very small in size, hence, physical partition is not possible. Lastly he contended that tenancy rights can not be subject to partition.

8. Learned counsel for the respondents in reply contended that a suit for partition of tenancy rights is maintainable and tenancy rights can be subject to partition between joint tenants. Learned counsel contended that after the death of Chiranji Lal all his legal heirs the respondents by way of inheritance became joint tenants. Learned counsel further contended that no construction of any permanent nature will be required for partition of the disputed shop. It can be conveniently partitioned between the joint tenants by temporary partition wall and can

be used by all the joint tenants as per their share.

9. It is not disputed that property in question is commercial in nature, hence, after the death of Chiranji Lal all his legal heirs will inherit as joint tenants. Now the legal question is whether the tenancy rights can be subject to partition. The Allahabad High Court way back in 1878 in the case of Mohammad Bakhsh and others Vs. Mana and others 1896 ILR 18 All 334 has held that tenancy rights between joint tenants can be subject to the partition. Delhi High Court in R.F.A. No. 73 of 2010 decided on 13.8.2015, in case of Dilip Kumar Vs. Om Parkash and others relying on earlier decisions Iresh Duggal Vs. Virender Kumar Seth MANU/DE/3068/2014 and Bharat Insulation Co. Vs. Suraj Prakash MANU/DE/1761/2015 has answered the question in positive and held that there is no bar in any law whatsoever to partition the tenancy rights.

10. The learned Single Judge while answering the question of partition of tenancy rights and maintainability of partition suit has also taken into account the contention which are being raised by the counsel for the appellants that due to its smaller size or otherwise the property is not devisable by metes and bounds and has observed that even if the tenancy premises, owing to its small size or otherwise owing to the restrictions placed by the landlord are not divisible by metes and bounds, the same can always be partitioned by one or more of the several legal heirs appropriating the tenancy rights to himself/themselves to the exclusions of others in consideration of payment of ovalty or otherwise to the other legal heirs. So the law is clear on this point. Joint tenants have right to partition in the tenancy rights. What will be the mode of partition may depend upon the nature of tenanted property which can be looked into in final decree proceedings. The findings recorded by the first appellate court on this point is according to law and just and proper. There is no illegality in this finding of the learned appellate court. The learned trial court has failed to appreciate the point of law in this regard and findings recorded by it was erroneous. Learned appellate court has rightly reversed the findings of the trial court on this point.

11. Learned counsel for the appellant further contended that after the death of Chiranji Lal respondent no. 4 was in actual exclusive possession of the disputed shop. He was paying the actual rent. On 5.1.1982 he surrendered the tenancy rights and gave possession to the landlord who after taking possession let it to the appellant and now appellant is in possession of the disputed shop. Learned counsel contended that the respondents have no right regarding the disputed shop and appellant is sole tenant in possession, hence, suit for partition is not maintainable.

12. Learned counsel for the respondents contended that Chiranji Lal was the original tenant and after his death the legal heirs became joint tenants of the disputed shop. Surrender by one of the joint tenants will not be binding on the remaining joint tenants and will apply only to the extent of the share of respondent no. 4. Remaining respondents have never surrendered the tenancy right in favour of the landlord, hence, their rights of tenancy will exist and suit for partition is

maintainable. Learned counsel placed reliance on the following citations:-

(i) 1989 Law Suit (SC) 264 H.C. Pandey Vs. G. C. Paul

(ii) 1979 ARC 242 Arya Kumar Ghosh and others Vs. Iind Addl. District Judge, Allahabad and others.

13. It is not disputed that Chiranji Lal was the original tenant of the shop and plaintiffs and defendant no. 1 to 4 are their legal representatives. The disputed shop is a commercial property, hence, after the death of Chiranji Lal all of his legal representatives will inherit the tenancy rights as joint tenants. It also stands proved from the evidence that only defendant no. 1 Ramesh Sen was professing vocation of hair cutting with his father in the disputed shop and after the death of Chiranji Lal he was in exclusive possession. None of the plaintiffs were in possession at any period of time in the disputed shop. It is true that surrender by one of the joint tenants will not amount to surrender by remaining joint tenants. A joint tenant can surrender only his rights. But in the present case only one of the joint tenants namely Ramesh Sen (defendant no. 1) was in actual and exclusive possession of the disputed shop. During pendency of the case he surrendered tenancy rights in favour of landlord and in pursuance thereof he also handed over the possession of the entire shop to the landlord who let it to the appellant (defendant no. 5) Lakshman Das Sindhi. It also stands proved from the evidence that at present only appellant Lakshman Das Sindhi is in possession of the disputed shop as tenant. So in the circumstances of the present case the rights of other joint tenants plaintiffs and defendant nos. 2 to 4 if any have become extinguished. Implied surrender will be presumed. The subject matter of the suit was tenancy rights in the disputed shop which is no more in-existence and the tenanted shop is in exclusive possession of the newly inducted tenant the appellant. Hence, the suit has become infructuous and now no decree for partition of tenancy rights can be passed. The second question is decided in the aforesaid terms.

14. From the above discussions it is clear that subject matter of the present case has become extinguished. There is no tenancy rights of respondents in-existence, hence, the suit has become infructuous and is liable to be dismissed in the aforesaid terms. The second appeal is liable to be allowed.

15. The second appeal is allowed. Judgment and decree dated 18.7.1988 passed by Civil Judge, Jhansi in Civil Appeal No. 201 of 1985 Ganesh Prasad and others Vs. Ramesh Singh and others is hereby set-aside. The original suit no. 70 of 1976 (Ganesh Prasad and others Vs. Ramesh Singh and others) stand dismissed.

Parties shall bear their own costs.

(2022)01ILR A92
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.12.2021

BEFORE

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

First Appeal From Order No. 38 of 2013

Brijendra Singh & Anr. ...Appellants
Versus
Sunil Rai & Anr. ...Respondents

Counsel for the Appellants:
Sri Ram Autar Verma, Sri Devendra Kumar Yadav

Counsel for the Respondents:

A. Civil Law - Motor Vehicle Act, 1988-Section 176-Enhancement of compensation-deceased was 21 years old and student of Final year M.A. and was preparing for competitive examination-Tribunal awarded a sum of Rs. 1,56,365/- together with interest @ 7% per annum as compensation but not granted future loss of income-Since, the deceased will fall within the category of self-employed and her age was 21 years at the time of accident, 40% shall be added towards future prospects as per Apex Court guidelines -By applying the multiplier of 18, the total loss of dependency is assessed Rs. 16,07,000/-Thus, the claimants entitled for increase of compensation a sum of Rs. 16,07,000/-from Rs 1,56,365/- with a modified rate of interest @ 7.5% per annum.(Paras 1 to 12)

The appeal is partly allowed.(E-6)

List of Cases cited:

1. Sarla Verma & ors. Vs D.T.C. & anr. (2009) 2 TAC 677 SC

2. National Ins. Co. Ltd. Vs Pranay Sethi & ors. (2014) 4 TAC 637 SC

3. Munna Lal Jain Vs Vipin Kumar Sharma (2015) 3 TAC 1 SC

4. Kurvan Ali & anr. Vs Shyam Kishore Murmu & anr.(2021) 4 TAC SC

5. National Ins. Co. Ltd. Vs Mannat Johal & ors. (2019) 2 T.A.C. 705 SC

6. Smt. Hansagori P. Ladhani Vs The Oriental Ins. Co. Ltd.(2007) 2 GLH 291

7. Smt. Sudesna & ors. Vs Hari Singh & anr. FAFO No . 23 of 2001

8. Tej Kumari Sharma Vs Chola Mandlam M.S. General Ins. Co. Ltd, FAFO No. 2871 of 2016

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

1. By way of this appeal, the claimants have challenged the judgment and order dated 4.10.2012, passed by Motor Accident Claims Tribunal/Special Judge (DAA), Jalaun at Orai *(herein after referred to as 'the Tribunal')* in MACP No.150 of 2011 awarding a sum of Rs.1,56,365/- as compensation to the claimants with interest at the rate of 7% per annum.

2. The claim petition was filed by the appellants, parents of the deceased before the Tribunal with the averments that on 14.4.2011 at about 12:30 in the afternoon, deceased, namely Kumari Beena Yadav @ Kumari Rita Yadav was returning to her home after studying in Kiran Career on bicycle. When she reached at the crossing of Zila Parishad Orai, a truck bearing No.MP09/HG-1398 came from opposite side, which was being driven very rashly and negligently by its driver. The aforesaid truck hit the deceased. In this accident, the deceased/injured sustained grievous injuries and taken to the District Hospital from where considering the serious condition of her, she was referred to Jhansi Medical College. She was hospitalized in a private hospital in Mathura after Jhansi and subsequently, she was admitted in Sufdarjung Hospital, New Delhi, but during the course of treatment, she died on 6.5.2011.

3. Heard Shri Ram Autar Verma, learned counsel for the appellant. Though,

notice has been sent to the respondent, none has appeared on behalf of respondent-Insurance Company.

4. The accident is not in dispute. The insurance company has not challenged the liability on it. The issue of negligence has attained finality. Now the only issue to be decided is the quantum of compensation awarded by the Tribunal.

5. Learned counsel for the appellants has submitted that deceased was unmarried girl aged about 21 years. She was a final year student of MA and preparing for competitive examination such as B.Ed. and Civil Services. It is also submitted that Tribunal has assessed her notional income at Rs.15,000/- per month, which is on the lower side and no amount is awarded towards loss of future income. It is next submitted that towards non-pecuniary damages only Rs.5,000/- was awarded for funeral expenses and Rs.5,000/- was awarded for loss of estate, which is also on the lower side. It is further contended that no amount towards proper filial consortium is awarded.

6. The deceased was 21 years of age as she was born on 9.1.1990. She was well-educated girl and having bright future. The accident had taken place on 14.4.2011. Hence, we fix her monthly income as Rs.10,000/- per month, namely Rs.1,20,000/- per annum.

7. The Tribunal has not added any percentage of amount towards future loss of income, which is, in our opinion, grave error. Since, the deceased will fall within the category of self-employed and his age was 20 years at the time of accident, 40% shall be added towards future prospects as held by Hon'ble Apex Court in ***National Insurance Company vs. Pranay Sethi*** *[2014 (4) TAC 637 (SC)]*. Hon'ble Apex Court has also held in ***Munna Lal Jain vs. Vipin Kumar Sharma*** *[2015 (3) TAC 1 (SC)]* that if the deceased was unmarried, 1/2 shall be deducted for his personal expenses. In this case, Hon'ble Apex Court has also held that multiplier will be applied with reference to the age of the deceased. Therefore, keeping in view the age of the deceased, multiplier of 18 will be applied in the light of the judgment of Hon'ble Apex Court in the case of ***Smt.Sarla Verma vs. Delhi Transport Corporation*** *[2009 (2) TAC 677 (SC)]*. As far as non-pecuniary damages are concerned, the Tribunal has awarded only Rs.5,000/- each towards loss of estate and funeral expenses, which are also on the lower-side. In the light of Judgment in the case of ***Pranay Sethi*** *(supra),* claimants shall be entitled to get Rs.15,000/- each for loss of estate and funeral expenses. Rs.40,000/- x 2 = Rs.80,000/- towards filial consortium is granted in the light of the judgment of Hon'ble Apex Court in the case of Kurvan Ansari alias ***Kurvan Ali and another vs. Shyam Kishore Murmu and another*** *[2021 (4) TAC (SC)]* .

8. Hence, the total compensation, in view of the above discussions, payable to the appellants-claimants is being computed herein below:

i	Annual Income	Rs.10,000/- x 12	Rs.1,20,000/-
ii	Percentage towards Future-Prospects (40%)	Rs.1,20,000/- x 40%	Rs.48,000/-
iii	Total Income	Rs.1,20,000/- + Rs.48,000/-	Rs.1,68,000/-
iv	Income after deduction of 1/2	Rs.1,68,000/- - Rs.84,000/-	Rs.1,68,000/- - Rs.84,000/-

v	Multiplier applicable	18	
vi	Loss of dependency	Rs.84,000/- x 18	Rs.15,12,000/-
vii	Funeral Expenses		Rs.15,000/-
viii	Filial Consortium	Rs.40,000/- x 2	Rs.80,000/-
ix	**Total Compensation**	Rs.15,12,000/- + Rs.15,000/- + Rs.80,000/-	**Rs.16,07,000/-**

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. Learned Tribunal has awarded rate of interest as 7% per annum but we are fixing the rate of interest as 7.5% in the light of the above judgment.

11. 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 Insurance Company shall deposit the amount within a period of 8 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.

12. In view of the ratio laid down by Hon'ble Gujarat High Court, in the case of ***Smt. Hansagori P. Ladhani vs. The Oriental Insurance Company Ltd.,*** *[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 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.

(2022)01ILR A96
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.12.2021

BEFORE

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

First Appeal From Order No. 179 of 2011

Smt. Reena Agarwal & Ors. ...Appellants
Versus
U.P.S.R.T.C. & Ors. ...Respondents

Counsel for the Appellants:
Sri A.K. Singh

Counsel for the Respondents:

A. Civil Law - Motor Vehicle Act, 1988 - Section 176-Enhancement of compensation-deceased was running coaching center, he was earning Rs. 35000/- to 40,000/ per month-he left behind his widow and four minor children-Tribunal awarded a sum of Rs. 18,67,492/- together with interest @ 6% per annum as compensation-Tribunal deducted 1/4th for personal expenses and did not add ay amount towards the future loss of income as he was self employed person below the age of 50 years-the annual income would be Rs 2,30,000/--By applying the multiplier of 14, the total loss of dependency is assessed Rs. 31,18,750/-Thus, the claimants entitled for increase of compensation a sum of Rs. 31,18,750/- from Rs. 18,67,492/- with a modified rate of interest @ 7.5% per annum.(Paras 1 to 22)

The appeal is partly allowed. (E-6)

List of Cases cited:

1. Bajaj Allianz General Ins. Co.Ltd. Vs Smt. Renu Singh & ors.,FAFO No.1818 of 2012

2. Rylands Vs Fletcher (1868) 3 HL LR 330

3. Jacob Mathew Vs St. of Punj. (2005) 0 ACJ SC 1840

4. National Ins. Co. Ltd. Vs Pranay Sethi & ors. (2017) 0 Supreme SC 1050

5. National Ins. Co. Ltd. Vs Mannat Johal & ors. (2019) 2 TAC 705 SC

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

7. Smt. Hansagori P. Ladhani Vs The Oriental Ins. Co. Ltd.(2007) 2 GLH 291

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

1. Heard Sri A. K. Singh, learned counsel for the appellants, learned counsel for the respondents-for the Insurance Company and none has appeared for the owner and perused the judgment and order impugned.

2. This appeal challenges the compensation findings and negligence by the Tribunal being Motor Accident Claims Tribunal, Aligarh, (hereinafter referred to as Tribunal) in M.A.C.P. No. 695 of 2008, awarding a sum of Rs. 18,67,492/- against the Uttar Pradesh State Road Transport Corporation, (U.P.S.R.T.C.) with interest at the rate of 6% from date of application.

3. The accident is not in dispute. The issue of negligence decided by the Tribunal is not in dispute. The respondents have not challenged the liability imposed on them. The only issue to be decided is the compensation awarded.

4. The accident and involvement of vehicle of respondent is not in dispute, where the vehicle of U.P.S.R.T.C., was not insured with any Insurance Company is also not in dispute. The issue of negligence as decided by Tribunal has attained finality. The only issue raised for our consideration to be decided is the issue of compensation awarded by the Tribunal for tortuous act of the driver of Uttar Pradesh State Road Transport Corporation. (U.P.S.R.T.C.).

5. The brief facts for our purpose which relates to compensation awarded is that accident occurred involving the bus whereby the deceased-Sanjeev Kumar Agarwal breathed his last. The deceased-Sanjeev Kumar Agarwal was driving the car, he suffered severe injuries and died on the spot. He was running coaching center in the name of Agarwal coaching center at Aligarh and where even students from out side of Aligarh were coming to take coaching and learn.

6. It is submitted by learned counsel for the appellants that deceased was earning Rs. 35,000/- to 40,000/- per month. He left behind him his widow and four children who were minor. It is further submitted that claimants have claimed Rs. 70,20,000/- with 18% interest before the Tribunal, thereafter Tribunal has framed the issues.

7. We are concerned with issue no. 7 which relates to compensation. The claimants had produced several documents namely the school living certificate, the income tax returns for the assessment years 2007-2008, 2008-2009 and 2009-2010 were produced before the Tribunal despite that did not decide.

8. The fact that accident caused the death of deceased is also proved by the postmortem report and that finding has attained finality. The issue of negligence has also been decided in favour of the claimants. His income is sought to be proved by PW-3 Anant Sharma and the widow of deceased namely Smt. Reena Agarwal-PW-1. The Tribunal has considered negligence of the deceased to be 25%.

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 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 comear 1992.

Despite given chance to the appellant, no one has appeared to press this appeal. It seems to us that the appellant is not interested in continuing with the appeal. After waiting for 28 years, I have no other option but to dismiss the appeal. In view of the above, this appeal stands dismissed for non prosecution.

ing 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 car dashed with bus of Uttar Pradesh State Road Transport Corporation, the driver of U.P.S.R.T.C. was more negligent as he was driving the bigger vehicle and therefore, he was supposed to take more care, we uphold the finding of Tribunal as far as it relates to issue of negligence. ear 1992.

Despite given chance to the appellant, no one has appeared to press this appeal.

It seems to us that the appellant is not interested in continuing with the appeal.

After waiting for 28 years, I have no other option but to dismiss the appeal.

In view of the above, this appeal stands dismissed for non prosecution.

13. The issue no. 7 relates to compensation it is proved that deceased the age group of 41 to 45 years. He was running his own school and his income tax returns shows that for the assessment year 2007-08 his income was Rs. 3,01.373.00/-. Even if we consider the mean of the returns of all the years it would come to Rs. 2,30,000/-. per annum very strangely the Tribunal has deducted 25% while considering income of deceased this could not have been done, no logical reason is assigned thereafter the Tribunal deducted 1/4th for personal expenses of deceased and did not add any amount towards the future loss of income as he was self employed person.

14. Looking to these facts, we will have to recalculate the compensation though vehemently objected by the learned counsel for the (U.P.S.R.T.C.).

15. It is further submitted that the Tribunal has assessed his income is Rs. 2,30,000/- which we do not interfere. To which as the deceased was below the age of 50 years and claimants were not granted any amount towards future loss of income of the deceased namely 25% lump sum

amount Rs. 60,000/- should be added in view of the decision in **National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050.** Out of which as he was having four children and a widow 1/4th will have to be deducted as deducted for personal expenses by the Tribunal the same is maintained. The multiplier of 14 granted is maintained. The amount of Rs. 1,00000/- under the head of non pecuniary damages will have to be added.

16. The total compensation payable is recalculated and is computed herein below:

i. Annual Income Rs. 2,30,000/-

ii. Percentage towards future prospects : 25% namely Rs. 57,500/-

iii. Total income : Rs. 2,30,000+57,500= Rs. 2,87,500/-

iv. Income after deduction of 1/4 towards personal expenses : Rs. 71,875/-

v. Multiplier applicable : 14

vi. Loss of dependency: Rs. 215625X14= Rs. 30,18,750/-

vii. Amount under non pecuniary heads : Rs. 100000/-

viii. Total compensation : Rs. 31,18,750/-

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 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. The Tribunal could not have deducted 25% ad-hoc amount from the income of deceased. The 25% has to be over all compensation which has been granted and therefore, so that this mistake may not be committed, this judgment may be circulated to the M.A.C.T. after obtaining approval of the Hon'ble Chief Justice.

20. On depositing the amount in the Registry of Tribunal, Registry is directed to first deduct the amount of deficit court fees, if any. Considering the ratio laid down by the Hon'ble Apex Court in the case of **A.V. Padma V/s. Venugopal, Reported in 2012 (1) GLH (SC), 442,** the order of investment may not be passed as the deceased has already elapsed. The claimants be paid by RTGS to their account in bank.

21. 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.

22. 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.

23. Record and proceedings be sent to the Tribunal.

(2022)01ILR A101

APPELLATE JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 17.12.2021

BEFORE

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

First Appeal From Order No. 1002 of 2021

Smt. Sarla Devi & Ors. ...Appellants
Versus
Satendra Singh & Anr. ...Respondents

Counsel for the Appellants:
Sri Shiv Narayan Pandey

Counsel for the Respondents:
Sri Mohd. Ashraf

A. Civil Law -Motor Vehicle Act, 1988-Section 176-Enhancement of compensation-deceased was Assistant Teacher and his salary was Rs. 30,958/- per month-he left behind his widow and four minor children-Tribunal awarded a sum of Rs. 16,95,350/- together with interest @ 7% per annum as compensation-Tribunal added 50% of income towards the future loss of income keeping in view 30 years of age of the deceased and also applied multiplier of 17 instead of 16 as per direction of Apex Court in Sarla Verma case-Hence, there is no illegality in fixation of award-award is modified only to the extent of the rate of interest which shall be 7.5% per annum.(Para 1 to 16)

The appeal is partly allowed. (E-6)

List of Cases cited:

1. Dr. Anoop Kumar Bhattacharya & anr. Vs National Ins. Co. Ltd. (2021) LawSuit (All) 1327

2. Sarla Verma & ors. VsDTC & anr.(2009) ACJ 1298

3. National Ins. Vs Pranay Sethi & ors. (2017) LawSuit (SC) 1093

4. National Ins. Co. Ltd. Vs Mannat Johal & ors. (2019) 2 TAC 705 SC

5. Smt. Hansagori P. Ladhani Vs The Oriental Ins. Co. Ltd (2007) 2 GLH 291

6. Smt. Sudesna & ors. Vs Hari Singh & anr. FAFO No . 23 of 2001

7. Tej Kumari Sharma Vs Chola Mandlam M.S. General Ins. Co. Ltd, FAFO No. 2871 of 2016

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

1. This appeal at the behest of the appellants has been preferred against the judgement and order dated 04.04.2019 passed by Motor Accident Claims Tribunal, Chitrakoot in MACP No.154/70/2016 (Smt. Sarla Devi & others Vs. Satendra Singh), whereby learned Tribunal awarded Rs.16,95,350/- with rate of interest 7% per annum.

2. The brief facts of the case are that the claim petition was filed by the appellants for the death of Chandra Pal @ Chandan Singh Rathore, who died in road accident. It is averred in petition that on 16.10.2016 at about 7:30, the Deceased Chandra Pal was travelling in Tata Safari No. U.P.79 J 9596 from Maihar to Karvi Banda road via Chitrakoot. When he reached at the place of accident, the aforesaid vehicle was overturned due to rash and negligent driving of the driver of the said vehicle. In this accident, deceased sustained fatal injuries and died on the spot. As per averments the of petition, deceased was Assistant Teacher and his salary was Rs.30,958/- per month.

3. Learned Tribunal awarded Rs.16,95,350/- compensation with rate of interest of 7% per annum but appellants were not happy with the award. Hence, this appeal.

4. Heard Shri Shiv Narayan Pandey, learned counsel for the appellants and Shri Mohd. Ashraf, learned counsel for the respondent as well as perused the record.

5. The accident is not in dispute. The Insurance Company has not challenged the liability imposed on it. Hence, mainly the dispute between the parties is regarding the amount of compensation.

6. Learned counsel for the appellants submitted that on the date of death of the deceased, he was serving as Assistant Teacher in Primary School Mahotara, Block- Naraini, District- Banda and was getting salary of Rs.30958/- per month. It is also submitted that on the date of accident, deceased was on probation and getting probation allowances of Rs.7300/- per month. Learned counsel for the appellants emphatically submitted that learned Tribunal has considered the salary of the deceased as Rs.7,300/- per month only but the real fact is that after confirmation, deceased would have got Rs.30,958/- per month as salary. Hence, Tribunal should have calculated the amount of compensation on the basis of salary Rs.30,958 per month and not on the basis of Rs.7,300/-. It is next submitted by learned counsel for the appellants that Tribunal has not added any sum towards future loss of income. In addition to these arguments, last argument was made by learned counsel for the appellants that in non-pecuniary heads, Tribunal has awarded only Rs.15,000/- for loss of consortium and Rs.5,000/- for funeral expenses. Learned counsel for the appellants relied on the latest judgement of this Court **Dr. Anoop Kumar Bhattacharya and another Vs. National Insurance Company Limited 2021 LawSuit (All) 1327.**

7. Learned counsel for the Insurance Company objected the contentions made by the learned counsel for the appellants and submitted that at the time of death, the deceased was on probation and during probation period his salary was Rs.7,300/- only as per his salary certificate. Learned counsel argued that the compensation was calculated by Tribunal on the basis of the amount of salary which the deceased was getting on the date of accident which is quite correct. Future salary cannot be taken into consideration. Learned counsel also submitted that appellants have wrongly argued that the Tribunal has not added any sum towards future loss of income because Tribunal has added 50% of income for future prospects. Lastly, learned counsel for the insurance company submitted that learned Tribunal has applied multiplier of 17 while keeping in view the 30 years of age of the deceased, the multiplier of 16 should have been applied as per the direction of the Apex Court in **Sarla Verma and Others Vs. Delhi Transport Corporation and Another, 2009 ACJ 1298.** Hence, there is no error or illegality in fixation of award and it does not call any interference by this Court.

8. The principles with regard to the determination of just compensation contemplated under the Motor Vehicle Act are well settled. The Court has to make a judicious attempt to award damages, so as to compensate the claimants for the loss suffered by them. On the one hand, the compensation should not be assessed very conservatively but on the other hand, the compensation should also not be assessed so liberally so as to make it a bonanza for the claimant.

9. We have perused the record, which shows that the office of District Basic Education Officer, Banda has issued the appointment order of the deceased, which shows that before getting confirmed, he had to remain on probation as trainee teacher for six months (three months practical and three months theory). He was appointed on Rs.7,300/- per month fixed honorarium. Perusal of statement of A.P.W2- Raja Bhaiya has also clarified in his statement that at the time of death, the deceased was working as Trainee Assistant Teacher and during six months of training he was getting Rs.7,300/- per month. He would have been entitled to the salary of Rs.30,958/- per month after completion of the training period of six months. But, it is admitted fact that the deceased died before completing the training period. Hence, it cannot be disputed that on the date of death, the deceased was getting salary Rs.7,300/- per month and only this amount was relevant for computation of compensation, which is rightly done by the learned Tribunal. We are in full agreement with the finding of the learned Tribunal that Rs.7,300/- per month is the amount which is to be taken into consideration for the purpose of computation of compensation.

10. Perusal of the record shows that learned Tribunal has added 50% of the income for future loss of the income. Hence, the argument of the appellants that no amount is added by Tribunal for future loss of income is against the record and we reject the same.

11. Learned Tribunal has applied multiplier of 17 while it should have been 16 as per the Apex Court judgement Sarla Verma (Supra). It is correct that learned

Tribunal has awarded Rs.15,000/- for consortium and Rs.5,000/- for funeral expenses. In this way, Rs.20,000/- are awarded for non-pecuniary damages while it should have been Rs.70,000/- as per the directions of Hon'ble the Apex Court in **National Insurance Vs. Pranay Sethi and Others, 2017 LawSuit (SC) 1093** but if Rs.50,000/- more are added in the head of non-pecuniary damages and multiplier of 16 is applied instead of 17 (as applied by Tribunal), final amount of compensation will come down to some extent. Hence, we consider it proper not to disturb the amount of compensation awarded by the Tribunal and we maintain it.

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. Learned Tribunal has awarded rate of interest as 7% per annum but we are fixing the rate of interest as 7.5% in the light of the above judgment.

14. Hence, the appeal is partly allowed and award is modified only to the extent of the rate of interest which shall be 7.5% per annum from the date of filing of the claim petition to the date of deposit. Award is modified to the extent as above accordingly.

15. Insurance company is directed to deposit the amount within eight weeks from today. The amount already deposited is to be deducted from the amount to be deposited.

16. 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 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.

(2022)01ILR A105
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.12.2021

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE KRISHAN PAHAL, J.

First Appeal From Order No. 1652 of 2009

Dr. Anoop Kumar Bhattacharya & Anr.
...Appellants
Versus
National Insurance Co. Ltd. & Anr.
...Respondents

Counsel for the Appellants:
Sri Sanjay Singh, Sri Amrendra Nath Rai

Counsel for the Respondents:
Sri Amit Manohar

A. Civil Law - Motor Vehicle Act, 1988 - Section 176-Enhancement of compensation-deceased was 24 years old and was in final year of MBA Course , he was earning Rs. 13,080/- per month as part time job-he left behind his mother and father- Tribunal computed loss of dependency 4,60,000/- by applying multiplier 8 and the said figure was then halved to Rs. 2,30,000/- to account for the contributory negligence on the part of the deceased-contributory negligence on the part of the deceased unsustainable-Total compensation payable to the claimants works out to Rs. 33,50,000/- by applying multiplier 18 with interest rate 8% per annum.(Para 1 to 143)

The appeal is partly allowed.(E-6)

List of Cases cited:

1. Pramod Kumar Rasikbhai Jhaveri Vs Karmasey Kunvargi Tak (2002) 6 SCC 155

2. Mohammed Siddique & anr. Vs National Ins. Co. Ltd. & ors. (2020) 3 SCC 57

3. Jiju Kuruvila & ors. Vs Kunjujamma Mohan & ors. (2013) 9 SCC 166

4. Arvind Kumar Mishra Vs New India Assr. Co. Ltd. & anr. (2010) 10 SCC 254

5. Neeta W/O Kallappa Kadolkar & ors. Vs Div. Manager, MSRTC, Kolhapur (2015) 16 SCC 680

6. National Ins. Co. Ltd. V. Pranay Sethi & ors. (2017) 16 SCC 680

7. Jabbar Vs MSRTC, (2019) 0 Supreme SC 2283

8. Smt. Sarla Verma & ors. Vs DTC & anr (2009) 2 SCC (Civ) 770

9. National Ins. Co. Ltd. Vs Mannat Johal & ors (2019) 15 SCC 260

10. B D Bagri Vs Daulat Ram & ors. (1998) ACJ 1303

11. Mata Ji Beva & ors. Vs Hemant Kumar (1994) ACJ 1303

12. Anita Sharma & ors. Vs The New India Assr. Co. Ltd. & anr. (2021) 1 SCC 171

13. Dulcina Fernandes & ors. Vs Joaquim Xavier Cruz & ors. (2013) 10 SCC 646

14. Bimla Devi Vs Himachal RTC (2009) 13 SCC 530: (2009) 5 SCC (Civ) 189 : (2010) 1 SCC (Cri) 1101

15. M. Siddiq Vs Suresh Das (2020) 1 SCC 1

16. Mangla Ram Vs Oriental Ins. Co. & ors. (2018) 5 SCC 656

17. N.K.V. Bros.(P) Ltd. Vs M. Karumai Ammal & ors. (1980) 3 SCC 457

18. United India Ins. Co. Ltd. Vs Shila Datta

19. Parmeshwari Vs Amir Chand in (2011) 11 SCC 635

20. Kartar Singh Vs St. of Punj.

21. Sunita Vs RSRTC (2019) SCC Online SC 195

22. UPSRTC Vs Km. Mamta & ors. (2016) AIR SC 948

23. Ravi Kapur Vs St. of Raj.(2012) 9 SCC 984

24. United India Ins. Co. Ltd. Vs Satinder Kaur @ Satwinder Kaur & ors. (2020) AIR SC 3076

25. Kirti Vs Oriental Ins. Co. Ltd. (2021) SCC Online SC 3

26. M.R. Krishnamurthy Vs The New India Assr. Co. Ltd.(2019) SCC Online SC 315

27. Arvind Kumar Mishra Vs New India Assr. Co. Ltd. in (2010) 10 SCC 254

28. Oriental Ins. Co. Ltd. Vs Deo Patodi & ors (2009) 13 SCC 123

29. Smt. Sarla Verma & ors. Vs DTC & anr (2009) 93 Supreme 487

30. Reshma Kumari & ors. Vs Madan Mohan & anr. (2013) 9 SCC 65

31. National Ins. Co. Ltd. V. Pranay Sethi & ors. (2017) 16 SCC 680

32. Magma General Ins. Co. Ltd. Vs Nanu Ram & ors., in (2018) 18 SCC 130

33. National Ins. Co. Ltd Vs Mannat Johal & ors. (2019) 15 SCC 260

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

1. Heard Sri Sanjay Singh, learned counsel for the claimants-appellants and Sri Amit Manohar, learned counsel for the Insurance Company, arrayed as respondent no.1.

2. This First Appeal From Order (hereinafter referred to as "FAFO') was instituted by the claimants-appellants, under Section 173 of the Motor Vehicles Act, 1988 (hereinafter referred to as "Act, 1988'), assailing the judgment and order dated 24.01.2009 rendered by the Motor Accident Claims Tribunal/Additional District Judge/ Special Judge (E.C. Act), Bareilly (hereinafter referred to as "Tribunal') in Motor Accident Claim Petition Case No.-881 of 2004.

3. A perusal of the order sheet indicates that this Court, vide order dated 02.11.2015, admitted this FAFO and issued notices. Accordingly, notices were sent to the respondents 1 & 2 by ordinary post. The office report dated 22.09.2021 reads *"notices sent by ordinary post to respondents 1 & 2 did not return after service'* indicating satisfactory service.

4. While Sri Amit Manohar, learned counsel, has put in appearance on behalf of the respondent no.1 the Insurance Company (hereinafter referred to as "Insurer'), no one has appeared on behalf of the respondent no.2, the owner of truck involved in the accident (hereinafter referred to as "offending truck') despite service of notice. The appeal is of the year 2009 and, thus, very old. It transpires from the record that the respondent no.2 did not contest the case even before the Tribunal, the judgment dated 24.01.2009 whereof is under challenge in this FAFO. The record indicates that though Vakalatnama was filed before the Tribunal by one Advocate Mohd. Rashid Malik on 14.12.2005 on behalf of the respondent no.2 but the respondent no.2 did not even file a written statement and the Tribunal vide order dated 25.09.2007 proceeded ex-parte against him. The respondent no.2, therefore, does not seems to be interested in putting up a defence despite ample opportunity.

FACTS

5. Before adverting to the issues which arise for consideration by this Court, it would be of profit to undertake a survey of the relevant facts of the case.

6. The claimants-appellants, namely Dr. Anoop Kumar Bhattacharya (who had unfortunately died during the pendency of the case before the Tribunal) and Smt. Leena Bhattacharya, on 16.12.2004, instituted Motor Accident Claim Petition (M.A.C.P.) No.-881/2004 before the Tribunal, under Section 166 of the Act, 1988, for grant of compensation on account of the unfortunate and tragic death of their only son, namely Abhishek Bhattacharya (hereinafter referred to as "deceased'), who had died in a motor vehicle accident on 20.07.2004. Dr. Anoop Kumar Bhattacharya was claimant no.1 whereas Smt. Leena Bhattacharya was claimant no.2 (Dr. Anoop Kumar Bhattacharya and Smt. Leena Bhattacharya shall hereinafter individually be referred to as "claimant no.1' and "claimant no.2' respectively and jointly as "claimants').

7. As per the claim petition, the deceased was 24 years old and was in the final year of MBA course at the Institute of Cost and Financial Accountants of India, Hyderabad (hereinafter referred to as "ICFAI'). It was also contended that the deceased was in the part time employment of M/S Ivy Comptech, Hyderabad and was earning Rs.13,080. The case of the claimants, as a matter of fact, can be conveniently looked into in its entirety from the particulars furnished under the head *''23. Other information that may be helpful in the disposal'* in the claim petition, which is extracted hereunder for ready reference: -

"On 20.07.2004, the claimant no.1 was travelling from Bareilly with the deceased in his Car No.-UA-06-A6970 on Bareilly-Delhi National Highway at a very low speed. The Truck No.-GJ-1-TT-8883 came from the front from Rampur side and was driven very rashly and negligently by its driver and collided into the car on the right side. The deceased was severely injured and was taken by the claimant no.1 to Dhanwatari Tomer Hospital, Bareilly with the help of people but he died. The claimant no.1 also received severe shock and injuries. FIR was lodged with PS Meerganj, Distt Bareilly.

The deceased Abhishek was the only child of the claimants and was in the final year of MBA in Institute of Cost and Financial Accountants of India at Hyderabad, which is one of the best institutes of the country. Owing to his excellent performance, he was employed/ working with M/S Ivy Comptech at Hyderabad and drawing a starting salary of Rs.13080/-. He was a very promising young man and would have been absorbed by big corporate houses on very high salary of over Rs.50,000/- per month initially with further rise. He had a very bright future and had also received several awards for his performances. He had no bad habits of drinking, smoking etc. He was very good natured and was greatly loved in the whole family. Being the only child of the claimants, the life and future of the claimants has been completely shattered by his death and they are left with no one to look after in this old age."

8. The claimants prayed for compensation of Rs.92 lacs (Rupees Ninety

Two Lacs) along with interest at the rate of 18% per annum as also the cost of the petition. They also prayed for an interim award of Rs.50,000/- under Section 140 of the Act, 1988.

9. The claim petition was contested by the Insurer, who was arrayed as Opposite party No.1 in the claim petition. The Insurer filed its written statement on 28.08.2005. The factum of the accident was disputed; the age, income and occupation of the deceased was also disputed; the accident, if at all it took place, was alleged to have occurred due to the fault and negligence of the deceased and not because of the act of the driver of the offending truck; the dependency of the claimants on the deceased was disputed; the driver of the offending truck was alleged to have not holding a valid driving license at the time of the accident; the offending truck was alleged to have been driven in violation of the terms and conditions of the insurance policy. It, however, appears from the issues framed by the Tribunal, which we shall refer to shortly, that not all objections taken in the written statement were pressed into service.

10. Based on the pleadings of the contesting parties, the Tribunal framed five issues for determination which are extracted hereunder: -

"1- क्या दिनांक 20.7.04 को जब मृतक अभिषेक भट्टाचार्य अपने पिता डा० अनूप कुमार भट्टाचार्य के साथ कार संख्या - यू० ए०-06-ए-6970 से बरेली से दिल्ली जा रहा था, तब थाना मीरगंज से लगभग 5 किलोमीटर दूरी पर थाना मीरगंज जिला बरेली में अन्तर्गत ट्रक सं०-जी०जे०-1-टी०टी०-8883 के चालक द्वारा ट्रक को तेजी एवं लापरवाही से चलाकर कार में टक्कर मार दी, जिससे अभिषेक भट्टाचार्य को चोटें आयीं और उसकी मृत्यु हो गयी?

2- क्या यह दुर्घटना स्वयं कार चालक की गलती एवं लापरवाही के कारण हुई?

3- क्या दुर्घटना के समय ट्रक चालक के पास वैध ड्राइविंग लाईसेंस नहीं था?

4- क्या दुर्घटना के समय यह ट्रक विपक्षी संख्या - 1 नेशनल इंश्योरेन्स कम्पनी से बीमित था और बीमा पालिसी की किसी शर्त का कोई उल्लंघन नहीं किया गया था तथा ट्रकको वैध फिटनेस प्रमाण पत्र, परमिट आदि के आधार पर चलाया जा रहा था?

5- क्या याचीगण प्रतिकर की धनराशि पाने के अधिकारी है? यदि हाँ तो कितनी और किससे?"

"(i) On 24.07.2004, when the deceased was going to Delhi from Bareilly with his father in his Car No.- UP-06 A-6970, did the driver of the Truck No.- GJ 1 TT 8883 ram the truck into the car of the deceased driving the truck rashly and negligently, at about 5 km from P.S.- Meerganj, Bareilly, injuring the deceased and ultimately causing his death?

(ii) Did the accident take place due to the fault and negligence on the part of the car driver himself?

(iii) Did the truck driver not have a valid driving license at the time of the accident?

(iv) Was the truck, at the time of the accident, insured by the respondent no.1 and was not in violation of any of the terms and conditions of the insurance policy, and, was the truck being driven under a valid fitness certificate, permit, etc.?

(v) Are the claimants liable to be awarded compensation? If yes, the quantum of such compensation and by whom?"

(English Translation by Court)

11. The claimants adduced both documentary evidence and oral evidence to substantiate their claim. In oral evidence, the claimant no.2, Smt. Leena Bhattacharya was examined as PW-1 whereas one Chaturbhuj Shukla, who claimed to have witnessed the whole incident, was examined as PW-2. Both PW-1 and PW-2 were also subjected to cross-examination by the counsel for the Insurer. In the documentary evidence, the claimants, inter alia, filed: certified copy of the FIR dated 21.07.2004 lodged by the claimant no.1, under Sections 279, 304A & 427 IPC, against Raj Kishore, the driver of the offending truck, in connection with the accident at the Police Station Meerganj, Bareilly; certified copy of the post mortem report dated 21.07.2004 of the deceased; certified copy of the charge-sheet dated 06.08.2004, under Sections 279, 304A & 427 IPC, filed by the police against Raj Kishore; original copy of the appointment letter dated 24.07.2003 issued to the deceased by M/S Ivy Comptech, Hyderabad; original salary slip; attested photocopy of the driving license of the deceased; photocopy of the insurance policy whereunder the offending truck was insured; photocopy of driving license of Raj Kishore, the driver of the offending truck; photocopy of the site plan prepared by the police during the course of investigation. The Insurer, on the other hand, did not adduce any documentary evidence or oral evidence.

12. In the wake of the evidence led and the arguments advanced, the Tribunal decided the issues framed as hereunder.

13. Issue No.-1 and Issue No.-2 were decided together by the Tribunal. The Tribunal observed that the onus to prove the factum of the accident lay upon the claimants whereas the onus to prove that there was contributory negligence on the part of the deceased lay on the Insurer. As regards the factum of the accident, the Tribunal held that since the Insurer admitted that the accident did take place, factum of the accident stood proved. On the question if the accident was caused solely by the rash and negligent driving on the part of the driver of the offending truck or did negligence on the part of the deceased also played a role, the Tribunal attributed the fault for the accident equally between both the deceased and the driver of the offending truck. The Tribunal observed that the claimants did not examine "actual' eyewitnesses to prove the factum of the accident while the Insurer did not examine the driver of the offending truck to prove negligence on part of the deceased. It was, thus, reasonable to assume that both the deceased and the driver of the offending truck were equally at fault. The Tribunal referring to the record had observed that the record indicated that the accident resulted from a head on collision between the car driven by the deceased and the offending truck and that the deceased sustained injuries in the accident which ultimately led to his death, which, as per the Tribunal, justified the conclusion that the accident resulted from the fault of both the deceased and the driver of the offending truck.

14. On issue No.-3, the Tribunal found that the driving license was valid at the time of the accident.

15. Issue No.-4 entailed determination on the point if the offending truck was under insurance by the Insurer at the time

of the accident and if it was being driven in violation of terms and conditions of the insurance policy. The Tribunal examined the insurance policy document and found that the offending truck was insured by the Insurer for the period from 03.06.2004 to 02.06.2005 and, thus, Insurance policy was alive when the accident took place on 20.07.2004. The Tribunal also found that there was nothing on record to indicate that the offending truck was being driven in violation of the terms and conditions of the insurance policy when the accident occurred.

16. Issue No.5 concerned compensation. The Tribunal had to determine if the claimants were liable to receive any compensation, and, if so, the quantum of compensation and from whom. The Tribunal held that the claimants were liable to be compensated. The Tribunal then went on to determine the quantum of compensation. As per the pay slip filed by the claimants in evidence, the deceased was earning a monthly sum of Rs.13,080/-, which included Rs.5500/- in basic pay, Rs.1700/- in dearness allowance, Rs.800/- in transportation allowance, Rs.2200/- in house rent allowance, Rs.1000/- in medical allowance, Rs.1100/- in lunch allowance and Rs.780/- in LTA. The Tribunal held that for the purpose of quantification of compensation only basic pay and dearness allowance were relevant. The income of the deceased, for the purpose of determination of compensation, was, therefore, taken to be Rs.7200/- per month (Rs.5500/- in basic pay + Rs.1700/- in dearness allowance), which, on an annual basis, worked out to Rs.86,400/-. Thereafter, the Tribunal deducted one-third (1/3rd) of said income towards personal and living expenses which left Rs.57,600/- as the multiplicand. Applying an age-multiplier of 8 based on the age of the claimant no.2, who was 57 years old at the time of the accident, the figure for "loss of dependency' was computed at Rs.4,60,800/- (8 x 57600). Said figure was then halved to Rs.2,30,400/- to account for the contributory negligence on the part of the deceased. Nothing was added either in the future prospects or under the conventional heads (loss of estate, loss of consortium, funeral expenses). The compensation payable to the claimants was, resultantly, computed at Rs.2,30,400/-. Additionally, simple interest at the rate of 8 % per annum from the date of the decision was also awarded. The liability to pay the compensation to the claimants was fastened upon the Insurer.

17. Having thus determined the issues framed, the Tribunal proceeded to order the Insurer to pay the claimant no.2 (the claimant no.1 had already died during the pendency of MACP) Rs.2,30,400/- as compensation along with simple interest at the rate of 8 % per annum for the period from the date of the order to the date of disbursal of payment. The Insurer was directed to deposit a cheque of said amount with the Tribunal within a period of one month out of which Rs.1,50,000/- was directed to be deposited in a fixed deposit account in the name of the claimant no.2 in a nationalized bank and the rest was directed to be disbursed to the claimant no.2.

18. The aforesaid judgment and order dated 24.01.2009 rendered by the Tribunal has come to be challenged by the claimants before this Court by the instant FAFO.

RIVAL CONTENTIONS

19. The learned counsel for the claimants assailed the judgment and order

dated 24.01.2009 rendered by the Tribunal on multiple grounds which are as follows: -

i) The Tribunal has erroneously disbelieved the testimony of PW-2 who had proved both the factum of the accident and also that the accident took place because of rash and negligent driving on the part of the driver of the offending truck;

ii) The finding that there was contributory negligence on the part of the deceased rendered by the Tribunal is absolutely arbitrary and unwarranted. The deposition of PW-2 proved that it was rash and negligent driving on the part of the driver of the offending truck which led to the accident. Even though said testimony could not be shaken, it was arbitrarily disregarded by the Tribunal which went on to conclude, without any positive evidence that both the drivers were to blame for the incident. Reliance was placed on **Pramod Kumar Rasikbhai Jhaveri V. Karmasey Kunvargi Tak (2002 (6) SCC 155), Mohammed Siddique & Another V. National Insurance Company Ltd. & Others (2020 (3) SCC 57), Jiju Kuruvila & Others V. Kunjujamma Mohan & Others (2013 (9) SCC 166);**

iii) It was argued that the Tribunal, in its adjudication, has refused to take into consideration the FIR, the charge sheet and the site plan brought on record by the claimants contending that said documents, which were part of the police record, do not constitute evidence and that the claimants must produce their own evidence, whereas, on the other hand, the Tribunal, to justify its decision to ignore the testimony of PW-2, has contended that the testimony of PW-2 is liable to be disbelieved because even though he claimed to have witnessed the accident and to have taken the deceased and the claimant no.1 to the hospital, his name did not figure either in the FIR or in the list of witnesses set out in the chargesheet or in the hospital records. In the eyes of the Tribunal, the testimony of PW-2 was, therefore, suspicious. The reasoning adopted by the Tribunal is, therefore, inherently self-contradictory because one cannot rely on the same set of documents for one reasoning and reject it at the same time;

iv) The Tribunal has committed an error in opting to altogether ignore the FIR, the charge sheet and the site plan in its adjudication as the said documents were material to be taken into consideration for deciding as to who was at fault in the case of an accident, and the Tribunal cannot altogether ignore the said documents without any good reason;

v) The income of the deceased, for the purposes of quantification of compensation, was arbitrarily taken to be Rs.7,200/- even though it was clear from the pay slip filed in the evidence that the deceased earned Rs.13,080/- as monthly pay. Loss of future earnings was not taken into account in computing the income of the deceased. The multiplier was erroneously chosen based on the age of the claimant no.2 whereas it ought to have been chosen based on the age of the deceased. No amount was awarded for the future prospects. No amount was awarded under conventional heads. The Tribunal had also erred in awarding interest from the date of the decision instead of the date of the institution of the case. At any rate, the compensation awarded by the Tribunal amounts to a pittance. It does not amount to "just compensation' and deserves to be modified. Reliance was placed on **Mohammed Siddique & Another V. National Insurance Company Ltd. &**

Others (2020 (3) SCC 57), Arvind Kumar Mishra V. New India Assurance Co. Ltd. & Another (2010 (10) SCC 254), Neeta W/O Kallappa Kadolkar & Others V. Div Manager, MSRTC, Kolhapur (2015 (16) SCC 680), National Insurance Company Ltd. V. Pranay Sethi & Others (2017 (16) SCC 680), Jabbar V. Maharashtra State Road Transport Corporation (2019 0 Supreme(SC) 2283).

20. Per contra, the learned counsel for the Insurer has refuted the arguments advanced on behalf of the claimants. The contentions advanced by the learned counsel for the Insurer are as follows: -

(i) The Tribunal committed no error in disbelieving the testimony of PW-2 who had asserted that he had not only witnessed the accident but had also extricated the victims (the deceased and the claimant no.1) out of the wreckage with the help of the local people and had taken them to the hospital. The name of PW-2, however, did not find mention even in the hospital records. Moreover, the claimant no.1 who lodged the FIR regarding the incident with the police on the next day did not mention anything about PW-2. Additionally, the charge sheet filed by the police in the matter did not include PW-2 in the list of witnesses. The learned counsel contends that said circumstances render the presence of PW-2 on the spot at the time of the accident doubtful and the Tribunal, therefore, had rightly concluded that the testimony of PW-2 was suspected and was liable to be disbelieved;

(ii) The finding that there was contributory negligence on the part of the deceased which led to the accident and that the driver of the truck could not be solely blamed for the accident was completely justified. The Tribunal had drawn adverse inference against the claimants for withholding the best evidence. The claimants examined PW-2 to prove that the accident resulted from rash and negligent driving on the part of the driver of the offending truck whose testimony was found suspected and his presence on the spot doubtful. The claimants examined PW-2, even though his name did not figure either in the hospital records or the FIR or the charge sheet, whereas they could instead have examined somebody who was actually listed as a witness in the charge sheet. As such, the Tribunal was completely justified in drawing an adverse inference against the claimants for not examining an actual witness and instead producing PW-2 whose presence on the spot was found doubtful. The finding of contributory negligence on the part of the deceased in the accident, therefore, requires no interference;

(iii) The approach adopted by the tribunal whereby it had opted to ignore the FIR, the charge sheet and the site plan in adjudicating the claim petition is based on the sound principles and is in consonance with with law;

(iv) The quantum of compensation awarded to the claimants by the Tribunal is erroneously computed and deserves to be modified. Contrary to the contention advanced on behalf of the claimants, the income of the deceased, for the purpose of computation of quantum of compensation, was rightly taken to be Rs.7200/-. An error was, however, committed in deducting only 1/3rd of said income towards personal and living expenses. At the time of death, the deceased was only 24 years old and unmarried. The law is now settled that in case the deceased is a bachelor and the claimants are the parents, normally a 50% deduction shall be made towards personal and living expenses. The Tribunal was, therefore, in error in deducting only 1/3rd of

the income of the deceased towards personal and living expenses. The tribunal had also erred in awarding interest at the rate of 8% which could only be awarded at the rate of 7.5%. To that extent, the quantum of compensation deserves to be modified. Reliance was placed on **Smt. Sarla Verma & Others V. Delhi Transport Corporation & Another (2009 2 SCC(Civ) 770) and National Insurance Company Limited V. Mannat Johal And Others ((2019) 15 Supreme Court Cases 260).**

ANALYSIS

21. We have heard the learned counsels for the contesting parties at length and have examined the record.

22. The following points arise for our consideration: -

i) Whether the tribunal had adopted a correct approach in opting to altogether exclude from evidence documents such as the FIR, charge sheet and site plan which formed part of the police record?

ii) Whether the tribunal was justified in disbelieving the testimony of PW-2 on the ground that his name did not figure either in the FIR or the charge sheet or the hospital records?

iii) Whether the claimants satisfactorily discharged the burden to prove the factum of the accident and negligence on the part of the driver of the offending vehicle?

iv) Whether the tribunal was justified in holding that there was contributory negligence on part of the deceased?

v) Whether the quantum of compensation determined by the Tribunal "just' and in accordance with well settled legal principles? If not, what should be the quantum of compensation to which the claimants are entitled to?

23. We shall now proceed to answer the aforesaid questions.

24. The first point that falls for consideration concerns the correctness and validity of the approach adopted by the Tribunal in so far as the Tribunal opted to ignore and exclude from evidence documents such as the FIR, the charge sheet and the site plan, which formed part of the police record. In justification of its approach, the Tribunal invoked judgment rendered by the Punjab and Haryana High Court in **B D Bagri Vs Daulat Ram and Others**, reported in **1998 ACJ 1303**, along with the judgment delivered by the Orissa High Court in **Mata Ji Beva and Others Vs Hemant Kumar,** reported in **1994 ACJ 1303.** In **B D Bagri (supra)**, the Punjab and Haryana High Court held that while dealing with a matter of compensation arising out of an accident, the Tribunal must decide on the strength of the evidence led before it and that no inference can be drawn from the contents of the FIR to confer liability on the driver of the vehicle involved in the accident. Placing reliance on **B D Bagri (supra),** the Tribunal observed that no inference can be drawn on the basis of the contents of the FIR and that based on the FIR it cannot be concluded that the driver of the offending truck was involved in the accident. On the other hand, in **Mataji Bewa (supra)**, the Orissa High Court held that the contents of a charge sheet filed in the criminal case cannot

possibly be treated as evidence in claim proceedings. Accordingly, the Tribunal opted to disregard the charge sheet filed in evidence by the claimants.

25. To our mind, what documents can and what documents cannot form part of the evidence in claim proceedings arising out of motor vehicle accidents must necessarily bear nexus with the character and complexion of the proceedings themselves. Thus, before we can hold forth on the correctness or otherwise of exclusion of the documents which form part of the police record from evidence in claim proceedings, we must first pause to remind ourselves of the nature of such claim proceedings.

26. It is well settled that the standard of proof applicable to claim proceedings arising out of motor vehicle accidents is that of preponderance of probabilities and not that of proof beyond reasonable doubt. In the case of **Anita Sharma and Others Vs The New India Assurance Co. Ltd. And Another,** reported in **2021 (1) SCC 171,** the Hon'ble Supreme Court, as regards applicability of the standard of preponderance of probabilities to claim proceedings arising out of motor vehicle accidents, observed thus: -

"22. Equally, we are concerned over the failure of the High Court to be cognizant of the fact that strict principles of evidence and standards of proof like in a criminal trial are inapplicable in MACT claim cases. The standard of proof in such like matters is one of preponderance of probabilities, rather than beyond reasonable doubt. One needs to be mindful that the approach and role of Courts while examining evidence in accident claim cases ought not to be to find fault with non-examination of some best eye-witnesses, as may happen in a criminal trial; but, instead should be only to analyze the material placed on record by the parties to ascertain whether the claimant's version is more likely than not true. A somewhat similar situation arose in ***Dulcina Fernandes and Others v. Joaquim Xavier Cruz and Others*** *reported in (2013) 10 SCC 646 wherein this Court reiterated that:*

"7. It would hardly need a mention that the plea of negligence on the part of the first respondent who was driving the pick-up van as set up by the claimants was ***required to be decided by the learned Tribunal on the touchstone of preponderance of probabilities and certainly not on the basis of proof beyond reasonable doubt. (Bimla Devi v. Himachal RTC [(2009) 13 SCC 530 : (2009) 5 SCC (Civ) 189 : (2010) 1 SCC (Cri) 1101]"*** *(emphasis supplied)*

27. The principle of preponderance of probabilities as applicable in claim proceedings was spelt out by a Constitution Bench of the Hon'ble Supreme Court in the case of **M. Siddiq Vs. Suresh Das,** reported in **(2020) 1 SCC 1**, in the following terms: -

"720. The court in a civil trial applies a standard of proof governed by a preponderance of probabilities. This standard is also described sometimes as a balance of probability or the preponderance of the evidence. Phipson on Evidence formulates the standard succinctly: If therefore, the evidence is such that the court can say "we think it more probable than not", the burden is discharged, but if the probabilities are equal, it is not. [Phipson on Evidence.]"

28. As such, it is clear that in claim proceedings arising out of motor vehicle accidents, the task of the tribunal is to evaluate the pleadings and the evidence with a view to form an opinion whether the case set up by a claimant is more probable or not.

29. We may now revert to the original question whether Tribunal was correct in altogether excluding from evidence the documents such as the FIR, the site plan and the charge sheet, which form part of the police record.

30. We have no doubt in our mind that the answer to the aforesaid question must be a resounding "No'. The Tribunal opted to ignore the FIR, the charge sheet and the site plan on the ground that they do not establish either that the driver of the offending truck was involved in the accident or that he was guilty of rash and negligent driving. In our opinion, the Tribunal would have been correct had the standard of proof in claim proceedings been that of beyond reasonable doubt as is the case with criminal proceedings. Even in a criminal proceedings, these documents may be considered to corroborate the evidence led in the court and not to be completely disregarded or ignored. In any case, corroborative value of the police record cannot be ignored completely though decision may not be based solely upon them. Moreover, the standard of proof in the claim proceedings is not that of proof beyond reasonable doubt but that of preponderance of probabilities. The Tribunal on assessment of evidence before it had to satisfy itself that it was more likely than not that the events as alleged in the claim petition had transpired. To our mind, the documents such as the FIR, the site map and the charge-sheet, which form part of the police record, even though they do not establish the occurrence when considered holistically and prudently could help draw an informed and intelligent inference as to the degree of probability which lends itself to the case set up by a claimant. Was the FIR promptly lodged or was it lodged after an undue delay? Does the site plan conform to the recital contained in the FIR? Do injuries sustained corroborate the recital contained in the FIR? Does the charge sheet bolster the allegations contained in the FIR? These are the factors which when considered fairly and prudently could help to assess if the case set up by the claimants was more probable or not. As such, we consider it an error to altogether ignore the said documents on the ground that they were not conclusive proof of the occurrence more sosince that is not the goal of claim proceedings in the first place.

31. We may also refer to the judgment of the Hon'ble Supreme Court in **Mangla Ram Vs. Oriental Insurance Company and Others, reported in (2018) 5 SCC 656,** wherein a somewhat similar factual situation arose. The claim proceedings arising out of an accident between a motorcycle and a jeep in which the rider of the motorcycle sustained severe injuries, leading to the amputation of his right leg below the knee, came to be instituted before the tribunal. Despite disbelieving the oral evidence adduced by the witnesses examined by the claimant, the tribunal eventually ruled in favour of the claimant placing reliance on the FIR and the charge sheet filed by the police and proceeded to award compensation to the claimant. The matter, thereafter, reached the Rajasthan High Court. The High Court did not concur, taking the view that the tribunal could not have ruled in favour of the claimant by relying solely on the police record and set aside the judgment rendered by the Tribunal. The judgment delivered by the High Court was challenged by the claimant before the Supreme Court. The Supreme Court contradicted the observations of the High Court and

confirmed the findings of the tribunal notwithstanding that they were based on documents which formed part of the police record. The Hon'ble Supreme Court observed thus:-

"16. The question is: whether this approach of the High Court can be sustained in law? While dealing with a similar situation, this Court in ***Bimla Devi (supra)*** *noted the defence of the driver and conductor of the bus which inter alia was to cast a doubt on the police record indicating that the person standing at the rear side of the bus, suffered head injury when the bus was being reversed without blowing any horn. This Court observed that while dealing with the claim petition in terms of Section 166 of the Motor Vehicles Act, 1988, the Tribunal stricto sensu is not bound by the pleadings of the parties, its function is to determine the amount of fair compensation. In paragraphs 11 to 15, the Court observed thus:*

"11. ***While dealing with a claim petition in terms of Section 166 of the Motor Vehicles Act, 1988, a tribunal stricto sensu is not bound by the pleadings of the parties; its function being to determine the amount of fair compensation in the event an accident has taken place by reason of negligence of that driver of a motor vehicle. It is true that occurrence of an accident having regard to the provisions contained in Section 166 of the Act is a sine qua non for entertaining a claim petition but that would not mean that despite evidence to the effect that death of the claimant's predecessor had taken place by reason of an accident caused by a motor vehicle, the same would be ignored only on the basis of a post-mortem report visàvis the averments made in a claim petition.***

12. The deceased was a constable. Death took place near a police station. The postmortem report clearly suggests that the deceased died of a brain injury. The place of accident is not far from the police station. It is, therefore, difficult to believe the story of the driver of the bus that he slept in the bus and in the morning found a dead body wrapped in a blanket. If the death of the constable had taken place earlier, it is wholly unlikely that his dead body in a small town like Dharampur would remain undetected throughout the night particularly when it was lying at a busstand and near a police station. In such an event, the court can presume that the police officers themselves should have taken possession of the dead body.

13. The learned Tribunal, in our opinion, has rightly proceeded on the basis that apparently there was absolutely no reason to falsely implicate Respondents 2 and 3. The claimant was not at the place of occurrence.

She, therefore, might not be aware of the details as to how the accident took place but the fact that the first information report had been lodged in relation to an accident could not have been ignored.

14. Some discrepancies in the evidence of the claimant's witnesses might have occurred but the core question before the Tribunal and consequently before the High Court was as to whether the bus in question was involved in the accident or not. For the purpose of determining the said issue, the Court was required to apply the principle underlying the burden of proof in terms of the provisions of Section 106 of the Evidence Act, 1872 as to whether a dead body wrapped in a blanket had been found at the spot at such an early hour, which was required to be proved by Respondents 2 and 3.

15. In a situation of this nature, the Tribunal has rightly taken a holistic view of the matter. It was necessary to be borne in mind that strict proof of an accident caused by a particular bus in a particular manner may not be possible to be done by the claimants. The claimants were merely to establish their case on the touchstone of preponderance of probability. The standard of proof beyond reasonable doubt could not have been applied. For the said purpose, the High Court should have taken into consideration the respective stories set forth by both the parties."

(emphasis supplied)

17. The Court restated the legal position that the claimants were merely to establish their case on the touchstone of preponderance of probability and standard of proof beyond reasonable doubt cannot be applied by the Tribunal while dealing with the motor accident cases. Even in that case, the view taken by the High Court to reverse similar findings, recorded by the Tribunal was set aside. Following the enunciation in Bimla Devi's case (supra), this Court in Parmeswari (supra) noted that when filing of the complaint was not disputed, the decision of the Tribunal ought not to have been reversed by the High Court on the ground that nobody came from the office of the SSP to prove the complaint. The Court appreciated the testimony of the eyewitnesses in paragraphs 12 & 13 and observed thus:

"12. The other ground on which the High Court dismissed the case was by way of disbelieving the testimony of Umed Singh, PW 1. Such disbelief of the High Court is totally conjectural. Umed Singh is not related to the appellant but as a good citizen, Umed Singh extended his help to the appellant by helping her to reach the doctor's chamber in order to ensure that an injured woman gets medical treatment. The evidence of Umed Singh cannot be disbelieved just because he did not file a complaint himself. We are constrained to repeat our observation that the total approach of the High Court, unfortunately, was not sensitised enough to appreciate the plight of the victim.

13. The other socalled reason in the High Court's order was that as the claim petition was filed after four months of the accident, the same is "a device to grab money from the insurance company". This finding in the absence of any material is certainly perverse. The High Court appears to be not cognizant of the principle that in a road accident claim, the strict principles of proof in a criminal case are not attracted....."

18. It will be useful to advert to the dictum in ***N.K.V. Bros.(P) Ltd. Vs. M. Karumai Ammal and Others reported in (1980) 3 SCC 457,*** *wherein it was contended by the vehicle owner that the criminal case in relation to the accident had ended in acquittal and for which reason the claim under the Motor Vehicles Act ought to be rejected. This Court negatived the said argument by observing that the nature of proof required to establish culpable rashness, punishable under the IPC, is more stringent than negligence sufficient under the law of tort to create liability. The observation made in paragraph 3 of the judgment would throw some light as to what should be the approach of the Tribunal in motor accident cases. The same reads thus:*

"3. Road accidents are one of the top killers in our country, specially when truck and bus drivers operate nocturnally. This proverbial recklessness often persuades the courts, as has been observed

by us earlier in other cases, to draw an initial presumption in several cases based on the doctrine of res ipsa loquitur. Accidents Tribunals must take special care to see that innocent victims do not suffer and drivers and owners do not escape liability merely because of some doubt here or some obscurity there. Save in plain cases, culpability must be inferred from the circumstances where it is fairly reasonable. The court should not succumb to niceties, technicalities and mystic maybes. We are emphasizing this aspect because we are often distressed by transport operators getting away with it thanks to judicial laxity, despite the fact that they do not exercise sufficient disciplinary control over the drivers in the matter of careful driving. The heavy economic impact of culpable driving of public transport must bring owner and driver to their responsibility to their neighbour. Indeed, the State must seriously consider nofault liability by legislation. A second aspect which pains us is the inadequacy of the compensation or undue parsimony practised by tribunals. We must remember that judicial tribunals are State organs and Article 41 of the Constitution lays the jurisprudential foundation for State relief against accidental disablement of citizens. There is no justification for niggardliness in compensation. A third factor which is harrowing is the enormous delay in disposal of accident cases resulting in compensation, even if awarded, being postponed by several years. The States must appoint sufficient number of tribunals and the High Courts should insist upon quick disposals so that the trauma and tragedy already sustained may not be magnified by the injustice of delayed justice. Many States are unjustly indifferent in this regard."

19. In ***Dulcina Fernandes (supra),*** *this Court examined similar situation where the evidence of claimant's eye witness was discarded by the Tribunal and that the respondent in that case was acquitted in the criminal case concerning the accident. This Court, however, opined that it cannot be overlooked that upon investigation of the case registered against the respondent, prima facie, materials showing negligence were found to put him on trial. The Court restated the settled principle that the evidence of the claimants ought to be examined by the Tribunal on the touchstone of preponderance of probability and certainly the standard of proof beyond reasonable doubt could not have been applied as noted in* ***Bimla Devi (supra)****. In paragraphs 8 & 9, of the reported decision, the dictum in* ***United India Insurance Co. Ltd. Vs. Shila Datta (supra)****, has been adverted to as under:*

"8. In ***United India Insurance Co. Ltd. v. Shila Datta****, while considering the nature of a claim petition under the Motor Vehicles Act, 1988 a threeJudge Bench of this Court has culled out certain propositions of which Propositions (ii), and (vi) would be relevant to the facts of the present case and, therefore, may be extracted hereinbelow: (SCC p. 518, para 10)*

"10. (ii) The rules of the pleadings do not strictly apply as the claimant is required to make an application in a form prescribed under the Act. In fact, there is no pleading where the proceedings are suo motu initiated by the Tribunal.

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Though the Tribunal adjudicates on a claim and determines the compensation, it does not do so as in an adversarial litigation. ...

The Tribunal is required to follow such summary procedure as it thinks fit. It may choose one or more persons

possessing special knowledge of and matters relevant to inquiry, to assist it in holding the enquiry."

9. The following further observation available in para 10 of the Report would require specific note: (Shila Datta case, SCC p. 519)

"10. ... We have referred to the aforesaid provisions to show that an award by the Tribunal cannot be seen as an adversarial adjudication between the litigating parties to a dispute, but a statutory determination of compensation on the occurrence of an accident, after due enquiry, in accordance with the statute'."

In paragraph 10 of the reported decision ***[Dulcina Fernandes and Ors.*** *(supra)], the Court opined that non examination of witness per se cannot be treated as fatal to the claim set up before the Tribunal. In other words, the approach of the Tribunal should be holistic analysis of the entire pleadings and evidence by applying the principles of preponderance of probability.*

20. In the above conspectus, the appellant is justified in contending that the High Court committed manifest error in reversing the holistic view of the Tribunal in reference to the statements of witnesses forming part of the chargesheet, FIR, Jeep Seizure Report in particular, to hold that Jeep No.RST4701 driven by respondent No.2 was involved in the accident in question."

32. In the light of the foregoing analysis, we hold that the tribunal had erred in opting to ignore documents such as the FIR, the charge sheet and the site plan, which formed part of the police record. The said documents ought to have been taken into consideration by the tribunal in adjudication of the case of the claimants. In so far as the authorities relied upon by the tribunal are concerned, we humbly and respectfully disagree to the extent that the said authorities run contrary to the observations of the Hon'ble Supreme Court in **Mangla Ram (supra).**

33. The second point which falls for consideration is that if the Tribunal was correct in disbelieving the testimony of PW-2 on the ground that his name did not figure either in the FIR or the charge sheet or the hospital records?

34. An examination of the record indicates that one Chaturbhuj Shukla was examined by the claimants as PW-2 who in his deposition, had stated that on 20.07.2004, as he was on his way from Rampur to Shahjahanpur in a jeep bearing registration number UP-31/0169, he saw a truck bearing registration number GJ 1 TT 8883, which was loaded with wood, going on the wrong side and ramming into a car bearing registration number UA 06A 6970 which was coming from the opposite direction. The car in question was being driven by the deceased. The truck in question which was being driven very fast and negligently in the middle of the road suddenly veered to its right without any warning dashing into the car driven by the deceased. PW-2 further deposed that after the accident, a lot of people gathered on the spot and that he, with the help of other local people, extricated the deceased and the claimant no.1 from the wreckage and took them to Dhanwantri Tomar Hospital in Bareilly. PW-2 deposed that the accident took place at about 4 pm. Furthermore, PW-2 categorically and unequivocally deposed that the accident was caused due to the fault of the driver of the offending truck who was driving the truck rashly and negligently. The record further indicates that PW-2 was subjected to cross-examination by the counsel for the

Insurer. In the cross-examination, PW-2 revealed that he was a driver by profession and that he had brought his driving license along with him. The jeep in which he was in travelling belonged to one Shri Pal Yadav and that he was coming from Rampur and was headed to Shahjahanpur. PW-2 further revealed that he had been tailing the offending truck for 2-3 kms and that there was a distance of about 20-25 m throughout between the truck in question and the jeep he was in. He also revealed that the jeep was moving at 50 km/hour throughout. It also appears from the record that PW-2, in the cross-examination, deposed that neither did he lodged the FIR in connection with the incident nor did he give his particulars at the hospital where the deceased and the claimant no.1 were brought in for treatment. PW-2 further revealed that he did not know any of the people who gathered on the spot after the accident and that he gave his name and address in writing to the claimant no.1. PW-2 refuted the suggestion that he was not present on the spot at the time of the accident and that he did not witness the accident. He also refused the suggestion that the driver of the truck was not at fault and responsible for the accident. On overall appreciation of oral testimony of PW-2, it is clear that his version of the events that came to transpire on the fateful day was not shaken. He clearly laid the blame for the accident on the rash and negligent driving on the part of the driver of the offending truck. He steadfastly held his ground in the cross-examination and nothing could be elicited from him which could be said to have contradicted or rendered unbelievable the details of the accident as divulged by him.

35. The testimony of PW-2 was, however, disbelieved by the tribunal solely on the ground that his name did not figure either in the FIR or the charge sheet or the hospital records though PW-2 claimed to have brought the deceased and the claimant no.1 to the hospital. Further that he did not lodge an FIR which was lodged the next day by the claimant no.1 who did not even mention the name of PW-2 as a witness in the FIR. The name of PW-2 also did not figure in the list of witnesses set out in the charge sheet filed by the police after investigation. The fact that the name of PW-2 did not appear either in the hospital records or the FIR or the charge sheet, in the eyes of the tribunal, rendered his presence at the time and place of the accident doubtful and his testimony suspicious. Thus, the Tribunal discarded his testimony in toto.

36. We do not concur with the reasoning of the Tribunal.

37. Let us first deal with the absence of the name of PW-2 from the hospital records and the FIR. Does it render the testimony of PW-2 suspected and liable to be disbelieved?

38. In **Anita Sharma (supra)**, the Rajasthan High Court set aside the judgment of the Tribunal awarding compensation to the claimant, inter alia, on the ground that the eyewitness, the testimony of whom the Tribunal had relied on, could not have been believed because he had failed to report the accident to the police and because even though he asserted that he had brought the injured to the hospital the same was not borne out from the hospital records. The hospital records instead indicated that the injured was brought in by the police. The judgment of the High Court was assailed before the Supreme Court. Contradicting the reasoning of the High Court, the Supreme Court observed thus: -

"12. It is commonplace for most people to be hesitant about being involved in legal proceedings and they therefore do not volunteer to become witnesses. Hence, it is highly likely that the name of Ritesh Pandey or other persons who accompanied the injured to the hospital did not find mention in the medical record. There is nothing on record to suggest that the police reached the site of the accident or carried the injured to the hospital. The statement of AW3, therefore, acquires significance as, according to him, he brought the injured in his car to the hospital. Ritesh Pandey (AW-3) acted as a good samaritan and a responsible citizen, and the High Court ought not to have disbelieved his testimony based merely on a conjecture. It is necessary to reiterate the independence and benevolence of AW3. Without any personal interest or motive, he assisted both the deceased by taking him to the hospital and later his family by expending time and effort to depose before the Tribunal.

13. It is quite natural that such a person who had accompanied the injured to the hospital for immediate medical aid, could not have simultaneously gone to the police station to lodge the FIR. The High Court ought not to have drawn any adverse inference against the witness for his failure to report the matter to Police. Further, as the police had themselves reached the hospital upon having received information about the accident, there was perhaps no occasion for AW3 to lodge a report once again to the police at a later stage either. the turn of events at the spot, or the appellant claimants' hardship in tracing witnesses and collecting information for an accident which took place many hundreds of kilometers away in an altogether different State. Close to the facts of the case in hand, this Court in ***Parmeshwari v. Amir Chand1,*** *viewed that:*

"12. The other ground on which the High Court dismissed the case was by way of disbelieving the testimony of Umed Singh, PW 1. ***Such disbelief of the High Court is totally conjectural. Umed Singh is not related to the appellant but as a good citizen, Umed Singh extended his help to the appellant by helping her to reach the doctor's chamber in order to ensure that an injured woman gets medical treatment. The evidence of Umed Singh cannot be disbelieved just because he did not file a complaint himself. We are constrained to repeat our observation that the total approach of the High Court, unfortunately, was not sensitised enough to appreciate the plight of the victim.***

x x x

15. In a situation of this nature, the Tribunal has rightly taken a holistic view of the matter. ***It was necessary to be borne in mind that strict proof of an accident caused by a particular bus in a particular manner may not be possible to be done by the claimants.*** *The claimants were merely to establish their case on the touchstone of preponderance of probability. The standard of proof beyond reasonable doubt could not have been applied."*

39. It is clear that the Supreme Court did not concur with the approach adopted by the Rajasthan High Court in discarding the testimony of an eyewitness on the ground that he did not report the incident to the police and that his name did not appear in the hospital records even though he claimed to have brought the injured to the hospital.

40. In a telling and insightful commentary on the general tendencies of

everyday actors, the Supreme Court observed that it is very common-place that people are hesitant to give their details to the hospitals in cases of accidents for the fear of getting embroiled in tedious and cumbersome legal proceedings. The testimony of a witness, who claims to have brought the victim of an accident to the hospital, therefore, does not automatically become doubtful and suspicious simply on account of the fact that the concerned individual's name was missing from the hospital records. In fact, such a circumstance is highly likely. The Hon'ble Supreme Court also opined that it is unrealistic to expect that a person who decides to stop and help the injured by taking the injured to the hospital should also simultaneously go to the police station and lodge the FIR. Placing reliance on its judgment in the case of **Parmeshwari Vs Amir Chand, reported in (2011) 11 SCC 635,** the Supreme Court opined that an eye-witness, who helps the victim of an accident get to the hospital, acts as a good Samaritan and cannot be disbelieved simply because he did not file a complaint with the police. The decision to discard the testimony of such a witness cannot be based solely on conjecture. A holistic view of the matter must be taken without losing sight of the distress caused to the victim. It must be borne in mind that strict proof of accident is not required and the case of the victim has to be tested only according to the standard of preponderance of probabilities.

41. Applying the aforementioned guiding principles to the case at hand, we do not have any doubt that the mere omission of the name of PW-2 from the hospital records and the fact that PW-2 did not lodge an FIR, do not take away from the integrity of the testimony of PW-2 and cannot be held against him. The contrary position adopted by the tribunal cannot be countenanced.

42. PW-2, in his deposition before the Tribunal, asserted that after the accident a lot of people gathered on the spot and that he, with the help of other local people, extricated the deceased and the claimant no.1 from the wreckage and took them both to Dhanwantri Tomar Hospital in Bareilly. In the FIR, lodged the very next day after the accident, the claimant no.1 also stated that people who were nearby helped him and the deceased get to the Dhanwantri Tomar Hospital in Bareilly. There is, therefore, no disconnect or contradiction between the version in the FIR and the testimony of PW-2 as to how the deceased and the claimant no.1 were admitted to the hospital. Both indicate that the people who were nearby at the time of the accident helped the two got to the hospital. There is nothing doubtful or unbelievable per se about the assertion by PW-2 that he, with the aid of other local people, took the deceased and the claimant no.1 to the hospital. During the course of cross-examination, when confronted with the fact that his name did not appear in the hospital records, PW-2 stated that he did not give his particulars at the hospital. He was not interrogated any further on why he did not do so. PW-2 was also confronted with the fact that his name did not figure in the FIR. To that PW-2 responded that he did not lodge the FIR. Once again, he was not interrogated any further on why he did not. At this stage, we may briefly pause to take note of the importance of cross-examination. The Hon'ble Supreme Court in **Anita Sharma (supra)** has made some pertinent observations on the importance of cross-examination which may be profitably reproduced herein below: -

"20. The importance of cross-examination has been elucidated on several occasions by this Court, including by a Constitution Bench in ***Kartar Singh v. State of Punjab,*** *which laid down as follows:-*

"278. Section 137 of the Evidence Act defines what cross examination means and Sections 139 and 145 speak of the mode of crossexamination with reference to the documents as well as oral evidence. ***It is the jurisprudence of law that cross-examination is an acid test of the truthfulness of the statement made by a witness on oath in examinationinchief,*** *the objects of which are:*

a. to destroy or weaken the evidentiary value of the witness of his adversary;

b. to elicit facts in favour of the crossexamining lawyer's client from the mouth of the witness of the adversary party;

c. to show that the witness is unworthy of belief by impeaching the credit of the said witness;

and the questions to be addressed in the course of cross examination are to test his veracity; to discover who he is and what is his position in life; and to shake his credit by injuring his character.

279. The identity of the witness is necessary in the normal trial of cases to achieve the above objects and the right of confrontation is one of the fundamental guarantees so that he could guard himself from being victimised by any false and invented evidence that may be tendered by the adversary party." (emphasis supplied)

21. Relying upon ***Kartar Singh (supra),*** *in a MACT case this Court in* ***Sunita v. Rajasthan State Road Transport Corporation3*** *considered the effect of non-examination of the pillion rider as a witness in a claim petition filed by the deceased of the motorcyclist and held as follows:*

"30. Clearly, the evidence given by Bhagchand withstood the respondents' scrutiny and the respondents were unable to shake his evidence. In turn, the High Court has failed to take note of the absence of cross examination of this witness by the respondents, leave alone the Tribunal's finding on the same, and instead, deliberated on the reliability of Bhagchand's (A.D.2) evidence from the viewpoint of him not being named in the list of eye witnesses in the criminal proceedings, without even mentioning as to why such absence from the list is fatal to the case of the appellants. This approach of the High Court is mystifying, especially in light of this Court's observation [as set out in Parmeshwari (supra) and reiterated in Mangla Ram (supra)] that the strict principles of proof in a criminal case will not be applicable in a claim for compensation under the Act and further, that the standard to be followed in such claims is one of preponderance of probability rather than one of proof beyond reasonable doubt. There is nothing in the Act to preclude citing of a witness in motor accident claim who has not been named in the list of witnesses in the criminal case. ***What is essential is that the opposite party should get a fair opportunity to cross examine the concerned witness. Once that is done, it will not be open to them to complain about any prejudice caused to them. If there was any doubt to be cast on the veracity of the witness, the same should have come out in cross examination, for which opportunity was granted to the respondents by the Tribunal.***

x x x

32. The High Court has not held that the respondents were successful in challenging the witnesses' version of events, despite being given the opportunity to do so. The High Court accepts that the said witness (A.D.2) was cross examined by the respondents but nevertheless reaches a conclusion different from that of the Tribunal, by selectively overlooking the deficiencies in the respondent's case, without any proper reasoning."

(emphasis supplied)

43. In view of the above, in the absence of proper cross-examination, it cannot be assumed, based on nothing but conjecture, that the reason why PW-2 did not lodge an FIR and why his name is missing from the hospital record was that he was not present at the spot when the accident occurred and that his whole testimony is nothing but a bundle of lies. We have already noticed the observations of the Supreme Court in **Anita Sharma (supra)** that very often eyewitnesses, who come to the aid of the victims of accidents, do not give their names at hospital to avoid getting entangled in legal proceedings. It was also opined that it was unrealistic to expect that an eyewitness who stopped to help the victim get to the hospital should simultaneously also go to the police station and lodge the FIR. We have no reason to take a contrary view in the matter at hand. Nothing could be elicited from PW-2 during the course of cross-examination to persuade us otherwise.

44. We may also advert to the suggestion that claimant no.1 did not mention the name of PW-2 in the FIR even though PW-2, during the course of cross-examination, admitted to have given his name and address to the former in writing, the implication being that the testimony of PW-2 is concocted. In our opinion, this does not help the Insurer. It is well-settled that an FIR is not an encyclopedia. As such, simply because PW-2 was not mentioned by claimant no.1 in the FIR, the testimony of PW-2 cannot be rendered unbelievable.

45. Accordingly, we hold that mere absence of the name of PW-2 from the hospital records and the FIR does not render the testimony of PW-2 suspicious and liable to be disbelieved.

46. The Tribunal also found the testimony of PW-2 unreliable on the ground that his name did not find place in the list of witnesses set out in the charge sheet filed by the police. Does the testimony of an eyewitness lose credibility and is rendered suspicious and unreliable simply because he does not find place among the list of witnesses set out in the charge sheet?

47. In the case of ***Sunita Vs. Rajasthan State Transport Corporation, reported in (2019) SCC Online SC 195,*** the testimony of an eyewitness was sought to be impeached, inter alia, on the ground that his name did not find mention in the list of witnesses in the charge-sheet. The argument was, however, repelled by the tribunal. The tribunal observed that in case of an accident everybody who witnesses the accident is an eyewitness but it is not necessary that every such person may be mentioned as a witness in the charge-sheet by the police. The mere fact that such a person is not listed as a witness in the charge-sheet, in and of itself, does not render the testimony of an eyewitness suspicious and liable to be discarded. The tribunal also took notice of the fact that

during the course of cross-examination the concerned witness was not interrogated about giving statement to the police or about not having his name in the list of witnesses. If the veracity of one's testimony had to be impeached on the ground that one's name did not appear in the list of witnesses in the chargesheet, one ought to have been interrogated on that aspect for any doubt to emerge. Since the witness was not interrogated on the subject, the opportunity to weaken his testimony on that account was foregone. The Rajasthan High Court, however, took an opposite view of the matter. The fact that the name of the eyewitness did not appear in the list of witnesses in the chargesheet, in the opinion of the High Court, rendered the testimony of the witness suspicious and liable to be disbelieved. The Supreme Court, however, sided with the tribunal and did not concur with the approach of the High Court. While observing that the tribunal had dealt with the matter "substantially' and "correctly', the Supreme Court termed the approach of the High Court "mystifying'. The Supreme Court faulted the High Court for not only failing to provide reasons as to why absence from the list of witnesses in the charge-sheet was fatal but also for failing to notice the absence of cross-examination on the issue. The relevant observations of the Supreme Court are extracted hereunder: -

"27. The next question is whether the purported shortcomings in the evidence of Bhagchand Khateek (A.D.2) and the lack of evidence of the pillion rider on the motorcycle, Rajulal Khateek, would be fatal to the appellants' case. As regards the evidence of Bhagchand, the High Court found that the deposition of the said witness was unreliable because his name was not mentioned in the list of witnesses in the criminal proceedings and also because he was unable to tell the age of the pillion rider. Besides, the said witness lived in Pakhala village, which was 3 (three) kilometres away from the accident spot and hence, he could not have been near the said spot when the accident occurred. The Tribunal had dealt with these objections quite substantially and, in our opinion, correctly, in its judgment, wherein it records:

"In the present case the petitioners have got examined the eye-witness A.D.2 Bhag Chand son of Ram Dev. ***Admittedly the name of the witness Bhag Chand is not mentioned in the list of witnesses in exhibit2 charge sheet but if the interrogation with this witness is perused then the opponent in order of not considering this witness as eyewitness, has not asked about giving police statement or not having his name in the list of witnesses.*** *The witness A.D.2 Bhag Chand Khateek, in interrogation on behalf of opponents has accepted this that he neither knows Banwari nor after the incident he has seen Banwari.*

During interrogation the statement of the witness has been that I was near the place of incident itself. That time I was returning after relieving myself. ***The argument of the opponents has been that the witness Bhag Chand is resident of village Pakhala whereas the place of incident is at distance of 3 k.m. therefore, the statement of going to toilet is false. Therefore, he should not be considered eyewitness. But the witness A.D.2 Bhag Chand Khateek has stated in his main statement that one day from dated 28.10.2011, he had come to his brother's house at village Shivad. In such a Situation, in our humble opinion, the***

witness being at a distance of 3 k.m. from spot of incident, being resident of Pakhala village, this cannot be considered that this witness would not be considered eye-witness.

Whereas there is question of his name not being in the chargesheet as witness, definitely due to this fact, each such witness cannot be considered eyewitness who gives little statement about incident. ***But the evidence which the witness A.D.2 Bhag Chand Khateek has given on oath, in order to prove that distrust worthy, the opponents have not done any such interrogation from which there is suspicion in the statements of witness. The witness Bhag Chand Khateek was not even this suggestion that his police statement was not taken or the police had not interrogated him. In our humble opinion, in cases like accident occurring suddenly, the persons present near the place of incident are eyewitness of the incident. But during investigation this is not necessary that the investigation agency should name all the eyewitnesses as witness in the charge sheet. Therefore, the statement of witness A.D.2 Bhag Chand Khateek cannot be considered distrust worthy that his name in the charge sheet is not mentioned as witness."***

(emphasis supplied)

28. Clearly, the evidence given by Bhagchand withstood the respondents' scrutiny and the respondents were unable to shake his evidence. In turn, the High Court has failed to take note of the absence of cross examination of this witness by the respondents, leave alone the Tribunal's finding on the same, and instead, deliberated on the reliability of Bhagchand's (A.D.2) evidence from the viewpoint of him not being named in the list of eye witnesses in the criminal proceedings, without even mentioning as to why such absence from the list is fatal to the case of the appellants. This approach of the High Court is mystifying, especially in light of this Court's observation [as set out in ***Parmeshwari*** *(supra) and reiterated in* ***Mangla Ram*** *(supra)] that the strict principles of proof in a criminal case will not be applicable in a claim for compensation under the Act and further, that the standard to be followed in such claims is one of preponderance of probability rather than one of proof beyond reasonable doubt. There is nothing in the Act to preclude citing of a witness in motor accident claim who has not been named in the list of witnesses in the criminal case. What is essential is that the opposite party should get a fair opportunity to cross examine the concerned witness. Once that is done, it will not be open to them to complain about any prejudice caused to them. If there was any doubt to be cast on the veracity of the witness, the same should have come out in cro*ss examination, for which opportunity was granted to the respondents by the Tribunal."

48. In light of the above, it is untenable to contend that the testimony of a witness who claims to have seen the accident is liable to be disbelieved on the ground that he is not cited as a witness in the charge-sheet filed by the investigating agency. Even otherwise, it is not necessary for the investigating agency to mention the name of every person who may have witnessed the accident in the list of witnesses in the charge-sheet. Everybody who witnesses the accident is an eyewitness notwithstanding whether his or her name appeared in the list of witnesses in the charge-sheet or not. Therefore, simply because one is not cited as a witness in the charge-sheet does not automatically

render his testimony suspicious and liable to be disbelieved.

49. Accordingly, we have no hesitation is observing that the Tribunal committed an error in discarding the testimony of the PW-2 as suspicious on the ground that his name was not mentioned in the list of witnesses in the charge-sheet. We may also take note of the absence of any suggestion to PW-2 during the course of cross-examination about his name not having been mentioned in the list of witnesses in the charge-sheet. It cannot be ignored that PW-2 was not interrogated about the very aspect, which, it is contended, cuts at the root of his testimony and undermines its integrity. The Insurer had ample opportunity to interrogate PW-2 about non-inclusion of his name in the list of witnesses in the charge-sheet but the opportunity was foregone. The tribunal erred in not taking into account the same.

50. In conclusion, on the point whether the Tribunal was correct in discarding the testimony of PW-2 as unbelievable, a discordant note must be struck. We hold that none of the reasons recorded by the Tribunal to justify its decision to disbelieve the testimony of PW-2 withstand scrutiny and are, accordingly, overruled.

51. The third point which falls for consideration is whether the claimants satisfactorily discharged the burden to prove the factum of the accident and negligence on the part of the driver of the offending vehicle.

52. In the case of ***U.P.S.R.T.C. Vs. Km. Mamta and Others,*** reported in ***AIR 2016 SC 948,*** the Supreme Court, after discussing the powers of the first appellate court under Section 96 of Code of Civil Procedure, 1908, held that an appeal under Section 173 of the Act, 1988 is essentially in the nature of an appeal under Section 96 of the Code of Civil Procedure, 1908. The relevant observations of the Hon'ble Supreme Court are extracted hereunder-

"14) The powers of the first appellate Court while deciding the first appeal are indeed well defined by various judicial pronouncements of this Court and are, therefore, no more res integra.

15) As far back in 1969, the learned Judge - V.R. Krishna Iyer, J (as His Lordship then was the judge of Kerala High Court) while deciding the first appeal under Section 96 of the CPC in Kurian Chacko vs. Varkey Ouseph, AIR 1969 Kerala 316, reminded the first appellate court of its duty to decide the first appeal. In his distinctive style of writing with subtle power of expression, the learned judge held as under:

"1. The plaintiff, unsuccessful in two Courts, has come up here aggrieved by the dismissal of his suit which was one for declaration of title and recovery of possession. The defendant disputed the plaintiff's title to the property as also his possession and claimed both in himself. The learned Munsif, who tried the suit, recorded findings against the plaintiff both on title and possession. But, in appeal, the learned Subordinate Judge disposed of the whole matter glibly and briefly, in a few sentences.

2. An appellate court is the final Court of fact ordinarily and therefore a litigant is entitled to a full and fair and independent consideration of the evidence at the appellate stage. Anything less than

this is unjust to him and I have no doubt that in the present case the learned Subordinate Judge has fallen far short of what is expected of him as an appellate Court. Although there is furious contest between the counsel for the appellant and for the respondent, they appear to agree with me in this observation....."

(Emphasis supplied)

16) This Court also in various cases reiterated the aforesaid principle and laid down the powers of the appellate Court under Section 96 of the Code while deciding the first appeal.

17) We consider it apposite to refer to some of the decisions.

18) In Santosh Hazari vs. Purushottam Tiwari (Deceased) by L.Rs. (2001) 3 SCC 179, this Court held (at pages 188-189) as under:

".....the appellate court has jurisdiction to reverse or affirm the findings of the trial court. First appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court.....while reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it "

19) The above view was followed by a three-Judge Bench decision of this Court in Madhukar & Ors. v. Sangram & Ors.,(2001) 4 SCC 756, wherein it was reiterated that sitting as a court of first appeal, it is the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings.

20) In H.K.N. Swami v. Irshad Basith,(2005) 10 SCC 243, this Court (at p. 244) stated as under: (SCC para 3)

"3. The first appeal has to be decided on facts as well as on law. In the first appeal parties have the right to be heard both on questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons. Unfortunately, the High Court, in the present case has not recorded any finding either on facts or on law. Sitting as the first appellate court it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording the finding regarding title."

21) Again in Jagannath v. Arulappa & Anr., (2005) 12 SCC 303, while considering the scope of Section 96 of the Code of Civil Procedure, 1908, this Court (at pp. 303-04) observed as follows: (SCC para 2)

"2. A court of first appeal can reappreciate the entire evidence and come to a different conclusion"

22) Again in B.V Nagesh & Anr. vs. H.V. Sreenivasa Murthy, (2010) 13 SCC 530, this Court taking note of all the earlier judgments of this court reiterated the aforementioned principle with these words:

"3. How the regular first appeal is to be disposed of by the appellate court/High Court has been considered by this Court in various decisions. Order 41 CPC deals with appeals from original decrees. Among the various rules, Rule 31 mandates that the judgment of the appellate court shall state:

(a) the points for determination;

(b) the decision thereon;

(c) the reasons for the decision; and

(d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled.

4. The appellate court has jurisdiction to reverse or affirm the findings of the trial court. The first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. Sitting as a court of first appeal, it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings. The first appeal is a valuable right and the parties have a right to be heard both on questions of law and on facts and the judgment in the first appeal must address itself to all the issues of law and fact and decide it by giving reasons in support of the findings. (Vide Santosh Hazari v. Purushottam Tiwari, (2001) 3 SCC 179 at p.188, para 15 and Madhukar v. Sangram, (2001) 4 SCC 756 at p. 758, para 5.)

5. In view of the above salutary principles, on going through the impugned judgment, we feel that the High Court has failed to discharge the obligation placed on it as a first appellate court. In our view, the judgment under appeal is cryptic and none of the relevant aspects have even been noticed. The appeal has been decided in an unsatisfactory manner. Our careful perusal of the judgment in the regular first appeal shows that it falls short of considerations which are expected from the court of first appeal. Accordingly, without going into the merits of the claim of both parties, we set aside the impugned judgment and decree of the High Court and remand the regular first appeal to the High Court for its fresh disposal in accordance with law."

23) The aforementioned cases were relied upon by this Court while reiterating the same principle in State Bank of India & Anr. vs. Emmsons International Ltd. & Anr., (2011) 12 SCC 174.

24) An appeal under Section 173 of the M.V. Act is essentially in the nature of first appeal alike Section 96 of the Code and, therefore, the High Court is equally under legal obligation to decide all issues arising in the case both on facts and law after appreciating the entire evidence. [See National Insurance Company Ltd. vs. Naresh Kumar & Ors. ((2000) 10 SCC 198 and State of Punjab & Anr. vs. Navdeep Kuur & Ors. (2004) 13 SCC 680].

53. As such, having recorded our disapproval of the approach adopted by the tribunal, it is incumbent on us as the court of first appeal to consider the matter in the correct perspective and record our findings after an independent examination of the record.

54. The burden on the claimants was to establish, on the standard of preponderance of probabilities- (a) the factum of the accident and (b) that the accident was caused by the negligence on the part of the driver of the offending truck.

55. We may begin by scrutinizing the documentary evidence adduced by the claimants.

56. We have already held that the Tribunal erred in ignoring documents such as the FIR, site plan, charge sheet, etc., brought on record by the claimants. Said

documents, therefore, shall be taken into consideration by us.

57. A certified copy of the FIR lodged by the claimant no.1 is on record. The FIR was lodged on 21.07.2004, a day after the accident which took place on 20.07.2004, naming Raj Kishore, the driver of the offending truck as the culprit. There is, therefore, no delay much less undue delay in registration of the FIR. The FIR reads that on 20.07.2004, a truck bearing registration number GJ-1-TT-8883, driven rashly and negligently by one Raj Kishore, rammed into the car bearing registration number UA-06A/6970 in which the deceased and the claimant no.1 were travelling and which was being driven by the deceased. The accident took place at around 4 pm. The deceased and the claimant no.1 were headed to Pant Nagar from Bareilly via Rampur on the Delhi Road. The car was severely damaged on the right-hand side. Both the car and the truck were at the site of the accident. People who were nearby helped the deceased and the claimant no.1 get to the Dhanwantri Tomar Hospital in Bareilly but the deceased could not be saved and breathed his last.

58. The FIR attested to the factum of the accident. It is also categorically alleged in the FIR that the driver of the offending truck was driving rashly and negligently. The fact that the FIR was lodged promptly without any undue delay lends it a veneer of believability. Though, we may not say just yet that the factum of the accident and the negligence on the part of the driver stand proved and must wait for more corroborating evidence.

59. Certified copy of the post mortem report dated 21.07.2004 is also on record. It records multiple ante-mortem injuries on the body of the deceased. The cause of death is recorded as shock and hemorrhage due to ante-mortem injuries.

60. The post mortem report clearly bears out the recital contained in the FIR. The number and nature of injuries recorded in the post mortem report strongly point to the deceased having met with an accident lending credence to the allegations contained in the FIR.

61. A copy of the site plan dated 22.07.2004 is also on record. It appears from the site plan that the truck veered to its right and rammed into the right-hand side of the car driven by the deceased which was coming from the opposite direction. The truck and the car were found at the site of the accident and the front right wheel of the truck had come off.

62. Site plan clearly points to an accident. It also hints at the fault of the driver of the offending truck, inasmuch as, it indicates that it was the truck that veered from its path causing the accident. The impact appears to have caused the front right wheel of the offending truck to come off.

63. Also on record is the certified copy of the charge-sheet dated 06.08.2004 filed by the police, under Sections 279, 304A and 427 IPC, against Raj Kishore, the driver of the offending truck.

64. The submission in the charge sheet against the driver of the offending truck undoubtedly bolsters the allegations contained in the FIR. It reinforces that not only did the accident occur but that the driver of the offending truck was at fault. The police after investigation and based on

statements of multiple witnesses who are cited in the charge sheet have found that a case for criminal prosecution under Sections 279, 304A and 427 IPC was made out.

65. It is noteworthy that nothing has been brought on record to indicate that either the FIR or the charge sheet have been challenged before any forum. No attempt has been made to impeach the veracity of the FIR or the charge sheet. In fact, the authenticity of none of the above noted documents had been called into question. We may also note that certified copies of the FIR, the post mortem report and the charge sheet were brought on record. Under Section 79 of the Evidence Act, 1872, a presumption of genuineness is attached to such copies, which the Insurer could not dislodge. Additionally, it is not contended that the claimants acted out of malice or mala fide. No animus or bad blood is alleged. The claimants had no reason to falsely implicate the driver of the offending truck.

66. We now turn to the oral evidence led by the claimants which include depositions of the claimant no.2(PW-1) and one Chaturbhuj Shukla (PW-2).

67. The testimony of claimant no.2(PW-1) was ignored by the tribunal on the ground that she was admittedly not an eyewitness. PW-2 claimed to be an eyewitness. The tribunal, however, found his presence at the site of the accident doubtful and discarded his testimony. We have already held that the reasons recorded by the Tribunal to discard the testimony of PW-2 are unsustainable. We, therefore, proceed to examine the testimony of PW-2.

68. It is not necessary to re-state the testimony of PW-2 in entirety since we have already done so earlier. Briefly stated, PW-2 testified that on 20.07.2004, while on the way from Rampur to Shahjahanpur in a jeep, he witnessed the offending truck, which was ahead by 20-25 m, suddenly veered to its right and rammed into the car which was being driven by the deceased and was coming from the opposite direction. PW-2 categorically pinned the blame for the incident on the driver of the offending truck, who, PW-2 stated, was driving the truck very rashly and negligently in the middle of the road. PW-2 also testified that he, with the help of other people, extricated the deceased and the claimant no.1 from the wreckage and helped them get to the hospital.

69. During cross-examination, PW-2 repulsed the suggestion that he was not present at the spot when the accident took place. He also repelled the suggestion that the driver of the offending truck was not at fault.

70. We may also note that during cross-examination, PW-2 revealed that he had been travelling behind the offending truck for about 2-3 km, maintaining a distance of 20-25 m all along. PW-2 also revealed that he was moving at a speed of 50km/hr throughout. The said line of questioning appears to be geared to suggest that the offending truck was not speeding. Since the jeep PW-2 was in, was moving at 50 km/hr while maintaining a distance of 20-25m all along, the offending truck, it was sought to be implied, could not have been moving much faster than the jeep itself or else it would have pulled away. The suggestion is that the offending truck

was not over-speeding and, therefore, it could not be said that it was being driven rashly and negligently, implication being that the testimony of PW-2 stands contradicted.

71. We are not impressed. Rash and negligent driving does not always equate to over-speeding. Even though one may be driving within the speed limit, it is conceivable that one may still be driving rashly and negligently. We may profitably refer to the observations of the Supreme Court in the case of **Ravi Kapur V. State of Rajasthan, reported in (2012) 9 SCC 984,** to substantiate our point. The Hon'ble Supreme Court observed thus: -

"10. In order to examine the merit or otherwise of contentions (b) and (c) raised on behalf of the appellant, it is necessary for the Court to first and foremost examine (a) what is rash and negligent driving; and (b) whether it can be gathered from the attendant circumstances. Rash and negligent driving has to be examined in light of the facts and circumstances of a given case. It is a fact incapable of being construed or seen in isolation. It must be examined in light of the attendant circumstances. A person who drives a vehicle on the road is liable to be held responsible for the act as well as for the result. It may not be always possible to determine with reference to the speed of a vehicle whether a person was driving rashly and negligently. Both these acts presuppose an abnormal conduct. ***Even when one is driving a vehicle at a slow speed but recklessly and negligently, it would amount to ''rash and negligent driving' within the meaning of the language of Section 279 IPC.*** *That is why the legislature in its wisdom has used the words "manner so rash or negligent as to endanger human life'. The preliminary conditions, thus, are that (a) it is the manner in which the vehicle is driven; (b) it be driven either rashly or negligently; and (c) such rash or negligent driving should be such as to endanger human life. Once these ingredients are satisfied, the penalty contemplated under Section 279 IPC is attracted."* (emphasis supplied)

72. As such, even if it is accepted that the offending truck was not over-speeding, it does not imply automatically that it was not being driven rashly and negligently. Failure to exercise due care and caution while driving, even when within speed limit, would still constitute rash and negligent driving. Thus, even if it is accepted that the offending truck was not over-speeding, it is not enough to contradict and render doubtful the testimony of PW-2.

73. Overall, it appears to us that the testimony of PW-2, about the events which transpired on the fateful day, could not be shaken and remained intact. He held his ground in cross-examination and nothing could be elicited from him which could be said to render his testimony contradictory or liable to be disbelieved. It is also noteworthy that there is nothing on record to indicate that the testimony of PW-2 was motivated by ulterior motives or that his actions were prompted by anything other than a sense of moral and civic duty. PW-2 had no reason to falsely implicate the driver of the offending truck. There is no allegation that PW-2 had colluded with the claimants and was siding with them. No interrogation along that line was done during cross-examination. We, therefore, find the testimony of PW-2 believable.

74. On a holistic appreciation of the testimony of PW-2 along with the

documentary evidence including the FIR, post-mortem report, charge-sheet and the site plan, we have no hesitation in holding that it appears more probable than not that not only did the accident take place but that it was caused by rash and negligent driving on the part of the driver of the offending truck.

75. Accordingly, we hold that when examined against the standard of preponderance of probabilities, the claimants have proved both the factum of the accident and the negligence on the part of the driver of the offending truck.

76. The fourth point which falls for consideration by this Court is whether the Tribunal was justified in holding that there was contributory negligence on the part of the deceased.

77. The Tribunal apportioned the fault for the accident equally between both the deceased and the driver of the offending truck. The Tribunal observed that though the burden to prove the factum of the accident was on the claimants, they did not examine any "actual' eyewitness to the accident. The Tribunal further observed that though the burden to prove negligence on the part of the deceased was on the Insurer which could have been discharged by examining the driver of the offending truck, the Insurer failed to do so. As such, the Tribunal thought it fit to assume that both the deceased and the driver of the offending truck were equally at fault. Furthermore, the conclusion that both drivers were at fault was also sought to be justified by referring to the record, which, the Tribunal observed, revealed that both the vehicles involved in the accident were four-wheelers and the accident resulted from a head on collision and that the deceased sustained injuries in the accident which ultimately led to his death, thereby, indicating that both the drivers were to blame.

78. To our mind, the reasons recorded by the Tribunal to hold that the deceased and the driver of the offending truck were both at fault for the accident are entirely unsustainable.

79. The Tribunal took an adverse view of the fact that the claimants examined PW-2, who was purportedly not an "actual' eyewitness as his presence at the spot when the accident occurred was found doubtful by the tribunal, even though the claimants had the option to examine other "actual' eyewitnesses cited in the charge-sheet filed by the police. The Tribunal had found the testimony of PW-2 suspicious and liable to be disbelieved because even though he claimed to have witnessed the accident and to have taken the deceased and the claimant no.1 to the hospital, his name did not figure either in the FIR or in the list of witnesses set out in the chargesheet or in the hospital records.

80. We have already held that the Tribunal was not correct in disbelieving the testimony of PW-2 as suspicious and unreliable. On an independent examination, we have found the testimony of PW-2 reliable. As such, the very foundation of the charge against the claimants that they did not examine an "actual' eyewitness is taken away rendering the finding of contributory negligence unsustainable.

81. The other reasons advanced by the Tribunal merit notice only to be rejected. It

was observed that the record indicated that at the time of the accident the deceased was driving the car and that he sustained injuries in the accident leading to his death. It was contended that it was, therefore, reasonable to assume that both drivers were at fault. We absolutely fail to understand the logic. How exactly does negligence on the part of the deceased stand established by the fact that the deceased was driving the car at the time of the accident and that he sustained injuries and later died, eludes us. It was also observed that both the vehicles involved in the accident were four-wheelers and were involved in a head-on collision indicating that there was negligence on the part of both the drivers. We yet again fail to see the connection. Not to mention that the record indicates that the offended truck veered from its path and rammed into the side of the car, which can't be labelled a head-on collision. We, therefore, have no doubt in our mind that the reasons recorded by the Tribunal for holding that the deceased was also at fault for the accident are entirely unsustainable.

82. We may also advert to the authorities placed before us by the learned counsel for the claimants to assail the finding of the tribunal that there was contributory negligence on the part of the deceased. Reliance was placed on **Pramod Kumar Rasikbhai Jhaveri V. Karmasey Kunvargi Tak [2002 (6) SCC 155], Mohammed Siddique & Another V. National Insurance Company Ltd. & Others [2020 (3) SCC 57] and Jiju Kuruvila & Others V. Kunjujamma Mohan & Others [2013 (9) SCC 166].**

83. In **Pramod Kumar Rasikbhai Jhaveri (supra)**, the Supreme Court has held that *''the question of contributory negligence arises when there has been some act or omission on the claimants part, which has materially contributed to the damage caused, and is of such a nature that it may properly be described as negligence'*. In **Mohammed Siddique (supra)**, the Supreme Court held that *''where, but for the violation of the law, either the accident could have been averted or the impact could have been minimized, that the principle of contributory negligence could be invoked'*. In **Jiju Kuruvila (supra),** the Supreme Court observed that *''in the absence of any direct or corroborative evidence, no conclusion can be drawn as to whether there was negligence on the part of the driver'*.

84. A scrutiny of the record, bearing in mind the aforesaid authorities, reveals that besides a bald assertion in the written statement that the deceased was himself at fault for the accident, no evidence was adduced by the Insurer to substantiate said contention. In fact, not only was no evidence led on this aspect, the Insurer also failed to interrogate the witnesses led by the claimants on the aspect. Not once was it suggested either to PW-1 (claimant no.2) or PW-2 that the accident was caused by negligence on the part of the deceased himself. Said failure on the part of the Insurer must be read as a tacit admission that there was in fact no negligence on the part of the deceased.

85. Accordingly, we hold that the Tribunal was not justified in attributing contributory negligence to the deceased. The inference that both the deceased and the driver of the offending truck were equally at fault for the accident is unsustainable and untenable. We have undertaken an independent scrutiny of the record but have nothing to persuade us to take the view that there was contributory

negligence on the part of the deceased. We, therefore, hold that there was no contributory negligence on the part of the deceased.

86. The fourth and last point which falls for consideration by this Court concerns the quantum of compensation awarded by the Tribunal? Is the compensation correctly computed? Is the compensation just?

87. Both parties have faulted the computation of compensation as carried out by the Tribunal albeit on distinct grounds. Scrutiny is, therefore, warranted.

88. The steps which are to be followed in determination of compensation in claim proceedings arising out of motor vehicle accidents were clearly laid out by the Supreme Court in the case of **United India Insurance Co. Ltd. V. Satinder Kaur @ Satwinder Kaur and Others, reported in AIR 2020 SC 3076**. The Supreme Court observed thus: -

8. Relevant principles for assessment of compensation in cases of death as evolved by judicial dicta.

The criteria which are to be taken into consideration for assessing compensation in the case of death, are : (i) the age of the deceased at the time of his death; (ii) the number of dependants left behind by the deceased; and (iii) the income of the deceased at the time of his death.

In *Sarla Verma & Ors. v. Delhi Transport Corporation & Anr.*, this Court held that to arrive at the loss of dependency, the tribunal ought to take into consideration three factors :-

i) Additions/deductions to be made for arriving at the income;

ii) The deduction to be made towards the personal living expenses of the deceased; and

iii) The multiplier to be applied with reference to the age of the deceased. In order to provide uniformity and consistency in awarding compensation, the following steps are required to be followed :-

"Step 1 (Ascertaining the multiplicand)

The income of the deceased per annum should be determined. Out of the said income a deduction should be made in regard to the amount which the deceased would have spent on himself by way of personal and living expenses. The balance, which is considered to be the contribution to the dependant family, constitutes the multiplicand.

Step 2 (Ascertaining the multiplier)

Having regard to the age of the deceased and period of active career, the appropriate multiplier should be selected. This does not mean ascertaining the number of years he would have lived or worked but for the accident. *Having regard to several imponderables in life and economic factors, a table of multipliers with reference to the age has been identified by this Court. The multiplier should be chosen from the said table with reference to the age of the deceased.*

Step 3 (Actual calculation)

The annual contribution to the family (multiplicand) when multiplied by such multiplier gives the 'loss of dependency' to the family. Thereafter, a conventional amount in the range of Rs. 5,000/- to Rs. 10,000/- may be added as loss of estate. Where the deceased is

survived by his widow, another conventional amount in the range of 5,000/- to 10,000/- should be added under the head of loss of consortium. But no amount is to be awarded under the head of pain, suffering or hardship caused to the legal heirs of the deceased.

The funeral expenses, cost of transportation of the body (if incurred) and cost of any medical treatment of the deceased before death (if incurred) should also be added." (emphasis supplied)

89. With the aforesaid observations as our guiding light, we now proceed to examine whether the compensation determined by the Tribunal is just and proper and if not what quantum of compensation are the claimants entitled to.

90. The first step in determination of compensation is ascertaining the multiplicand. The multiplicand is income of the victim less amount to be deducted towards personal and living expenses. So in order to arrive at the multiplicand, the income of the victim and the amount to be deducted towards personal and living expenses are to be computed.

91. Let us first deal with the question of income of the deceased.

92. According to the claimants, at the time of the accident, the deceased was a final year MBA student at ICFAI, Hyderabad. Moreover, the deceased was also in the part time employment of one M/S Ivy Comptech, Hyderabad and was earning Rs.13,080/- as monthly pay. As per the claimants, the deceased was a "very promising young man and would have been absorbed by a big corporate house on very high salary of over Rs.50,000/- per month initially with further rise'.

93. As evidence, the claimants brought on record the original copy of the appointment letter dated 24.07.2003 issued to the deceased by M/S Ivy Comptech, Hyderabad along with the original copy of salary slip for the month of June, 2004. Additionally, the claimant no.2 entered the witness box and deposed that the deceased, at the time of the accident, was a final year MBA student and was working for M/S Ivy Comptech, earning Rs.18,000/- as monthly pay. Claimant no.2 was cross-examined. During the course of cross-examination, claimant no.2 revealed that the claimants had paid Rs. 3 lacs in fees for the MBA course which the deceased was pursuing. When confronted with the suggestion that the deceased was not doing MBA at the time of the accident, the claimant no.2 held steadfast and repulsed the suggestion. She also rebuffed the suggestion that the deceased was not in the employment of M/S Ivy Comptech and that she had lied about the income of the deceased. No further interrogation was done on the subject and nothing contradictory could be elicited. No evidence to the contrary was brought on record by the Insurer. Importantly, the veracity of the appointment letter and pay slip could not be questioned.

94. Scrutiny of the record reveals that the appointment letter bears the signature of one Sanjay Ratha, who, it appears, was the Manager-HR at M/S Ivy Comptech, when the deceased was appointed to said company. The pay slip bears no endorsement and appears to be a system-generated document, carrying a note at the bottom which reads "Please Send Your Queries to info @india-life.com'. It was not for a moment contended that said documents were forged or fabricated and, thus, liable to be disbelieved.

95. To our mind, when considered together, the testimony of the claimant no.2 along with the appointment letter and the pay slip brought on record, are sufficient to establish that the deceased, at the time of the accident, was a final year MBA student and was employed with M/S Ivy Comptech on a monthly salary of Rs.13,080/-. The appointment letter, the original copy whereof is on record, is duly signed by one Sanjay Ratha, Manager-HR. The veracity of the document was not questioned. It is not the case of Insurer that the signature on the document is forged. The pay slip is not endorsed but it is a system-generated copy and it is common knowledge that such system generated copies ordinarily do not bear endorsement and are meant only for informational purposes. Thus, the pay slip is not rendered suspect simply because it bears no endorsement. At any rate, the Insurer did not contend that the pay slip was fabricated. In cross-examination, suggestion to the effect that the deceased was not an MBA student and that he was not employed when the accident took place was repulsed by the claimant no.2. The suggestion that she was lying about the income of the deceased was also repulsed by her. Nothing contradictory could be elicited from her. The record reveals that not once was it suggested to the claimant no.2 that the appointment letter and the pay slip were forged. By failing to do so, the opportunity to cast a cloud of doubt over the authenticity of documents in question was foregone. Under the circumstances, we are inclined to take the view that it stood proved that the deceased, at the time of the accident, was a final year MBA student and in employment of M/S Ivy Comptech, Hyderabad on a monthly pay of Rs.13,080/-.

96. A perusal of the judgment of the Tribunal reveals that the failure on the part of the Insurer to question the veracity of the appointment letter and the pay slip brought on record by the claimants weighed on the mind of the Tribunal which proceeded to determine the income of the deceased based on the pay slip. The Tribunal noted that as per the pay slip in question, the deceased was earning a monthly sum of Rs.13,080/-, which included Rs.5,500/- in basic pay, Rs.1700/- in dearness allowance, Rs.800/- in transportation allowance, Rs.2200/- in house rent allowance, Rs.1000/- in medical allowance, Rs.1,100/- in lunch allowance and Rs.780/- in LTA. The Tribunal further observed that for the purpose of quantification of compensation only basic pay and dearness allowance were liable to be construed as income. The income of the deceased was, therefore, taken to be Rs.7200 per month (Rs.5500/- in basic pay + Rs. 1700 in dearness allowance), which worked out to Rs.86,400/- per annum.

97. We do not concur.

98. In claim proceedings arising out of motor vehicle accidents involving students, notional income is required to be determined. In the case of **Kirti V. Oriental Insurance Co. Ltd., reported in 2021 SCC OnLine SC 3**, the Supreme Court delineated two categories of cases where the Court is called upon to determine notional income of the victim. The Supreme Court observed thus: -

"2. There are two distinct categories of situations wherein the Court usually determines notional income of a victim. The first category of cases relates to

those wherein the victim was employed, but the claimants are not able to prove her actual income, before the Court. In such a situation, the Court "guesses" the income of the victim on the basis of the evidence on record, like the quality of life being led by the victim and her family, the general earning of an individual employed in that field, the qualifications of the victim, and other considerations.

3. The second category of cases relates to those situations wherein the Court is called upon to determine the income of a nonearning victim, such as a child, a student or a homemaker. Needless to say, compensation in such cases is extremely difficult to quantify.

4. The Court often follows different principles for determining the compensation towards a nonearning victim in order to arrive at an amount which would be just in the facts and circumstances of the case. Some of these involve the determination of notional income. Whenever notional income is determined in such cases, different considerations and factors are taken into account. For instance, for students, the Court often considers the course that they are studying, their academic proficiency, the family background, etc., to determine and fix what they could earn in the future. [See M. R. Krishna Murthi v. New India Assurance Co. Ltd., 2019 SCC OnLine SC 315]"

99. As such, in the case at hand notional income of the deceased, who was a final year
MBA student, had to be determined.

100. In **M. R. Krishnamurthy V. The New India Assurance Co. Ltd., reported in 2019 SCC OnLine SC 315,** the Supreme Court has dealt with the issue of determination of notional income students in depth. Said case entailed assessment of compensation in a motor vehicle accident claim case involving a school-going student who was not earning anything. After adverting to multiple judgments, the Supreme Court culled out certain principles for determination of notional income of students, observing thus-

"23) From the conjoint reading of the aforesaid judgments, inter alia, following principles can be culled out which would be relevant for deciding the instant appeal:

(i) In those cases where the victim of the accident is not an earning person but a student, while assessing the compensation for loss of future earning, the focus of the examination would be the career prospect and the likely earning of such a person in future. For example, where the claimant is pursuing a particular professional course, the poser would be: what would have been his income had he joined a service commensurating with the said course. That can be the future earning.

(ii) There may be cases where the victim is not, at that stage, doing any such course to get a particular job. He or she may be studying in a school. In such a case, future career would depend upon multiple factors like the family background, choice/interest of the complainant to pursue a particular career, facilities available to him/her for adopting such a career, the favourable surrounding circumstances to see which would have enabled the claimant to successfully pick up the said career etc. If the chosen field is employment, then the future earning can be taken on the basis of salary and allowances which are payable for such calling. In case,

career is a particular profession, the future earning would depend on host of other factors on the basis of which chances to achieve success in such a profession can be ascertained.

(iii) ***There may be cases like Deo Patodi where even a student, the claimant would have made earnings on part-time basis or would have received offer for a particular job. In such cases, these factors would also assume relevance.***

(iv) After ascertaining the likely earning of the victim in the aforesaid manner, the nature of injuries and disability suffered as a result thereof would be kept in mind while determining as to how much earning has been affected thereby. Here, impact of injuries on functional disability is to be seen. In case of death of victim, it would result in total loss of earning. In the case of injuries, the nature of disability becomes important. Such an exercise was undertaken in N. Manjegowda case."

101. It is clear that notional income of the deceased was required to be ascertained by factoring in loss of future earnings. The deceased was an MBA student. It was required to be assessed as to what the deceased could have earned had he not tragically died in the accident and had gone on to complete his MBA and got a job thereafter. Relevant factors to consider were the academic record, job prospects, etc. The fact that the deceased was earning Rs.13,080/- in monthly pay in a part-time job even before completing MBA was also a relevant consideration.

102. In computing the income of the deceased, the Tribunal did not appreciate the fact that the information that the deceased was earning Rs.13,080/- in monthly pay in a part-time job was only meant to be an input. The Tribunal did not appreciate that based on said input, supplemented by other relevant considerations, a holistic analysis was required to be undertaken so as to make a logical and meaningful extrapolation to arrive at the notional income of the deceased. Instead, the basic pay and dearness allowance components of the salary of the deceased were simply added to arrive at the income of the deceased. Other components were ignored claiming they were not relevant and were not liable to be construed as income. No reasons were provided as to why not. We have no hesitation in stating that the approach of the Tribunal was not correct. As a result, it falls on us to determine the notional income of the deceased in consonance with the principles spelt out by the Supreme Court in **M. R. Krishnamurthy (supra)**. We may note that the learned counsel for the claimants also placed before us the judgment rendered by the Supreme Court in **Arvind Kumar Mishra V. New India Assurance Co. Ltd., reported in 2010 (10) SCC 254**, to contend that the Tribunal erred in not factoring in the bright future of the deceased while computing the income of the deceased. We may note that **Arvind Kumar Mishra (supra)** was considered in **M. R. Krishnamurthy (supra)** whereon we propose to largely rely on in our analysis.

103. The deceased was a final year MBA student. It is contended in the claim petition that the deceased was a promising student. Nothing, however, was brought on record wherefrom an opinion could be formed about the academic track record of the deceased. Be that as it may, the deceased was in the employment of M/S Ivy Comptech and was earning Rs.13080/- in monthly pay. The fact that the deceased had managed to secure part time employment even though still a student is in itself a positive factor. It is a matter of common knowledge that the job market in the private sector is very competitive. Many apply but private entities are very particular about their recruitment standards and select only the most suitable candidates. As such, there is no reason to doubt that the deceased was a bright and promising young boy.

104. Furthermore, it is contended in the claim petition that the deceased, after completing MBA, could easily have found employment with any big corporate house and could have easily earned Rs.50,000/- per month in starting salary. Said contention merits closer scrutiny. It is not a secret that MBAs command a higher salary in the private sector. Top level management positions in private entities are more often than not occupied by MBAs who definitely command a premium. Of course, other factors also play a role. The institution whereat one pursues MBA is important. Academic performance and past work experience are also important. The deceased was a final year MBA student at ICFAI, Hyderabad. In the absence of any material on the record, we do not think it would be appropriate for us to comment on the quality of the institution. Suffice to say that said institution is not unheard of and is not an obscure institution. We have already noted that there is nothing on the record to enable us to draw an inference about the academic performance of the deceased. We do, however, know that the deceased was in the part time employment of M/S Ivy Comptech and was earning Rs.13,080/- in monthly pay. We have no doubt that the job experience gained by the deceased would have played out to his advantage when he would have applied for full-time positions after completing MBA. The deceased was already earning Rs.13,080/- while still studying. It is fair to presume that he would have landed a higher paying position after completing MBA. Question is, in the situation, what could be fairly taken to be his notional income.

105. We may take guidance from the judgment rendered by the Supreme Court in the case of **Oriental Insurance Company Limited V. Deo Patodi and Others, reported in (2009) 13 SCC 123.** The facts of **Deo Patodi (supra)** are somewhat similar to that of the matter at hand.

106. In **Deo Patodi (supra)**, the victim had done a course in business administration in the United Kingdom (UK). While studying, he was also working on a part-time basis and was earning equivalent of Rs.80,000/- per month. He was also offered a job in the United States of America (USA) at a pay equivalent of Rs.18 lacs per annum which he turned down because he wanted to pursue higher studies and do an MBA in Australia. The victim died, aged 22 years, in a motor vehicle accident which took place on 12.06.2003. The Tribunal and the High Court both computed the notional income of the victim at Rs.18,000/- per month. The Supreme Court, however, found said computation inadequate and revised the

figure to Rs.25,000/- per month, at one-third of the salary the victim was drawing while working part-time in UK. Relevant observations of the Supreme Court are extracted hereunder:-

"9. The question in regard to the calculation of loss of dependency, it is trite, would vary from case to case.

The fact that the deceased was a brilliant student is not in dispute. He had graduated in Business Administration in U.K. Even as a student, in a job on a part-time basis he was being paid a salary of Rs.80,000/- per month ((UK # 1008.31). He paid his income-tax even in U.K. After his graduation, he came back to India. He was offered a job as EU Controller by GOA LLC, a company based in Chicago, USA at an annual salary of Rs.18 lakhs (i.e. $ 41,600/-). However, when the accident took place he was not working; having not accepted the said offer. He was still a student. It would have been hazardous for the Tribunal to calculate the amount of compensation towards the loss of dependency on that basis.

10. The Tribunal and the High Court, however, in our opinion, keeping in view the aforementioned backdrop might not be correct in holding that he would have earned only Rs.18,000/- per month. It is true that the cost of living in the western countries would be higher. The standard of living in the western countries cannot be followed; in the absence of any material placed before this Court it should not be followed in India. Even in a case where the victim of an accident was earning salary in U.S. Dollars, this Court opined that a lower multiplier should be applied."

"11. It is in the aforementioned situation, we are of the opinion that the fair amount of compensation should have been calculated at Rs.25,000/- per month being about 1/3rd of the amount which he was receiving in U.K."

107. The victim in **Deo Patodi (supra)** and the deceased share similar academic backgrounds inasmuch as both were students of business administration. Both worked while still studying. Both belonged to similar age group and the accidents in both cases occurred only about an year apart. No doubt there are certain disparities. The victim in **Deo Patodi (supra)** had done his course and had worked in U.K. whereas the deceased was studying and working in India. The former, it appears, had done only a graduate level course and intended to do an MBA whereas the deceased was doing MBA. The victim in **Deo Patodi (supra)** was offered a job in USA at a salary equivalent to Rs.18 lacs per annum whereas there is nothing on record to indicate that the deceased had a full-time job offer on the table.

108. Taking all the of the above into account, we are of the view that the notional income of the deceased can be fairly assessed at Rs.20,000/- per month which is about 1.5 times what the deceased was earning in part time employment while still studying. Accordingly, notional income of deceased on a per annum basis works out to Rs.2,40,000/-.

109. We now come to the subject of deduction towards personal and living expenses, the second ingredient in determination of multiplicand.

110. The Tribunal has deducted one-third (1/3) of the income of the deceased towards personal and living expenses. The

learned counsel for the Insurer contended that the Tribunal ought to have deducted one-half (1/2) of the income towards personal and living expenses and not one-third (1/3). It was contended that the deceased was a 24 years old bachelor at the time of the accident and that the law is now settled that in such cases a 50% deduction is to be made towards personal and living expenses. The learned counsel, to substantiate his contention, placed reliance on the judgment rendered by the Supreme Court in **Smt. Sarla Verma and Others V. Delhi Transport Corporation and Another, reported in 2009 (3) Supreme 487.**

111. We find force in the submission of the learned counsel for the Insurer. In **Sarla Verma (supra)**, the Supreme Court held that if the deceased was a bachelor and the claimants were the parents of the deceased, the deduction towards personal and living expenses should ordinarily be 50%. Said observation was subsequently affirmed by a three-judge bench of the Supreme Court in **Reshma Kumari & Others V. Madan Mohan and Another, reported in (2013) 9 SCC 65**, wherein, in respect of deduction for personal and living expenses, it was observed the principle formulated in **Sarla Verma (supra)** must be adhered to unless a case for departure was made out. The observations in **Sarla Verma (supra)** and **Reshma Kumari (supra)**, as regards deduction towards personal and living expenses, were subsequently reaffirmed by a Constitution Bench of the Supreme Court in **National Insurance Co. Ltd. V. Pranay Sethi and Others, reported in (2017) 16 SCC 680**. The law on the subject was subsequently summarized in **Satinder Kaur (supra)**, wherein the Supreme Court, on the subject of "deduction towards personal and living expenses', observed thus:-

(a) Deduction for personal and living expenses

The personal and living expenses of the deceased should be deducted from the income, to arrive at the contribution to the family. In *Sarla Verma (supra)* (paras 30, 31 and 32), this Court took the view that it was necessary to standardize the deductions to be made under the head personal and living expenses of the deceased.

Accordingly, it was held that :

a) where the deceased was married, the deduction towards

personal and living expenses should be 1/3rd if the number of dependant family members is two to three;

b) 1/4th if the number of dependant family members is four to six; and

c) 1/5th if the number of dependant family members exceeds six.

d) If the deceased was a bachelor, and the claim was filed by the parents, the deduction would normally be 50% as personal and living expenses of the bachelor.

Subject to evidence to the contrary, the father was likely to have his own income, and would not be considered to be a dependant. Hence, the mother alone will be considered to be a dependant.

In the absence of any evidence to the contrary, brothers and sisters of the deceased bachelor would not be considered to be dependants, because they would usually either be independent and earning, or married, or dependant on the father.

Thus, even if the deceased was survived by parents and siblings, only the mother would be considered to be a dependant. The deduction towards personal expenses of a bachelor would be 50%, and 50% would be the contribution to the family.

However, in a case where the family of the bachelor was large and dependant on the income of the deceased, as in a case where he had a widowed mother, and a large number of younger non-earning sisters or brothers, his personal and living expenses could be restricted to 1/3rd, and contribution to the family be taken as 2/3rd.

A three-judge bench in *Reshma Kumari & Ors. v. Madan Mohan & Anr.*, affirmed the standards fixed in *Sarla Verma (supra)* with respect to the deduction for personal and living expenses, and held that these standards must ordinarily be followed, unless a case for departure is made out. The Court held :

"41. The above does provide guidance for the appropriate deduction for personal and living expenses. One must bear in mind that the proportion of a man's net earnings that he saves or spends exclusively for the maintenance of others does not form part of his living expenses but what he spends exclusively on himself does. The percentage of deduction on account of personal and living expenses may vary with reference to the number of dependant members in the family and the personal living expenses of the deceased need not exactly correspond to the number of dependants.

In our view, the standards fixed by this Court in Sarla Verma 2009 (6) SCC 121 on the aspect of deduction for personal living expenses in paragraphs 30, 31 and 32 must ordinarily be followed unless a case for departure in the circumstances noted in the preceding para is made out."

In what we have discussed above, we sum up our conclusions as follows:

...

43.6. In so far as deduction for personal and living expenses is concerned, it is directed that the Tribunals shall ordinarily follow the standards prescribed in paragraphs 30, 31 and 32 of the judgment in Sarla Verma 2009 (6) SCC 121 subject to the observations made by us in para 38 above. ..." (emphasis supplied)

A Constitution Bench of this Court *in National Insurance Co. Ltd. v. Pranay Sethi & Ors.,3 held that the standards fixed in Sarla Verma (supra)* would provide guidance for appropriate deduction towards personal and living expenses, and affirmed the conclusion in para 43.6 of *Reshma Kumari (supra).*

112. As such, we hold that the Tribunal erred in deducting only one-third (1/3) of the income of the deceased towards personal and living expenses and should have instead deducted one-half (1/2) of the income towards said expenses.

113. We have computed the notional income of the deceased at Rs.2,40,000/- per annum. One-half (1/2) of said income or Rs.1,20,000/- has to be deducted towards personal and living expenses.

114. To compute the multiplicand, the amount to be deducted towards personal and living expenses must first be subtracted from the figure for notional income. Deducting Rs.1,20,000/- from Rs.2,40,000/- we are left with Rs.1,20,000/-. But Rs.1,20,000/- is not the multiplicand. To arrive at the multiplicand, an amount towards future prospects has to be added to Rs.1,20,000/-.

115. In **Satinder Kaur (supra)**, the Supreme Court, on future prospects, observed thus:-

(b) Future Prospects

In the wake of increased inflation, rising consumer prices, and general standards of living, future prospects have to be taken into consideration, not only with respect to the status or educational qualifications of the deceased, but also other relevant factors such as higher salaries and perks which are being offered by private companies these days. The dearness allowance and perks from which the family would have derived monthly benefit, are required to be taken into consideration for determining the loss of dependency.

In **Sarla Verma *(supra)***, this Court held :

"24. In Susamma Thomas, this Court increased the income by nearly 100%, in Sarla Dixit, the income was increased only by 50% and in Abati Bezbaruah the income was increased by a mere 7%. In view of imponderables and uncertainties, we are in favour of adopting as a rule of thumb, an addition of 50% of actual salary to the actual salary income of the deceased towards future prospects, where the deceased had a permanent job and was below 40 years. [Where the annual income is in the taxable range, the words "actual salary' should be read as "actual salary less tax']. The addition should be only 30% if the age of the deceased was 40 to 50 years. There should be no addition, where the age of deceased is more than 50 years. Though the evidence may indicate a different percentage of increase, it is necessary to standardize the addition to avoid different yardsticks being applied or different methods of calculations being adopted. Where the deceased was self-employed or was on a fixed salary (without provision for annual increments etc.), the courts will usually take only the actual income at the time of death. A departure therefrom should be made only in rare and exceptional cases involving special circumstances."

(emphasis supplied)

In *Pranay Sethi (supra)*, the Constitution Bench evaluated all the judicial precedents on the issue of future prospects including *Sarla Verma (supra)*, and devised a fixed standard for granting future prospects. It was held :

"57. Having bestowed our anxious consideration, we are disposed to think when we accept the principle of standardization, 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 standardization 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.

59. The controversy does not end here. The question still remains whether there should be no addition where the age of the deceased is more than 50 years. Sarla Verma thinks it appropriate not to add any amount and the same has been approved in Reshma Kumari. Judicial notice can be taken of the fact that salary does not remain the same. When a person is in a permanent job, there is always an enhancement due to one reason or the other. To lay down as a thumb Rule that there will be no addition after 50 years will be an unacceptable concept. We are disposed to think, there should be an addition of 15% if the deceased is between the age of 50 to 60 years and there should be no addition thereafter. Similarly, in case of self- employed or person on fixed salary, the addition should be 10% between the age of 50 to 60 years. The aforesaid yardstick has been fixed so that there can be consistency in the approach by the tribunals and the courts.

59. In view of the aforesaid analysis, we proceed to record our conclusions:

...

While determining the income, an addition of 50% of actual salary to the income of the deceased towards future prospects, where the deceased had a permanent job and was below the age of 40 years, should be made. The addition should be 30%, if the age of the deceased was between 40 to 50 years. In case the deceased was between the age of 50 to 60 years, the addition should be 15%. Actual salary should be read as actual salary less tax.

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. ..."

(emphasis supplied)

116. Whether or not future prospects are to be granted to those with notional income was considered by the Supreme Court in **Kirti (supra).** Holding that future prospects are also to be granted to those with notional income, the Supreme Court observed thus: -

III. Addition of Future Prospects

"13. Third and most importantly, it is unfair on part of the respondent insurer to contest grant of future prospects considering their submission before the High Court that such compensation ought not to be paid pending outcome of the Pranay Sethi (supra) reference. Nevertheless, the law on this point is no longer res integra, and stands crystalised, as is clear from the following extract of the aforecited Constitutional Bench judgment:

"59.4. In case the deceased was selfemployed 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."

[Emphasis supplied]

14. Given how both deceased were below 40 years and how they have not been established to be permanent employees, future prospects to the tune of 40% must be paid. The argument that no such future prospects ought to be allowed for those with notional income, is both incorrect in law and without merit considering the constant inflation induced increase in wages. It would be sufficient to quote the observations of this Court in Hem Raj v. Oriental Insurance Co. Ltd., as it puts at rest any argument concerning non payment of future prospects to the deceased in the present case:

"7. We are of the view that there cannot be distinction where there is positive evidence of income and where minimum income is determined on guesswork in the facts and circumstances of a case. Both the situations stand at the same footing. Accordingly, in the present case, addition of 40% to the income assessed by the Tribunal is required to be made.."

[Emphasis supplied]

117. Accordingly, future prospects have to be granted in the instant case.

118. The deceased was 24 years old at the time of the accident. Accordingly, an addition of 50% has to be made towards future prospects. As such, an additional amount of Rs.60,000/- (50% of Rs.1,20,000/-) has to be added in future prospects. The Tribunal erred in awarding nothing in future prospects.

119. The multiplicand, thus, works out to Rs.1,80,000/-(Rs.1,20,000/- + Rs.60,000/-) First step in the computation

of quantum of compensation stands completed.

120. Second step in the quantification of compensation is "ascertaining the multiplier'.

121. The Tribunal has applied a multiplier of 8 based on the age of the claimant no.2, the mother of the deceased. The learned counsel for the claimants contended that the Tribunal committed an error inasmuch as the multiplier has to be chosen bearing in mind the age of the deceased. The learned counsel placed reliance on **Mohammed Siddique & Another V. National Insurance Co. Ltd. & Others, reported in 2020 (3) SCC 57**. In **Mohammed Siddique (supra)**, the Supreme Court, on the subject of choice of multiplier, observed thus: -

"19. Coming to the last issue relating to the multiplier, the Tribunal applied the multiplier of 18, on the basis of the age of the deceased at the time of the accident. But the High Court applied a multiplier of 14 on the ground that the choice of the multiplier should depend either upon the age of the victim or upon the age of the claimants, whichever is higher. According to the High court, this was the ratio laid down in General Manager, Kerala SRTC Vs Susamma Thomas, and that the same was also approved by a three Member Bench of this Court in UPSRTC Vs. Trilok Chandra (supra).

20. The High Court also noted that the choice of the multiplier with reference to the age of the deceased alone, approved in Sarla Verma & Ors. Vs. Delhi Transport Corporation & Anr, was found acceptance in two subsequent decisions namely (1) Reshmi Kumari & Ors. Vs. Madan Mohan & Anr. and (2) Munna Lal Jain Vs. Vipin Kumar Sharma5. But the High court thought that the decisions in Susamma Thomas and Trilok Chandra were directly on the point in relation to the choice of the multiplier and that the issue as envisaged in those 2 decisions was neither raised nor considered nor adjudicated upon in Sarla Verma. According to the High court, the impact of the age of the claimants, in cases where it is found to be higher than that of the deceased, did not come up for consideration in Reshma Kumari and Munnal Lal Jain. Therefore, the High court thought that it was obliged to follow the ratio laid down in Trilok Chandra (2009) 6 SCC 121 4 (2013) 9 SCC 65 5 JT 2015 (5) SC 1.

21. But unfortunately the High Court failed to note that the decision in Susamma Thomas was delivered on 06.01.-1993, before the insertion of the Second Schedule under Act 54 of 1994. Moreover what the Court was concerned in Susamma Thomas was whether the multiplier method involving the ascertainment of the loss of dependency propounded in Davies v. Powell (1942) AC 601 or the alternative method evolved in Nance v. British Columbia Electric Supply Co. ltd (1951) AC 601 should be followed.

22. Trilok Chandra merely affirmed the principle laid down in Susamma Thomas that the multiplier method is the sound method of assessing compensation and that there should be no departure from the multiplier method on the basis of section 110B of the 1939 Act. Trilok Chandra also noted that the Act stood amended in 1994 with the introduction of section 163A and the

second schedule. Though it was indicated in Trilok Chandra (in the penultimate paragraph) that the selection of the multiplier cannot in all cases be solely dependent on the age of the deceased, the question of choice between the age of the deceased and the age of the claimant was not the issue that arose directly for consideration in that case.

23. But Sarla Verma, though of a two member Bench, took note of Susamma as well as Trilok Chandra and thereafter held in paragraphs 41 and 42 as follows:

"41. Tribunals/ courts adopt and apply different operative multipliers. Some follow the multiplier with reference to Susamma Thomas [set out in Column (2) of the table above]; some follow the multiplier with reference to Trilok Chandra, [set out in Column (3) of the above]; some follow the multiplier with reference to Charlie [set out in Column (4) of the table above]; many follow the multiplier given in the second column of the table in the Second Schedule of the MV Act [extracted in column (5) of the table above]; and some follow the multiplier actually adopted in the Second schedule while calculating the quantum of compensation [set out in column (6) of the table above]. For example, if the deceased is aged 38 years, the multiplier would be 12 as per Susamma Thomas, 14 as per Trilok Chandra, 15 as per Charlie, or 16 as per the multiplier given in Column (2) of the Second schedule to the MV Act or 15 as per the multiplier actually adopted in the second schedule to the MV Act. some Tribunals as in this case, apply the multiplier of 22 by taking the balance years of service with reference to the retiring age. It is necessary to avoid this kind of inconsistency. We are concerned with cases falling under section 166 and not under section 163A of the MV Act. in cases falling under section 166 of the MV Act Davies methods is applicable.

42. We therefore hold that the multiplier to be used should be as mentioned in Column (4) of the Table above (prepared by applying Susamma Thomas, Trilok Chandra and Charlie), which starts with an operative multiplier of 18 (for the age groups of 15 to 20 and 21 to 25 years), reduced by one unit for every 5 years, that is M17 for 26 to 30 years, M16 to 31 to 35 years, M15 for 36 to 40 years, M14 for 41 to 45 years and M13 for 46 to 50 years, then reduced by 2 units for every 5 years, i.e., M11 for 51 to 55 years, M9 for 56 to 60 years, M7 for 61 to 65 years, M5 for 66 to 70 years."

24. What was ultimately recommended in Sarla Verma, as seen from para 40 of the judgment, was a multiplier, arrived at by juxtaposing Susamma Thomas, Trilok Chandra and Charlie6 with the multiplier mentioned in the Second Schedule.

25. However when Reshma Kumari v. Madan Mohan came up for hearing before a two member Bench, the Bench thought that the question whether the multiplier specified in the second schedule should be taken to be a guide for calculation of the amount of compensation in a case falling under section 166, needed to be decided by a larger bench, especially in the light of the defects pointed out in Trilok Chandra in the Second Schedule. The three member Bench extensively considered Trilok Chandra and the subsequent decisions and approved the Table provided in Sarla Verma. It was held in para 37 of the report in Reshma Kumari that the wide variations in the selection of multiplier in fatal accident cases can be avoided if Sarla Verma is followed. 6 (2005) 10 SCC 720

26. In Munna Lal Jain, which is also by a bench of three Hon'ble judges, the Court observed in para 11 as follows:

" Whether the multiplier should depend on the age of the dependents or that of the deceased has been hanging fire for sometime: but that has been given a quietus by another three judge bench in Reshma Kumari. It was held that the multiplier is to be used with reference to the age of the deceased. One reason appears to be that there is certainty with regard to the age of the deceased, but as far as that of dependents is concerned, there will always be room for dispute as to whether the age of the eldest or youngest or even the average etc. is to be taken."

27. In the light of the above observations, there was no room for any confusion and the High Court appears to have imagined a conflict between Trilok Chandra on the one hand and the subsequent decisions on the other hand.

28. It may be true that an accident victim may leave a 90 year old mother as the only dependent. It is in such cases that one may possibly attempt to resurrect the principle raised in Trilok Chandra. But as on date, Munna Lal Jain, which is of a larger Bench, binds us especially in a case of this nature."

122. The above noted observations of the Supreme Court in **Mohammed Siddique (supra)** leave no doubt that the age of the deceased is to be the basis for ascertaining the multiplier. In **Satinder Kaur (supra)**, Supreme Court was called upon to consider if the principle that age of the deceased must be the basis for determining the multiplier is valid even when the deceased is a bachelor. Holding that said principle applied even if the deceased was a bachelor, the Supreme Court observed thus: -

(c) Age of the deceased must be the basis for determining the multiplier even in case of a bachelor.

"In Sarla Verma (supra), this Court held that the multiplier should be determined with reference to the age of the deceased. This was subsequently affirmed in Reshma Kumari (supra), and followed in a line of decisions.

A three-judge bench in Munna Lal Jain & Ors. v. Vipin Kumar Sharma & Ors., held that the issue had been decided in Reshma Kumari (supra), wherein this Court held that the multiplier must be with reference to the age of the deceased. The decision in Munna Lal Jain (supra) was followed by another three-judge bench of this Court in Sube Singh & Ors. v. Shyam Singh (dead) & Ors.

The Constitution Bench in National Insurance Company Limited v. Pranay Sethi & Ors., affirmed the view taken in Sarla Verma (supra) and Reshma Kumari (supra), and held that the age of the deceased should be the basis for applying the multiplier.

Another three-judge bench in Royal Sundaram Alliance Insurance Co. Ltd. v. Mandala Yadagari Goud & Ors., traced out the law on this issue, and held that the compensation is to be computed based on what the deceased would have contributed to support the dependants. In the case of the death of a married person, it is an accepted norm that the age of the deceased would be taken into account. Thus, even in the case of a bachelor, the same principle must be applied.

The aforesaid legal position has recently been re-affirmed by this Court in

Sunita Tokas and Ors. v. New India Insurance Co. Ltd. and Ors."

123. Accordingly, we have no hesitation in holding that the Tribunal committed a serious error in determining the multiplier by taking the age of the claimant no.2 as reference. The law on the subject is settled. The multiplier has to be ascertained on the basis of the age of the deceased, even when the deceased is a bachelor.

124. Having held that the multiplier applied by the Tribunal was wrong, the obvious question we are faced with is what is the correct multiplier to be applied in the instant case.

125. We may again refer to **Satinder Kaur (supra)** and the observations therein on the subject of "determination of multiplier' which are reproduced hereunder: -

(d) Determination of Multiplier

With respect to the multiplier, the Court in **Sarla Verma (supra)**, prepared a chart for fixing the applicable multiplier in accordance with the age of the deceased, after considering the judgments in *General Manager, Kerala S.R.T.C., Trivandrum v. Susamma Thomas & Ors., U.P.S.R.T.C. & Ors. v. Trilok Chandra & Ors., and New India Assurance Co. Ltd. v. Charlie & Ors.*

The relevant extract from the said chart i.e. Column 4 has been set out hereinbelow for ready reference :-

Age of the deceased	Multiplier (Column 4)
Upto 15 years	-
15 to 20 years	18
21 to 25 years	18
26 to 30 years	17
31 to 35 years	16
36 to 40 years	15
41 to 45 years	14
46 to 50 years	13
51 to 55 years	11
56 to 60 years	9
61 to 65 years	7
Above 65 years	5

The Court in Sarla Verma (supra) held :-

"42. We therefore hold that the multiplier to be used should be as mentioned in column (4) of the Table above (prepared by applying Susamma Thomas, Trilok Chandra and Charlie),which starts with an operative multiplier of 18 (for the age groups of 15 to 20 and 21 to 25 years), reduced by one unit for every five years, that is M-17 for 26 to 30 years, M-16 for 31 to 35 years, M-15 for 36 to 40 years, M-14 for 41 to 45 years, and M-13 for 46 to 50 years, then reduced by two units for every five years, that is, M-11 for 51 to 55 years, M-9 for 56 to 60 years, M-7 for 61 to 65 years and M-5 for 66 to 70 years."

(emphasis supplied)

In Reshma Kumari (supra), this Court affirmed Column 4 of the chart prepared in Sarla Verma (supra), and held that this would provide uniformity and consistency in determining the multiplier to be applied. The Constitution Bench in Pranay Sethi (supra) affirmed the chart fixing the multiplier as expounded in Sarla Verma (supra), and held :-

"44. At this stage, we must immediately say that insofar as the aforesaid multiplicand/multiplier is concerned, it has to be accepted on the basis of income established by the legal representatives of the deceased. Future prospects are to be added to the sum on the percentage basis and "income" means

actual income less than the tax paid. The multiplier has already been fixed in Sarla Verma which has been approved in Reshma Kumari with which we concur.

...

59.6. The selection of multiplier shall be as indicated in the Table in Sarla Verma read with paragraph 42 of that judgment."

(emphasis supplied)

126. It is, therefore, clear that the multiplier has to selected from the Table laid out in **Sarla Verma (supra)** read in conjunction with the observations in paragraph 42 of the said judgment. The said table, along with paragraph 42 of **Sarla Verma (supra)**, can be found in the excerpt from **Satinder Kaur (supra)** which we have reproduced above.

127. In the case at hand, the deceased was 24 years old when the accident happened. We find that a multiplier of 18 is to be applied when the victim belongs to the age bracket of 21 to 25. As such, multiplier of 18 is to be applied in the case at hand. The second step of computation of compensation stands completed.

128. The third step of computation of compensation entails actual calculation. The multiplicand is multiplied by the multiplier to compute the figure for "loss of dependency'. To said figure, additional amounts under the heads of loss of estate, loss of consortium and funeral expenses are to be added.

129. We have computed the multiplicand to be Rs.1,80,000/-. The multiplier to be applied is 18. The figure for "loss of dependency' thus works out to Rs.32,40,000/- (1,80,000 x18).

130. To the above, additional amounts under the three conventional heads which are loss of estate, loss of consortium and funeral expenses are to be added. The learned counsel for the claimants faulted the Tribunal for failing to award any amount under the conventional heads. Reliance was placed on **Pranay Sethi (supra)**. We concur with the learned counsel. Observations of the Supreme Court in **Satinder Kaur (supra)** on the three conventional heads, summarizing the law on the subject, are extracted hereunder: -

(e) Three Conventional Heads

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.

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

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 non-pecuniary 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.

In *Magma General Insurance Co. Ltd. v. Nanu Ram & Ors.,*12 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.

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. 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.

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.

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.

Parental Consortium is awarded to the children who lose the care and protection of their parents in motor vehicle accidents.

The amount to be awarded for loss consortium will be as per the amount fixed in *Pranay Sethi (supra).*

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.

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.

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

The aforesaid conventional heads are to be revised every three years @10%.

131. As such, we hold that the Tribunal erred in not awarding any amount under the three conventional heads. The claimants are entitled to the following amounts: (a) Rs.15,000/- for loss of estate; (b) Rs.80,000/- (40,000 x 2) for loss of filial consortium; and (c) Rs.15,000/- towards funeral expenses.

132. We may note that the learned counsel for the claimants contended that the claimants were also liable to receive an amount under the head of loss of love and affection. Reliance was placed on **Jiju Kuruvila (supra)**. The contention of the learned counsel is not sustainable. In Satinder Kaur (supra), the Supreme Court, while deliberating on the concept of "loss of consortium', has faulted Tribunals and High Courts for awarding compensation for both "loss of consortium' and "loss of love and affection'. It was observed that the Constitution Bench in **Pranay Sethi (supra)** has recognized only three conventional heads whereunder compensation can be granted which are loss of estate, loss of consortium and funeral expenses. It was further observed that in **Magma General Insurance Co. Ltd. V. Nanu Ram and Others, reported in (2018) 18 SCC 130,** consortium has been interpreted expansively to include spousal consortium, filial consortium and parental consortium and that loss of consortium subsumed within it loss of love and affection. In light of said observations of the Supreme Court in **Satinder Kaur (supra)**, no amount is liable to be awarded under a separate head of "loss of love and affection' once we have already awarded compensation under the head of "loss of filial consortium'. We have also considered the judgment in **Jiju Kuruvila (supra)**. We find that the Supreme Court has awarded Rs.1,00,000/- each towards love and affection of two children of the victim who died in an accident. Said compensation, notwithstanding the description utilized, is clearly compensation for loss of parental consortium suffered by the two children of the victim. It is not as if said compensation was awarded in addition to compensation for loss of parental consortium. **Jiju Kuruvila (supra)**, therefore, cannot be relied on to claim compensation under the head of "loss of love and affection' in addition to compensation for loss of consortium. The contention of the learned counsel for the claimants is, accordingly, rejected.

133. The tribunal had also deducted 50% of the compensation on account of contributory negligence. We have already set aside the finding that there was contributory negligence on the part of the deceased as unsustainable. Accordingly, no deduction on account of contributory negligence is warranted.

134. Total compensation payable to the claimants works out to Rs.33,50,000/- (32,40,000 + 15,000 + 80,000 +15,000). Step three of the computation stands completed.

135. For ready reference, we summarize our findings on the question of quantum of compensation as follows:-

Per Annum Notional Income: Rs. 2,40,000/-

Deduction towards personal and living expenses: Rs.1,20,000/-
(1/2 x 2,40,000)

Future Prospects: Rs.60,000/-

Multiplicand: Rs.1,80,000/-
(1,20,000 + 60,000)

Multiplier: 18

Loss of Dependency:
Rs. 32,40,000/-
(1,80,000 x 18)

Funeral Expenses: Rs.15,000/-

Loss of Estate:
Rs.15,000/-

Loss of Filial Consortium:
Rs.80,000/-
(40,000 x 2)

Total Compensation:
Rs.33,50,000/-

Deduction on account of Contributory Negligence: 0

Total Compensation to be paid: Rs.33,50,000/-

136. The Tribunal has awarded the claimants simple interest at the rate of 8 % per annum from the date of the decision till realization of payment. The tribunal had declined to award interest from the date of institution of the claim petition stating that the claimants were themselves responsible for the delay in disposal of their case. No reason is recorded to substantiate said observation. The learned counsel for the claimants contended that the interest should be awarded from the date of filing of the claim and not from date of decision. The learned counsel for the Insurer, on the other hand, contended that while the tribunal was correct in awarding interest from the date of decision, it erred in awarding interest at the rate of 8%. The learned counsel, relying on the judgment of the Supreme Court in the case of **National Insurance Company Limited V. Mannat Johal and Others, reported in (2019) 15 SCC 260**, contended that at best interest at the rate of 7.5% could have been awarded and no more.

137. Section 171 of the Act, 1988 provides that when a claim for compensation is allowed, the Tribunal may direct that in addition to the amount of compensation simple interest shall also be paid at such rate and from such date not earlier than the date of making the claim as the Tribunal may specify. Section 171 of the Act, 1988 is extracted hereunder for ready reference: -

*"**171. Award of interest where any claim is allowed**- Where any Claims Tribunal allows a claim for compensation made under this Act, such Tribunal may direct that in addition to the amount of compensation simple interest shall also be paid at such rate and from such date not earlier than the date of making the claim as it may specify in this behalf".*

138. From the aforesaid provision, it follows that-

a. It is within the discretion of the Tribunal to direct payment of interest. The provision reads that the Tribunal "may' direct payment of interest as opposed to "shall' direct payment of interest. The Tribunal, thus, may or may not direct payment of interest;

b. If payment of interest is directed, it is open to the Tribunal to prescribe not only the rate of interest but also the date from which such interest is payable. The provision clearly reads that

the Tribunal can direct payment of interest at "such rate' and from "such date' as the Tribunal may specify. The only limitation is that the date from which interest is ordered to be paid should not be earlier than the date on which the claim was instituted.

139. We are of the opinion that technically speaking the order of the Tribunal directing payment of 8% simple interest from the date of decision till realization of payment does not run afoul of Section 171 of the Act, 1988. The judgment in **Mannat Johal (supra),** relied on by the learned counsel for the Insurer, does not lay down any hard and fast rule that interest can never be awarded at a rate exceeding 7.5%. In said case, Tribunal had awarded interest at the rate of 12% which the High Court revised to 7.5%. The Supreme Court only observed that 12% was *"too high a rate in comparison to what is ordinarily envisaged in these matters'* and that the decision of the High Court to reduce it to 7.5% did not warrant interference. The observations of the Supreme Court can hardly be construed as capping the rate of interest which may be awarded in claims arising out of motor vehicle accidents at 7.5%. The order of the Tribunal as to interest, therefore, cannot be faulted on that account.

140. Yet, we are of the opinion that the facts of the case warrant that the order of the Tribunal as to interest be modified so as to direct payment of interest from the date of institution of the claim petition instead of from date of the disposal of the claim petition.

141. Claim petition was originally filed in the year 2004. The Tribunal itself has noted that at the time of the accident claimant no.1 was about 61 years old and claimant no.2 was about 57 years old. About 17 years have elapsed since. In the year 2007, claimant no.1 also died. Claimant no.2 is about 74 years old today. We can only imagine the pain and agony suffered by claimant no.2. First, she lost her only son and then she lost her husband too. Against daunting odds, she has spent the later years of her life fighting a long and lonely battle enduring a fate we do not wish on anyone. The Tribunal did not award interest from date of filing of the claim only on the ground that the claimants themselves were to blame for the delay in disposal of claim petition. Said observation is not substantiated by referring to the record. Be that as it may, we are of the opinion that given the peculiar facts of the case, in the interest of justice, the order of the Tribunal as to interest deserves to be modified so as to direct payment of interest from the date of institution of the claim petition instead of from date of the disposal of the claim petition.

CONCLUSION

142. Accordingly, we direct the following: -

a. The quantum of compensation awarded by the Tribunal stands enhanced to Rs.33,50,000/-. The amount already paid to the claimants shall be adjusted against the total payable compensation determined above. The balance amount shall be disbursed to the claimant no.2 (as claimant no.1 is no longer with us) by the Insurer within eight weeks;

b. In addition to the above, simple interest at the rate of 8% per annum is

directed to be paid to claimant no.2 on the total payable compensation determined above from the date of institution of the claim petition till realization of the payment.

143. This FAFO is, accordingly, disposed of in the aforesaid terms.

144. No order as to costs.

(2022)01ILR A156
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.01.2022

BEFORE

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

First Appeal From Order No. 3336 of 2013

Bony Dubey ...Appellant
Versus
M/S Shyam Bidi Works & Anr. ...Respondents

Counsel for the Appellant:
Sri Amit Kumar Sinha

Counsel for the Respondents:
Sri Saurabh Srivastava, Sri Suyash Agarwal

A. Civil Law - Motor Vehicle Act, 1988- Section 176-Enhancement of compensation- appellant was minor t the time of accident, he became permanent disabled -Tribunal awarded a sum of Rs. 15,72,848/- together with interest @ 6% per annum as compensation but not granted future loss of income-Since, the deceased will fall within the category of self-employed, 40% shall be added towards future prospects as per Apex Court guidelines -By applying the multiplier of 15, the total loss of dependency is assessed Rs. 24,80,000/-Thus, the claimants entitled for increase of compensation a sum of Rs. 24,80,000/-from Rs 15,72,848/- with a modified rate of interest @ 7.5% per annum.(Paras 1 to 12)

The appeal is partly allowed.(E-6)

List of Cases cited:

1. K. Sureshh Vs New India Assr. Co. Ltd. (2012) 2 SCC 274

2. V. Mekala Vs M. Malathi & anr. (2014) 11 SCC 178

3. Kajal Vs Jagdish Chand & ors. (2020) 1 TAC 705 SC

4. Hdfc Ergo General Ins. Co. Ltd. Vs Mukesh Kumar (2021) 0 AJEL-SC 67851

5. Jithendran Vs New India Assr. Co. Ltd. (2021) 0 AIJEL-SC 67944

6. National Ins. Co. Ltd. Vs Mannat Johal & ors. (2019) 92 TAC 705 SC

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

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

2. This First Appeal From Order has been filed under section 173 of Motor Vehicle Act, 1988 (hereinafter referred to 'Act, 1988') by appellant-Bony Dubey, being aggrieved by judgment and award dated 05.08.2013 passed by Motor Accident Claims Tribunal, Allahabad (hereinafter referred to as 'Tribunal') in Claim Petition No. 249 of 2010 awarding a sum of Rs.15,72,848/- with interest at the rate of 6% to the injured.

3. The accident having taken place is not in dispute. The appellant having suffered loss of income besides other

grievous injuries fracture in Spinal Cord from several places and as such all body parts below waist became senseless and he is on wheelchair is not in dispute. The vehicle being insured with insurance company and there is no breach of policy condition is not in dispute. The accident occurred way back in the year 2010 is not in dispute. The involvement of the vehicle is not in dispute and it is proved before the Tribunal that the driver was negligent.

4. The appellant challenges the findings as they are perverse and against the record and, therefore, factual data is not adverted to except that the accident occurred on 23.1.2010 at 12.30 when rashly and negligently driven Vehicle No.UP 70 X 9756 hit the Motorcycle No.UP 70 AS 3148 coming from opposite direction as such appellant (pillion rider on the motorcycle) sustained grievous injuries resulting in permanent disability to the appellant. The appellant(minor) was about 15 years of age when the accident occurred and he would be by now 25 years of age. But unfortunately tribunal has considered yearly income Rs.36,000/-, loss of income Rs.5,40,000/-, Medical Bill & Vouchers Rs.9,99,848/-, Rs.10,000/- for pain & sufferings, Rs.15,000/- for Extra Diet & Nourishment and total Award of Tribunal Rs.15,72,848 with 6% rate of interest.

5. It is submitted by the learned counsel for the appellant claimant that the Tribunal has materially erred in calculating the amount of claim. According to the learned counsel for the appellant Yearly income of the injured Rs.60,000/- per annum; 40% addition towards future prospect; multiplier of 15; loss of earning capacity 100%; loss of income 12,60,000/-; Rs.2,50,000/- for addition towards permanent disability as per the ratio laid down by Hon'ble Apex Court in paragraph 29 of the **(2012) 12 SCC 274 K. Suresh V. New India Assurance Company Ltd.;** Rs.3,00,000/- for addition towards Bleak prospect of marriage life., as per the ratio laid down by Hon'ble Apex court in Paragraph No.23 of the case reported **(2014) 11 SCC 178** titled **V. Mekala Vs. M. Malathi & Another;** Rs.15,00,000/- for addition towards Pain & sufferings as per the ratio laid down by Hon'ble Apex Court in Paragraph Nos. 26 & 27 of the **2020 (1) TAC 705 (SC) Kajal v. Jagdish Chand & others;** Rs.60,000/- per annum for addition towards cost of attendants as per ratio laid down by Hon'ble Apex Court in Paragraph No.22 to 25 of the **2020 (1) TAC 705 (SC) Kajal v. Jagdish Chand & Others**; Rs.10,000/- for medical expenses; and total amount of compensation Rs.52,10,000/- demanded would just and proper and would be adequate compensation..

6. Recently the Supreme Court had an occasion of deciding a similar matter relating to a minor who had become practically crippled. The principles of just compensation have been laid in the said judgment.

7. Victim was 15 years of age who has been rendered totally incapacitated. As per the medical advice, he has suffered 90% disability for the body as a whole which means it would be 100% disability for earning, he has to move in a wheel-chair and his chances of marriage have become practically nil. The accident occurred before a decade, namely, 2010.

Hence he would be at the age of 25 years as of today.

8. We, therefore, would fall back judgment on the Kajal (Supra) and in this backdrop let us evaluate the income in view of the decisions of the Apex Court titled **Hdfc Ergo General Insurance Co. Ltd. v. Mukesh Kumar, 2021 (0) AJEL-SC 67851 and Jithendran v. New India Assurance Co. Ltd., 2021 (0) AIJEL-SC 67944** and, the recalculate the compensation which would be as follows:

i. Income Rs.5,000 x 12=60,000/- p.a.

ii. Percentage towards future prospects : 40% namely Rs.24,000/-

iii. Total income : Rs.60,000+24,000 = Rs.84,000/-

iv. Multiplier applicable : 15

v. Loss of dependency: Rs.84,000 x 15 = Rs.12,60,000/-

vi. Bleak prospect of Marriage: Rs.1,00,000/-

vii. For pain & sufferings: Rs.5,00,000/-

viii. Future medicine expenses = Rs.5,00,000/-

ix. All other heads for wheelchair = Rs.1,20,000/-

x. **Total compensation** : Rs.12,60,000 + Rs. 1,00,000 + 5,00,000 + 5,00,000 + Rs.1,20,000 =**24,80,000/-**

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. No other grounds are urged orally when the matter was heard.

11. In view of the above, the appeal is **partly allowed** and oral counter claim is allowed. Judgment and award passed by the Tribunal shall stand modified to the aforesaid extent. The respondent-Insurance Company shall deposit the amount within a period of 12 weeks from today with interest at the rate of 7.5% from the date of filing of the claim petition till the amount is deposited. The amount already deposited be deducted from the amount to be deposited.

12. The lower court record be sent back, if here, to the tribunal for disbursement.

(2022)01ILR A158
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.12.2021

BEFORE

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

First Appeal From Order No. 3380 of 2003
with
First Appeal From Order No. 1319 of 2003

Smt. Jagriti & Ors. ...Appellants
Versus
The NIACL, Allahabad & Ors.
...Respondents

Counsel for the Appellants:
Sri A.L. Jaiswal, Sri Shrave Singh

Counsel for the Respondents:
Sri Sudhanshu Behari Lal Gour

A. Civil Law - Motor Vehicle Act, 1988- Section 176-Enhancement of compensation- First appellant died leaving behind his widow and four minor children at the age of 35 years and he was earning Rs. 55,00/-per month as Manager while other appellant who was aged about 30 years was earning Rs. 2500/-per month in private service along with agriculture income 5000/-per month and he was 70% disabled after the accident-Tribunal awarded a sum of Rs. 50,000/- and 25,000/- to the appellants as compensation but not granted future loss of income-Since, the appellants will fall within the category of self-employed, 40% shall be added towards future prospects as per Apex Court guidelines - By applying the multiplier of 16, the total loss of dependency is assessed for first appellant Rs. 11,08,000/- and for the other appellant it would be 6,45,000/- Thus, the claimants entitled for increase of compensation.(Paras 1 to 16)

The appeal is allowed.(E-6)

List of Cases cited:

1. Bajaj Allianz General Insurance Co. Ltd. Vs Smt. Renu Singh & ors., FAFO No. 1818 of 2012

2. Kausnuma Begum Vs New India Ins. Co. (2001) SCC Pg 151

3. Bimla Devi Vs Himachal Rct. (2009) 13 SCC 530 2009 AIR SC 2819

4. Sunita Vs RSRTC, (2019) 0 SCC 195

5. Mangla Ram Vs Oriental Ins. Co. Ltd. & ors (2018) 5 SCC 656

6. Khenyei Vs New India Assr. Co. Ltd. & ors (2015) AIR SC 2261

7. Bithika Mazumdar & anr. Vs Sagar Pal & ors (2017) 2 AIR SCC 748

8. Ram Chandra Singh Vs Rajaram & ors (2018) AIR SC 3789

9. Nirmala Kothari Vs United India Ins. Co. Ltd. (2020) 4 SCC 49

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

1. Heard Sri Shrave Singh, learned counsel for the appellants, Sri Sudhanshu Behari Lal Gour, learned counsel for the respondent-for the Insurance Company and perused the judgments and orders impugned.

2. By way of these appeals the appellants who are the legal heirs of the deceased have brought in challenge the award passed by Sri. Narendra Kumar Jain in M.A.C. No. 765 of 1999 dated 08.09.2003 whereby the Tribunal granted a sum of Rs. 50,000/- only under section 166 M.V. Act, 1988, to the appellants by way of appeal being F.A.F.O. No. 3380 of 2003 whereas Sukhpal who was the claimant in M.A.C. No. 25 of 2000 was also awarded Rs. 25,000/- only as compensation against the claim of Rs. 54,00,000/- has challenged the award by filing F.A.F.O. No. 1319 of 2003. The Tribunals granted this amount under the head of no fault liability to both the claimants. Both the claim petitions were decided separately. It was decided by Smt. Sadhana Chaudhary, which is dated 03.02.2003 and the other judgment is of

Sri. Narendra Kumar Jain, dated 08.09.2003. At the outset it is not understood why both the matters which arose out of the same accident were not heard and decided together by the same Tribunal. At the outset we request the Registrar General of the High Court to place this concern of ours before Hon'ble the Chief Justice so directions can be passed on to the Tribunals in the State. So that multiplicity of awards and divergent views are not there, if the matter arises out of the same accident. We request the Principal Officer/Tribunal M.A.C.T. or the District Judge of the District should consolidate and list all theses matters before the same Tribunal, so that there is a comity of views and it does not become judgecentric decision.

3. The brief facts that emerges from the record and the paper book are the accident took place on 18.11.1999 is not in dispute. The deceased named as Ravindra who left behind him his widow and four minor children at the age of 35 years died in the said accident. He was the Manager in Sheela Chitra Mandir, Chirodi, and was earning Rs. 5,500/- per month, whereas Sukhpal who was aged about 30 years of age he was earning Rs. 2,500/- per month in private service in Hanuman Paper Mills and was having agricultural lands from which he used to earn Rs. 5,000/- per month. The doctor has opined that he has 70% disability in his body and he was aged about 30 years of age. The facts about the accident of Ravindra who was traveling in Maruti van owned by respondent no. 1 and driven by Ram Niwas respondent no. 2 when the Maruti van reached petrol pump at Sahibabad the driver who was driving the vehicle rashly and negligently dashed with a stationary truck which was stationed on the side of the road. The owner has not filed reply, the driver who had filed his reply contended that he was driving the vehicle with care and caution when the vehicle reached Bhopura road, suddenly one cyclist came from the other side, so as to save him Maruti van dashed with the stationary truck and contended that there was no negligence on his part while driving the vehicle. The Insurance Company filed its reply and accepted that vehicle Maruti van was insured with, it was driven in breach of policy condition and that vehicle before 1 ½ years was owned by Sushil Kumar son of Prem Chand who had sold the said vehicle to respondent no. 1 and therefore, the Insurance Company has no liability. The deceased was traveling as passenger in private vehicle which is against the terms and conditions of the policy. Three issues were framed, the first issue relates to negligence whereby the deceased was injured and Ravindra Singh died. In other matter also the issue raised about negligence, the issues were similar but it related to injury. All the other issues raised were similar.

4. The first award of the Tribunal of dated 03.02.2003 very strangely held that there is no negligence on the part of the driver of Maruti van just because P.W.-2 accepted that the driver of Maruti van tried to save the cyclist. It cannot be said that the driver of the Maruti van was not negligent. Similar finding is reiterated in the second also and has relied on the judgment in Claim Petition No. 25 of 2000 of Sukhpal. We will have to evaluate negligence on the principles enunciated by the Apex Court and this Court in different decisions.

5. The Tribunals held that driver of the vehicle not to be held negligent and, therefore, granted only a sum of Rs. 50,000/- for death and Rs. 25,000/- for

injury to Sukhpal namely under the provisions of no fault liability. This is under challenge. It is submitted by learned counsel for the appellants that the Tribunals have wrongly returned the issue of negligence against appellants and principle of strict liability has been totally ignored by both the Tribunals.

6. The principle for deciding whether driver of a vehicle is negligent or not we discussed in below mentioned judgments.

7. 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 inferen 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 comear 1992."

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

8. Also the judgment of Hon'ble Apex Court ***"Kausnuma Begum Vs. New India Insurance Company 2001 SCC Page 151"*** will also not permit us to concur with the decisions of learned Tribunals, the reasons being the F.I.R. and the charge-sheet were laid against the driver of the vehicle. The Supreme Court in ***Anita Sharma*** case relying on ***Bimla Devi Vs. Himachal Rct, (2009) 13 SCC 530 2009 AIR SC 2819 and Sunita Vs. Rajasthan State Road Transport Corporation, (2019) 0 SCC 195*** has held that the Evidence Act 1872, cast as duty on the respondents to adduce evidence, so it is to show that vehicles are being driven so as to avoid any accident being taken place. In our case the driver was the best person who has not been examined on oath, who has not stepped into the witness box, pleadings and prove necessary to establish the claim while discharging by the appellants herein. The contention of the appellants that accident occurred due to rash and negligent driving of the driver should have been accepted by the Tribunal. In view of the fact that one of the appellants was himself injured. Lifting one sentence from the testimony of PW-2 to exonerate the driver is bad in eyes of law. The approach of the Tribunal should be holistic analysis of entire pleadings and evidence by applying principles of preponderance of probability. Once, foundational fact, namely, actual occurrence of accident, has been established, then Tribunal's role would be to calculate quantum of just compensation if accident had taken place by reason of negligence of driver of a motor vehicle and, while doing so, Tribunal would not be strictly bound by pleadings of parties.

9. We can also rely on the decision in ***Mangla Ram Vs. Oriental Insurance Company Limited and Others (2018) 5 Supreme Court Cases 656*** wherein strictosencso principals of pleadings are not to bind the Tribunal, prima-facie negligence of the driver has to be proved. In our case both the deceased and the injured were persons who were not driving the vehicle nor have they contributed to the accident having taken place qua them the judgment of ***Kausnuma Begum (Supra) and decision in Khenyei Vs. New Indian Assurance Company Ltd. & Ors reported in AIR 2015 SC 2261***. The combined effect of negligence of two persons or joint tort fessor will be payable by the sole tort fessor rather the wrong doer. The Tribunal has in our view committed a grave error in coming to the conclusion that the driver of van was not negligent. This finding is not only erroneous but perverse, the driver of the offending van did not even step into the witness box, despite that holding him not negligent is against the record. The Tribunal has taken a view which is not permissible under law, hence, the said finding is upturned.

10. As far as, the deceased and injured in F.A.F.O. No. 1319 of 2003 are concerned the occupants of car. A non tortfeasor the car hit from behind a stationary vehicle.

11. As far as, the deceased and injured, qua both, it was case of composite negligence and therefore, also the claim petition could not have been dealt with in the manner which has been decided.

12. The appellant Sukhpal who is the injured nor the deceased none of them were driving the Maruti van. The vehicle was driven at an excessive speed will be not diluted by the evidence of PW-2 just because he stated that a cyclist all of sudden came on the road. The principle of **res-ipsaloquitur** would apply to the facts to demonstrate that the driver of the car was driving the vehicle at moderate speed had it been so, it would not have gone towards the side of the road and ramped into the stationary vehicle which would permit us to hold that the driver did not take proper care nor he did take proper caution. The principles for deciding the matter do not rest on the strict interpretation of criminal or civil jurisprudence but has to be on the basis of evidence led. In our case the F.I.R and the charge sheet and the written statement of driver himself would show that driver was negligent in driving. It is not proved that the truck was on the middle of road but was parked on the side line and the driver of the car driven his vehicle cautiously, he would have easily avoided the accident having taken place. The principles of negligence would not permit us to concur with findings of the fact returned by the Tribunals. The Tribunals has to take what is known as the practical view in the matter and cannot take a pendentic or hyper technical view as taken by the Tribunals. The doctrine of **res-ipsaloquitur** will apply to the facts of the case. Hence, we hold the driver of Maruti car was negligent. The witnesses as of fact have deposed that the accident took place and the vehicle ramped into stationary vehicle. It cannot be said that there was no negligence on the part of the driver of Maruti van.

13. As the matter has remained pending for 17 years before this High Court and the destitute family has not got any amount of compensation despite we feel that the family members who was the earning member is lost in the accident, but as the Insurance Company has contended that the driving license was fake and they have not filed appeal because that issue was never decided. As far as, the claimants are concerned as the accident is of the year 1999 and the family has been deprived of compensation. We would take help of judgment of the Apex Court in ***Bithika Mazumdar and Another Vs. Sagar Pal And Others AIR (2017) 2 Supreme Court Cases 748,*** we would venture to decide the quantum as empowered under section 173 of the Motor Vehicles Act, on the principles of grant of compensation for death and injury. As far as, Appeal No. 3380 of 2003 is concerned the deceased Ravindra was 35 years of age was the Manager in Sheela Chitra Mandir, Chirodi earning Rs. 4,500/- per month but we hold the income at Rs. 5,000/- per month to which being below the age of 40, 40% will have to be added for future prospects. As he was survived by widow, three sons and one daughter and mother deduction of 1/4 will be necessary for personal expenses and multiplier of 16 would have to be granted and Rs. 70,000+ rise 10% in Rs. 70,000/- will have to be granted. Hence the total calculation will be Rs. 5,000+2,000 - 1/4 for personal expenses. **Out of which the amount under no fault liability will have to be deducted** + Rs. 1 lac toward non pecuniary damages.

(i) Annual income Rs.5,000 X 12 = Rs. 60,000/- per annum

(ii) Percentage towards future prospect : 40% = Rs. 24,000/-

(iii) Total income : Rs. 60,000 + Rs. 24,000 = Rs. 84,000/-

(iv) Income after deduction of 1/4th : Rs. 84,000 - 21,000 = Rs. 63,000/-

(v) Multiplier applicable : 16 :- Rs. 63,000 X 16 = Rs. 10,08,000/-

(vi) Amount under non pecuniary head:Rs.70,000/-+30,000 = Rs.1,00,000/

(vii) Total compensation:Rs. 10,08,000+ Rs. 1,00,000 = Rs.11,08,000 /-

14. As far as Sukhpal is concerned, he was in private service and also doing agricultural work. We consider his income to be Rs. 3,000/- per month to which being below the age of 30 years, 40% will have to be added for future prospects. He had 70% disability of body as a whole to which we would consider it as 35% as functional disability. The Tribunal has been inconsistent, one Tribunal has granted interest and other Tribunal has refused interest on no fault liability. Though the amount under no fault liability should not have been kept in fixed deposit as that amount is of meeting the immediate needs of the family, we deprecate the said practice. The award shall carry 7% interest.

(i) Annual income Rs.3,000 X 12 = Rs. 36,000/- per annum

(ii) Percentage towards future prospect : 40% = Rs. 14,400/-

(iii) Total income : Rs. 36,000 + Rs. 14,400 = Rs. 50,400/-

(iv) Compensation for disability @ 35%=Rs.2,99,880 or Rs. 3,00,000/- (rounded of)

(v) For paying shocking suffering:- Rs. 25,000/-

(vi) Medical expenses and all other charges:- Rs. 3,00,000 + Rs. 20,000= Rs. 3,20,000/-

(vii) Total compensation: Rs. 3,00,000 + Rs. 25,000/- + Rs. 3,20,000/- = **Rs. 6,45,000/-. Out of which the amount under no fault liability will have to be deducted.**

15. In this case the Tribunal has held that the Insurance Company will have right of recovery from the owner, but in the final award that direction is missing. However, as we find that it is admitted fact that the vehicle was insured with the Insurance Company, and having decided the compensation. We grant the Insurance Company right of recovery to recover from owner. However, it will have to prove before the Tribunal that the owner was aware about the fake driving license of the driver and that driver was plying the vehicle with such a fake driving license. We pass this order as the Apex court in ***Ram Chandra Singh Vs. Rajaram and others AIR 2018 SC 3789*** and the case of ***Nirmala Kothari v. United India Insurance Co. Ltd. (2020) 4 SCC 49***, wherein it is held that High Court and Trial Court should examine the fact as to whether the owner of the vehicle was aware of fake driving license. In our case we remand the matter for fresh consideration on question of liability of the Insurance Company to recover the amount form the owner.

16. Appeals are partly **allowed.**

(2022)01ILR A164
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.07.2021

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Habeas Corpus Writ Petition No. 266 of 2021

Kanya Devi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ulajhan Singh Bind, Mansa Singh, Neetu Singh

Counsel for the Respondents:
A.G.A.

Criminal Law - Constitution of India, 1950 - Article 226 – Indian Penal Code 1860 – Sections 364 & 498A – Dowry Prohibition Act, 1961 – Section 3/4 - Habeas Corpus writ petition - Petitioner (mother of corpus) lodged F.I.R. - mother of corpus, moved an application before the Magistrate for fair investigation - petitioner allegation that she was neither aware of the proceedings of the case nor any progress report has been submitted by the Investigating Officer - Held - Habeas Corpus writ petition before High court is not maintainable - petitioner has a remedy under Section 190 read with Section 156 of Cr.P.C. to approach before the concerned Magistrate for redressal of her grievance & regarding the latest progress of the case (Para 7, 9)

Disposed off. (E-5)

(Delivered by Hon'ble Shamim Ahmed, J.)

1. Counter affidavit filed today, is taken on record.

2. Heard Sri Ulajhan Singh Bind, learned counsel for the petitioner as well as Sri Vinod Kant, learned Additional Advocate General assisted by Sri Nagendra Srivastava and Sri G.P. Singh represents State-respondents.

3. This habeas corpus writ petition has been filed by Ramrati, the mother of the corpus with the following prayer :

"(i) Issue a habeas corpus writ, order or direction in the nature of habeas corpus directing the respondents to produce the corpus namely Kanya Devi d/o Harmunji Lal before this Hon'ble Court and setting her at liberty to go anywhere where she wants.

(ii) Issue any other suitable habeas corpus order or direction as may be deemed fit and proper in the circumstances of the case.

(iii) Allow this habeas corpus writ petition in favour of the petitioner."

4. Learned counsel for the petitioner submits that in pursuance of the application filed by the petitioner before the learned Magistrate on 18.11.2018 for registering the F.I.R. against the respondent nos. 4, 5 and 6 namely Sanjay Kumar, Madhu and Arvind, an F.I.R. was lodged on 13.01.2020, under Sections 498A, 364 I.P.C. and 3/4 D.P. Act against them at Police Station Shivkuti, District Prayagraj but neither the proceedings of the case was expedited nor the corpus was recovered. He further argued that respondent nos. 4 and 5 used to harass the petitioner-Kanya Devi and the petitioner had informed her mother in this regard. The petitioner had phoned her mother for help but her mother was not in a position to help her and after some days, respondent nos. 4 & 5 with the help of respondent no. 6 detained the petitioner. The respondent no. 6 and respondent no. 5 are live in relationship and respondent no. 5 is sister of respondent no. 4 and respondent nos. 5 & 6 are living in the house of respondent no. 4. It was further the case of the prosecution is that the investigating officer after registering the FIR had not taken any action against the respondent nos. 4, 5 & 6 nor given any information about recovery of the petitioner/corpus to her mother namely Ramrati. Thereafter, the mother of the corpus namely Ramrati filed

a Criminal Misc. Writ Petition No. 7408 of 2020 before this Court and this Court disposed of the above writ petition vide order dated 06.10.2020, the same is reproduced herein below :

"Heard Sri Ulajhan Singh Bind, learned counsel for the petitioner and the learned AGA.

This writ petition has been filed for seeking a writ of mandamus commanding the respondent concerned to conduct fair investigation in pursuance of FIR dated 13.01.2020.

It is submitted that petitioner is an informant in the above case and despite approaching the authority concerned for fair investigation, no action whatsoever has been taken, an appropriate direction be issued for fair and expeditious investigation.

It is well settled in view of the decision of the Apex Court in Sakiri Vasu v. State of U.P., (2008) 2 SCC 409 as reiterated in Sudhir Bhaskarrao Tambe v. Hemant, Yashwant Dhage and others, (2016) 6 SCC 277 that in the event of unsatisfactory investigation, remedy of the aggrieved person is not to approach the High Court under Article 226 of the Constitution of India but to approach the Magistrate concerned under Section 156(3) Cr.P.C.

Paragraphs 2 and 3 of Tambe (supra) are quoted hereunder:

"2. This Court has held in Sakiri Vasu v. State of U.P., that if a person has a grievance that his FIR has not been registered by the police, or having been registered, proper investigation is not being done, then the remedy of the aggrieved person is not to go to the High Court under Article 226 of the Constitution of India, but to approach the Magistrate concerned under Section 156(3) CrPC. If such an application under Section 156(3) CrPC is made and the Magistrate is, prima facie, satisfied, he can direct the FIR to be registered, or if it has already been registered, he can direct proper investigation to be done which includes in his discretion, if he deems it necessary, recommending change of the investigating officer, so that a proper investigation is done in the matter. We have said this in Sakiri Vasu case because what we have found in this country that the High Courts have been flooded with writ petitions praying for registration of the first information report or praying for a proper investigation.

3. We are of the opinion that if the High Courts entertain such writ petitions, then they will be flooded with such writ petitions and will not able to do any other work except dealing with such writ petitions. Hence, we have held that the complainant must avail of his alternate remedy to approach the Magistrate concerned under Section 156(3) CrPC and if he does so, the Magistrate will ensure, if prima facie he is satisfied, registration of the first information report and also ensure a proper investigation in the matter, and he can also monitor the investigation."

Thus, in view of the above, remedy, if any, for the petitioner is to approach the competent Magistrate in respect of his grievance.

With the aforesaid observations, this writ petition is disposed off.

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 (s) (preferably Aadhar Card).

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."

5. Thereafter, learned counsel for the petitioner further submits that in compliance of the order dated 06.10.2020, the mother of corpus, Ramrati moved an application before the Magistrate concerned, thereafter, the learned Chief Judicial Magistrate, Court No. 10, Allahabad passed an order on 22.10.2010, the same is reproduced herein below :

आदेश

प्रार्थिनी रामरती की ओर से उपरोक्त मामले में मान्नीय उच्च न्यायालय में दाखिल क्रिमि0 मिस0 रिट पेटीशन नं0 7408/2020 में पारित आदेश दिनांकित 06.10.2020 दाखिल किया गया है।

सुना तथा मान्नीय उच्च न्यायालय के उपरोक्त आदेश का अवलोकन किया।

मान्नीय उच्च न्यायालय के उपरोक्त आदेश के आलोक में संबंधित विवेचक को आदेशित किया जाता है कि उक्त मामले में विवेचना अतिशीघ्र पूर्ण करना सुनिश्चित करें तथा आरोपपत्र अतिशीघ्र न्यायालय में प्रषित करना सुनिश्चित करें। इस आदेश की एक प्रति संबंधित थाना पुलिस को अनुपालन हेतु प्रेषित की जावे।

6. Learned counsel for the petitioner further submits that the petitioner was neither aware of the proceedings of the case nor any progress report has been submitted by the Investigating Officer.

7. Per contra, Sri Vinod Kant, learned Additional Advocate General submits that the jurisdiction lies with the Magistrate in view of the provision of Section 190 read with Section 156 of Cr.P.C. and the Magistrate shall proceed in accordance with law. He further suggests that the petitioner may approach before the concerned Magistrate regarding the latest progress of the case and she may also apprised the learned Magistrate that the matter may be expedited, the learned Magistrate may proceed in the matter in accordance with law, hence the present habeas corpus writ petition is not maintainable at this stage and referred the provision of Section 190 and 156 Cr.P.C. which is reproduced hereinbelow :

190. Cognizance of offences by Magistrates.

(1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub- section (2), may take cognizance of any offence-

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a police report of such facts;

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub- section (1) of such offences as are within his competence to inquire into or try.

156. Police officer' s power to investigate cognizable case.

(1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.

(2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.

(3) Any Magistrate empowered under section 190 may order such an investigation as above- mentioned.

8. Considering the arguments advanced by the learned counsel for the parties and after perusal of record, this Court finds that there is a force in the submission made by Sri Vinod Kant, learned Additional Advocate General that the petitioner has a remedy under Section 190 read with Section 156 of Cr.P.C. to approach before the concerned Magistrate for redressal of her grievance.

9. From the persual of the record, it is beyond doubt to observe that the learned Magistrate is already monitoring the matter and has passed the order dated 22.10.2020 directing the Investigating Officer to investigate the matter expeditiously and submit his report forthwith, if the petitioner is not satisfied with the progress of the investigation, she may apprise the learned Magistrate with this fact and she may move appropriate application in the case for further direction to be issued in accordance with law by the learned Magistrate.

10. Thus, in view of the above, the remedy, if any, for the petitioner is to approach the concerned Magistrate in respect of her grievance, the present habeas corpus writ petition before this Court is not maintainable.

11. With the above observation and direction, the present habeas corpus writ petition is being finally **disposed of.**

(2022)01ILR A168
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.12.2021

BEFORE

THE HON'BLE MAHESH CHANDRA TRIPATHI, J.
THE HON'BLE SUBHASH VIDYARTHI, J.

E-Habeas Corpus Writ Petition No. 362 of 2021

Abhayraj Gupta ...Petitioner
Versus
Superintendent, Central Jail, Bareilly & Ors. ...Respondents

Counsel for the Petitioner:
Sri Daya Shankar Mishra, Senior Advocate, Sri Chandrakesh Mishra, Sri Abhishek Mishra

Counsel for the Respondents:
Sri Syed Ali Murtaza, A.G.A., A.S.G.I., Ms. Sadhana Singh, Advocate

Constitution of India - Article 226 - Habeas corpus writ petition - F.I.R. lodged u/s 498A, 364 I.P.C., 3/4 D.P. Act - but neither proceedings of case expedited nor corpus recovered - habeas corpus writ petition filed for direction to produce corpus and to set her at liberty - Held - In view of S. 190 & S. 156 Cr.P.C. petitioner may approach Magistrate regarding the latest progress of the case & apprised Magistrate that the matter may be expedited - habeas corpus writ petition not maintainable (Para 9, 10)

Disposed Off. (E-5)

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

1. Heard Shri Daya Shankar Mishra, learned Senior Advocate, assisted by Shri Chandrakesh Mishra and Shri Abhishek Mishra Advocates, learned Counsel appearing for the petitioner, Shri Syed Ali

Murtaza. learned Additional Government Advocate for the State-respondents (1) Superintendent, Central Jail, Bareli, (2) the District Magistrate, Shahjahanpur and (3) the State of Uttar Pradesh and Ms. Sadhna Singh, learned Standing Counsel for the Union of India.

2. The instant Writ Petition under Article 226 of the Constitution of India has been filed by the petitioner Abhay Raj Gupta, who is in custody in Central Jail, Bareilly, through his mother, seeking issuance of a Writ of Habeas Corpus challenging his detention under an order dated 23-01-2021 passed under Section 3 (2) of the **National Security Act, 19801** and the entire consequential proceedings and continued detention as being illegal and unconstitutional and a prayer has been made to issue a Writ of Mandamus commanding the respondents to release the petitioner from custody.

3. The detention order dated 23-01-2021 states that the District Magistrate has been satisfied that it has become necessary to pass a detention order under Section 3 (2) of the NSA, 1980 to prevent the petitioner from acting in any manner which would be prejudicial to the maintenance of public order. The grounds of detention are contained in a separate communication of the same date issued by the District Magistrate, which narrates the incident which led to the passing of the detention order. As per the report given by the informant, the deceased Rakesh Yadav accompanied by Kuldeep Jaiswal alias Sonu, Driver Shadab and the informant, reached the P.W.D. Office at about 01:15 p.m. on 02-12-2019. Three unidentified persons present there started firing at Rakesh Yadav with the intention to kill him. As soon as Kuldeep Jaiswal alias Sonu took aim with the licensee pistol of Rakesh, they fired at him also. People starting running away. Rakesh Yadav was killed and Kuldeep Jaiswal was admitted for treatment. On the information of the brother of the deceased, Case Crime Number 837/19 under Sections 302, 307 IPC was registered on 03-12-2019 at 00:53 in Police Station Sadar Bazar, Shahjahanpur.

4. The Second F.I.R. under Case Crime Number 873/19 under Section 307 IPC was registered on 22-12-2019 in Police Station Sadar Bazar, Shahjahanpur on the allegation that when the police apprehended the petitioner to arrest him for the aforesaid incident which occurred on 02-12-2019, he fired at the Police personnel with the intention to kill. The petitioner was taken in custody and was lodged in Jail on 23-12-2019.

5. On the ground of the same incident, a third F.I.R. was lodged under Section 2/3 of the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986 as Case Crime No. 221/20 in Police Station Sadar Bazar, Shahjahanpur, in which the petitioner is in custody since 01-05-2020.

6. The detention order states that because of the incident which occurred in P.W.D. Office on 02-12-2019 at about 01:15, the students present in the Gandhi Faiz-e-Aam College adjacent to the P.W.D. College got panicked. Upon coming to know about the incident the guardians of the students also got panicked and in talks with the college management they expressed their concern regarding the

safety of their children. The Principal, G. F. College has given an application in this regard to the Police, which establishes that because of the offence of gruesome murder done by the petitioner's accomplices under a conspiracy hatched by him, people got afraid and panicked and the public order was disturbed.

7. It has been averred in the writ petition that there has been an old animosity between the deceased Rakesh Yadav and his family members and the family members of the petitioner. The petitioner's grand father Radheyshyam had lodged a first information report in relation to murder of the petitioner's uncle Ashutosh Gupta against Giran Yadav and Kamlesh Yadav uncles of the deceased Rakesh Yadav and in that case Giran Yadav, father of the deceased Rakesh Yadav had to remain in jail for a period of 18 months.

8. The detention order has been challenged by means of the instant Writ Petition mainly on five grounds. The first ground of challenge is that the alleged incident was an offence against an individual which affected "law and order", but it does not affect "public order" so as to attract the provisions of Section 3(2) of the NSA, 1980. The second ground of challenge is that the incident which took place on 02-12-2019 is a stale incident which has no proximity with the detention order and the invocation of the provisions of the NSA, 1980 after a long delay on 23-01-2021 was neither warranted nor justified. The third ground of challenge is that copies of the entire relevant material referred to and relied upon in the detention order have not been provided to the petitioner. The documents provided with the detention order have been mentioned in an index, a copy whereof has been filed as Annexure No. 5 to the writ petition and at serial No. 46 it mentions the bail application filed in case crime No. 221 of 2020 under Section 2/3 of the Gangsters Act contained one page only. The petitioner has filed a copy of the index of the aforesaid bail application as Annexure No. 4 to the writ petition which indicates that its index was of one page only and the entire bail application consisted of as many as of 19 pages. The copies of the report of the District Magistrate and that of the advisory Board were not provided to the petitioner as also comments on the said applications have not been provided to the petitioner in violation of the principles of natural justice, which renders the detention order unsustainable in law. Lastly the detention order has been assailed on the ground that on 23-01-2021, i.e. on the date of passing of the detention order, the petitioner was already in custody and he had not even filed an application for Bail in Case Crime No. 221 of 2020 under the U. P. Gangsters and Anti-Social Activities (Prevention) Act and there was no possibility of the petitioner acting in any manner prejudicial to the maintenance of public order and in these circumstances, the provisions of Section 3 (2) of the NSA, 1980 are not attracted and the detention order is unsustainable in law.

9. In support of his submissions, Shri Daya Shankar Mishra, learned Senior Advocate has placed reliance on the judgments in the cases of Ichhu Devi Choraria Vs. Union of India and others, 1980 AIR 1983, Mohinuddin @ Moin Master Vs. District Magistrate, Beed and others, 1987 AIR 1977, State of U.P. Vs. Kamal Kishore Saini, 1988 AIR 208, M. Ahamedkutty Vs. Union of India, 1990 SCR (1) 209, Inamul Haq Engineer Vs. Superintendent, Division/District Jail,

Azamgarh, 2001 Cri.L.J. 4398, Lallan Goswami Ajayn Vs. Superintendent, Central, 2002 (45) ACC 1089, Brijbasi Pathak Vs. State of Uttar Pradesh and others, 1985 (suppl.) ACC 273, Mrs. T. Devaki Vs. Government of Tamil Nadu and others, 1990 AIR 1086, Smt. Angoori Devi for Ram Ratan Vs. Union of India and others, 1989 AIR 371, Ram Manohar Lohia Vs. State of Bihar and another, AIR 1966 SC 740, Sant Singh Vs. District Magistrate and others, 2000 CriLJ 2230, Ram Kripal Singh Vs. State of U.P. And others, 1986 CriLJ 1437, Banka Sneha Sheela Vs. The State of Telangana and others, (2021) 9 SCC 415, Mahesh Kumar Chauhan alias Banti Vs. Union of India and others, 1990 0 Supreme (SC) 298, Prabhu Dayal Deorah etc. Vs. District Magistrate, Kamrup and others, 1973 0 Supreme (SC) 320, Imran @ Tendu Vs. Adhikshak, Janpad Karagar, Muzaffar Nagar and others, 2018 0 Supreme (All) 346, Ayya alias Ayub Vs. State of U.P. and another, 1989 AIR 364, SK. Serajul Vs. State of West Bengal, AIR 1975 Supreme Court 1517, Sk. Nizamuddin Vs. State of West Bengal, 1975 CRI. L.J. 12, Jagan Nath Biswas Vs. The State of W.B, AIR 1975 Supreme Court 1516, Md. Sahabuddin Vs. The District Magistrate 24 Parganas and others, 1975 CRI. L.J. 1499, Vijay Narain Singh Vs. State of Bihar and others, 1984 1 Crimes (SC) 914, Shesh Dhar Mishra Vs. Superintendent, Naini Central Jail, 1985 All L.J. 1222.

10. The District Magistrate, Shahjahanpur has filed a counter affidavit on behalf of the State-respondents stating that during the course of investigation of the heinous crime committed in broad day light in P.W.D. Office, in which one Rakesh Yadav was shot dead and another person Kuldeep Jaiswal alias Sonu received grievous injuries, the complicity of the petitioner came into knowledge. The act of the petitioner created terror and panic in the locality and peaceful atmosphere was disturbed and after considering this aspect of the matter, the provisions of NSA, 1980 have been imposed upon the petitioner, after considering the report of the Sponsoring Authority, Police Authority and the entire facts available on record and after serving relevant documents upon the petitioner through jail authorities.

11. A counter affidavit has been filed on behalf of the Union of India also stating that the report as envisaged under Section 3 (5) of the NSA, 1980 forwarded by the Government of Uttar Pradesh by a letter dated 01-02-2021 was received in the Ministry of Home Affairs on 08-02-2021. The same was examined in detail alongwith the documents attached therewith by the Deputy Secretary (Security) who noted that there was no reason to interfere with the said detention order. A copy of the representation dated 13-02-2021 of the detenue alongwith para-wise comments of the detaining authority, forwarded by the District Magistrate, Shahjahanpur by the letter dated 15-02-2021, was received in the Ministry of Home Affairs on 18-02-2021 and on 19-02-2021, the same was processed for consideration of Union Home Secretary. Being aware of the effects and sensitivity of detention under the NSA, 1980, the representation was duly considered at various levels to ascertain the merit. Thereafter, the Union Home Secretary having carefully gone through the material on record, including the order of detention, the grounds for detention, the representation of the detenue and the comments of the detaining authority thereon concluded that the detenue had

failed to put forth any material cause or ground in his representation to justify the revocation of the order by exercise of the power of the Central Government under Section 14 of the NSA, 1980. He, therefore, rejected the representation and the detenue was informed vide wireless message No. II/15028/25/2021-NSA dated 24.2.2021.

12. Opposing the writ petition, Shri Syed Ali Murtaza, learned A.G.A. has submitted that there is no thumb rule that the preventive detention can be ordered only if a bail application is pending. Its genesis lies under Article 22 of the Constitution of India. However, normally preventive detention is ordered only when a bail application is pending. As the petitioner was already in custody in a case under Section 302 I.P.C., the NSA, 1980 was not invoked. The cause of action for invoking the NSA, 1980, was that the petitioner was granted bail in Case Crime No. 837 of 2019 and Case Crime No. 873 of 2019 and he had filed an application for bail in the case under the Gangster Act. He has submitted that whether the case involves a threat to maintenance of "public order" or "law and order" depends upon the facts of each case and the order of preventive order has to be passed by the detaining authority on the basis of his subjective satisfaction in this regard. Mr. Murtaza has submitted that the incident took place at a public place due to which the PWD office and the nearby shops were closed and the students of college situated nearby got panicked and, therefore, it involves breach of public order and not merely a law and order. He has submitted that the detention order under NSA, 1980 can be passed in any of the following conditions: (a) if the accused is not in custody or when he is in custody (b) the detaining authority is satisfied that he may be enlarged on bail (c) where no bail application is pending.

13. In response to the petitioner's contention that the entire relevant material was not provided to him, Sri Murtaza has submitted that although the detention order refers to the two criminal cases bearing Case Crime Nos. 837 of 2019 and 873 of 2019, but it is not a ground of the detention order and it has not been relied upon by the detaining authority. Hence, the first information report of these two cases was not a relevant material required to be furnished by the detaining authority. The bail applications filed by the petitioners regarding these two cases were his own documents and, therefore, the petitioner did not suffer any prejudice due to non-supply of the bail applications and the connected documents. The material is to be provided because it would affect the satisfaction of the detaining authority regarding the grounds of detention and secondly to enable the detenue to make an effective representation. The criminal cases pending against the petitioner were not going to affect or change the mind of the detaining authority.

14. Sri Syed Ali Murtaza has further submitted that even if the Court comes to the conclusion that the relevant material was not provided to the petitioner, it would not affect the validity of the detention order because the detention order has been passed on many grounds and not on one. Section 5 A of the NSA, 1980 provides that the detention order shall not be deemed to be invalid or inoperative merely because one or some of the grounds for passing the detention order is vague, non-existent, not relevant, not connected or not proximately connected with such person or invalid for any other reason, whatsoever.

15. Sri Syed Ali Murtaza has placed reliance on judgments rendered in Baby Devassy Chully alias Bobby Vs. Union of India and others, (2013) 4 SCC 531, Arun Ghosh Vs. West Bengal, 1970 SC 1228, Alijan Miya Vs. District Magistrate, 1983 SC 1130 and K.K. Saravana Vs. State of Tamil Nadu, (2008) 9 SCC 89 and Kamarunnissa Vs. Union of India and another, AIR 1991 SC 1640.

16. Ms. Sadhna Singh, learned counsel appearing for the Union of India has advanced her submissions opposing the Writ Petition and she has tried to justify the detention order. She has placed reliance on Devesh Chourasia Vs. The District Magistrate, Jabalpur and Ors., WP No. 10177/2021 in The High Court of Madhya Pradesh (Indore Bench) Decided On: 24.08.2021 and Pankaj Vs. State of U.P. and others, 2016 1 Crimes (HC) 8.

17. In the case of **Devesh Chourasia vs. The District Magistrate, Jabalpur and Ors.,** WP No. 10177/2021 Decided On 24.08.2021 placed by Ms. Sadhna Singh, an FIR was lodged against employee of Pharmaceutical Department of a hospital under sections 274, 275, 308, 420, 120-B of IPC read with Sec. 53 of Disaster Management Act, 2005 and Sec. 3 of the Epidemic Act, 1897 on the allegations that the accused procured and used fake Remdesivir injections to gain illegal profits during the pandemic era thereby endangering human life. Keeping in view the peculiar facts of the case and after taking into consideration numerous precedents on this point, the Madhya Pradesh High Court summarized the principles applicable to preventive detention as follows: -

"36. In view of aforesaid judgments of Supreme Court, we can cull out the principles as under:-

[1] It is not necessary that authority passing the detention order must always be in possession of complete information at the time of passing the order.

[2] The information on the strength of which detention order is passed may fall far short of legal proof of any specific offence. If order indicates strong probability of impending commission of a prejudicial act, it is sufficient for passing a detention order.

[3] The Court is not obliged to enquire into the correctness/truth of facts which are mentioned as grounds of detention.

[4] Whether grounds of detention mentioned in the order are good or bad is within the domain of competent authority.

[5] The satisfaction of competent authority in passing the detention order can be assailed on limited grounds including the ground of mala-fide and no evidence at all.

[6] The jurisdiction under the NSA Act is different from that of judicial trial in courts for offence and of judicial orders for prevention of offence. Even unsuccessful judicial trial would not operate as a bar to a detention order or make it mala-fide.

[7] An improperly recorded confession u/S. 161 of Cr.P.C. cannot be used as substantive evidence against the accused in criminal case but it cannot be completely brushed aside on that ground for the purpose of preventive detention.

[8] The Court cannot examine the materials before it and give finding that detaining authority should not have been satisfied on the material before it. The

sufficiency of ground of detention can not be subject matter of judicial review.

[9] The justification for detention is suspicion or reasonable probability and not criminal conviction which can only be warranted by legal evidence. Thus, it is called as 'suspicious jurisdiction'.

[10] In a habeas corpus petition, Court needs to examine whether detention is prima-facie legal or not and is not required to examine whether subjective satisfaction on a question of fact is rightly reached or not.

[11] The statements/evidence gathered during investigation falls within the ambit of "some evidence" which can form basis for detaining a person.

[12] The detention order is an administrative order."

18. However, we are not inclined to follow the aforesaid decision cited by Mr. Sadhna Singh as in this decision, Madhya High Court has not taken into consideration the law laid down by the Hon'ble Supreme Court in the case of **Vijay Narain Singh v. State of Bihar2,** which is as follows:

"the view that "those who are responsible for the national security or for the maintenance of public order must be the sole judges of what the national security or public order requires" It is too perilous a proposition. Our Constitution does not give a carte blanche to any organ of the State to be the sole arbiter in such matters. Preventive detention is considered so treacherous and such an anathema to civilised thought and democratic polity that safeguards against undue exercise of the power to detain without trial, have been built into the Constitution itself and incorporated as Fundamental Rights. There are two sentinels, one at either end. ***The Legislature is required to make the law circumscribing the limits within which persons may be preventively detained and providing for the safeguards prescribed by the Constitution and the courts are required to examine, when demanded, whether there has been any excessive detention, that is whether the limits set by the Constitution and the Legislature have been transgressed. Preventive detention is not beyond judicial scrutiny."*** (emphasis supplied)

19. The law relating to preventive detention vis-a-vis the Fundamental Right to liberty guaranteed by Article 21 of the Constitution of India has been discussed by the Hon'ble Supreme Court in a recent decision in the case of ***Banka Sneha Sheela v. State of Telangana3*** in the following words: -

"24. In Rekha v. State of T.N. [Rekha v. State of T.N., (2011) 5 SCC 244 : (2011) 2 SCC (Cri) 596] , a three-Judge Bench of this Court spoke of the interplay between Articles 21 and 22 as follows: (SCC p. 252, paras 13-14 and 17)

"13. In our opinion, Article 22(3)(b) of the Constitution of India which permits preventive detention is only an exception to Article 21 of the Constitution. An exception is an exception, and cannot ordinarily nullify the full force of the main rule, which is the right to liberty in Article 21 of the Constitution. Fundamental rights are meant for protecting the civil liberties of the people, and not to put them in jail for a long period without recourse to a lawyer and without a trial. As observed in R. v. Secy. of State for the Home Deptt., ex p Stafford [R. v. Secy. of State for the Home Deptt., ex p Stafford, (1998) 1 WLR 503 (CA)] : (WLR p. 518 F-G)

"... The imposition of what is in effect a substantial term of imprisonment

by the exercise of executive discretion, without trial, lies uneasily with ordinary concepts of the rule of law.'

Article 22, hence, cannot be read in isolation but must be read as an exception to Article 21. An exception can apply only in rare and exceptional cases, and it cannot override the main rule.

14. Article 21 is the most important of the fundamental rights guaranteed by the Constitution of India. Liberty of a citizen is a most important right won by our forefathers after long, historical and arduous struggles. Our Founding Fathers realised its value because they had seen during the freedom struggle civil liberties of our countrymen being trampled upon by foreigners, and that is why they were determined that the right to individual liberty would be placed on the highest pedestal along with the right to life as the basic right of the people of India.

***

Article 22(1) of the Constitution makes it a fundamental right of a person detained to consult and be defended by a lawyer of his choice. But Article 22(3) specifically excludes the applicability of clause (1) of Article 22 to cases of preventive detention. Therefore, we must confine the power of preventive detention to very narrow limits, otherwise the great right to liberty won by our Founding Fathers, who were also freedom fighters, after long, arduous and historical struggles, will become nugatory."

25. This Court went on to discuss, in some detail, the conceptual nature of preventive detention law as follows: (Rekha case [Rekha v. State of T.N., (2011) 5 SCC 244 : (2011) 2 SCC (Cri) 596] , SCC p. 255, paras 29-30)

"29. Preventive detention is, by nature, repugnant to democratic ideas and an anathema to the rule of law. No such law exists in the USA and in England (except during war time). Since, however, Article 22(3)(b) of the Constitution of India permits preventive detention, we cannot hold it illegal but we must confine the power of preventive detention within very narrow limits, otherwise we will be taking away the great right to liberty guaranteed by Article 21 of the Constitution of India which was won after long, arduous and historic struggles. It follows, therefore, that if the ordinary law of the land (the Penal Code and other penal statutes) can deal with a situation, recourse to a preventive detention law will be illegal.

*30.**Whenever an order under a preventive detention law is challenged one of the questions the court must ask in deciding its legality is: was the ordinary law of the land sufficient to deal with the situation? If the answer is in the affirmative, the detention order will be illegal.** In the present case, the charge against the detenu was of selling expired drugs after changing their labels. Surely the relevant provisions in the Penal Code and the Drugs and Cosmetics Act were sufficient to deal with this situation. Hence, in our opinion, for this reason also the detention order in question was illegal." (emphasis supplied)*

26. In an important passage, this Court then dealt with certain general observations made by the Constitution Bench in Haradhan Saha v. State of W.B. [Haradhan Saha v. State of W.B., (1975) 3 SCC 198 : 1974 SCC (Cri) 816] as follows: (Rekha case [Rekha v. State of T.N., (2011) 5 SCC 244 : (2011) 2 SCC (Cri) 596] , SCC pp. 255-57, paras 33-36 and

"33. No doubt it has been held in the Constitution Bench decision in Haradhan Saha case [Haradhan Saha v. State of W.B., (1975) 3 SCC 198 : 1974 SCC (Cri) 816] that even if a person is liable to be tried in a criminal court for commission of a criminal offence, or is actually being so tried, that does not debar the authorities from passing a detention order under a preventive detention law. This observation, to be understood correctly, must, however, be construed in the background of the constitutional scheme in Articles 21 and 22 of the Constitution (which we have already explained). ***[Ed.****: The matter between two asterisks has been emphasised in original.] Article 22(3)(b) is only an exception to Article 21 and it is not itself a fundamental right [Ed. : The matter between two asterisks has been emphasised in original.] . It is Article 21 which is central to the whole chapter on fundamental rights in our Constitution. The right to liberty means that before sending a person to prison a trial must ordinarily be held giving him an opportunity of placing his defence through his lawyer. It follows that if a person is liable to be tried, or is actually being tried, for a criminal offence, but the ordinary criminal law (the Penal Code or other penal statutes) will not be able to deal with the situation, then, and only then, can the preventive detention law be taken recourse to.*

34. Hence, the observation in SCC para 34 in Haradhan Saha case [Haradhan Saha v. State of W.B., (1975) 3 SCC 198 : 1974 SCC (Cri) 816] cannot be regarded as an unqualified statement that in every case where a person is liable to be tried, or is actually being tried, for a crime in a criminal court a detention order can also be passed under a preventive detention law.

35. It must be remembered that in cases of preventive detention no offence is proved and the justification of such detention is suspicion or reasonable probability, and there is no conviction which can only be warranted by legal evidence. Preventive detention is often described as a "jurisdiction of suspicion" (vide State of Maharashtra v. Bhaurao Punjabrao Gawande [State of Maharashtra v. Bhaurao Punjabrao Gawande, (2008) 3 SCC 613 : (2008) 2 SCC (Cri) 128] , SCC para 63). The detaining authority passes the order of detention on subjective satisfaction. Since clause (3) of Article 22 specifically excludes the applicability of clauses (1) and (2), the detenu is not entitled to a lawyer or the right to be produced before a Magistrate within 24 hours of arrest. To prevent misuse of this potentially dangerous power the law of preventive detention has to be strictly construed and meticulous compliance with the procedural safeguards, however technical, is, in our opinion, mandatory and vital.

36. ***It has been held that the history of liberty is the history of procedural safeguards.*** *(See Kamleshkumar Ishwardas Patel v. Union of India [Kamleshkumar Ishwardas Patel v. Union of India, (1995) 4 SCC 51 : 1995 SCC (Cri) 643] vide para 49.)* ***These procedural safeguards are required to be zealously watched and enforced by the court and their rigor cannot be allowed to be diluted on the basis of the nature of the alleged activities of the detenu.*** *As observed in Rattan Singh v. State of Punjab [Rattan Singh v. State of Punjab, (1981) 4 SCC 481 : 1981 SCC (Cri) 853] : (SCC p. 483, para 4)*

"4. ... May be that the detenu is a smuggler whose tribe (and how their numbers increase) deserves no sympathy

since its activities have paralysed the Indian economy. But the laws of preventive detention afford only a modicum of safeguards to persons detained under them, and if freedom and liberty are to have any meaning in our democratic set-up, it is essential that at least those safeguards are not denied to the detenus.'

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39. Personal liberty protected under Article 21 is so sacrosanct and so high in the scale of constitutional values that it is the obligation of the detaining authority to show that the impugned detention meticulously accords with the procedure established by law. The stringency and concern of judicial vigilance that is needed was aptly described in the following words in Reverend Thomas Pelham Dale case [Reverend Thomas Pelham Dale case, (1881) LR 6 QBD 376 (CA)] : (QBD p. 461)

"Then comes the question upon the habeas corpus. It is a general rule, which has always been acted upon by the courts of England, that if any person procures the imprisonment of another he must take care to do so by steps, all of which are entirely regular, and that if he fails to follow every step in the process with extreme regularity the court will not allow the imprisonment to continue."

20. Keeping in mind the aforesaid dictum of the Hon'ble Supreme Court, we proceed to examine the grounds of challenge to the validity of the detention order dated 23-01-2021. The first ground of challenge is that the alleged incident was an offence against an individual which affected "law and order", but it does not affect "public order" so as to attract the provisions of Section 3 (2) of the NSA, 1980.

21. Before proceeding further, it would be appropriate to have a look at Section 3 (2) of the NSA, 1980, which is as follows:

"3. Power to make orders detaining certain persons.--

.....

(2) The Central Government or the State Government may, if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to the security of the State or from acting in any manner prejudicial to the maintenance of public order or from acting in any manner prejudicial to the maintenance of supplies and services essential to the community it is necessary so to do, make an order directing that such person be detained.

.....

(3) If, having regard to the circumstances prevailing or likely to prevail in any area within the local limits of the jurisdiction of a District Magistrate or a Commissioner of Police, the State Government is satisfied that it is necessary so to do, it may, by order in writing, direct, that during such period as may be specified in the order, such District Magistrate or Commissioner of Police may also, if satisfied as provided in sub-section (2), exercise the powers conferred by the said sub-section:

Provided that the period specified in an order made by the State Government under this sub-section shall not, in the first instance, exceed three months, but the State Government may, if satisfied as aforesaid that it is necessary so to do, amend such

order to extend such period from time to time by any period not exceeding three months at any one time."

22. An order of detention can be passed under the aforesaid provision with a view to prevent a person from acting in any manner prejudicial to the security of the State or from acting in any manner prejudicial to the maintenance of public order. Numerous judgments have been cited by the learned Senior Advocate appearing for the petitioner as well as by the learned A.G.A. on the interpretation of the phrase "public order".

23. We now proceed to examine a few precedents in detail so as to ascertain whether the facts of the present case make out a case of disturbance to "public order" or it would merely fall under the category of a disturbance to "law and order".

24. In **Arun Ghosh Vs. State of West Bengal4,** the preventive detention was ordered on the following allegations against the accused: -

"18-5-1966 Teased one Rekha Rani Barua, and when her father protested confined and assaulted him.

29-3-1968 One Deepak Kumar Ray was wrongfully restrained and assaulted with lathis and rods.

1-4-1968 Attempt was made to assault Deepak Kumar Ray at the Malda Sadar Hospital where he was being treated for his injuries in the previous assault.

2-9-1968 Threatened one Phanindra C. Das that he would insult his daughter publicly.

26-10-1968 Embraced Uma Das d/o Phanindra C. Das and threw white powder on her face (Criminal case started).

7-12-1968 Obscenely teased Smt Sima Das, sister of Uma Das and beat her with chappals.

18-12-1968 Smt Sima Das was again teased

26-1-1969 Threatened the life of Phanindra C. Das."

25. In the light of the aforesaid facts, the Hon'ble Supreme Court proceeded to hold as follows:-

"3. The submission of the counsel is that these are stray acts directed against individuals and are not subversive of public order and therefore the detention on the ostensible ground of preventing him from acting in a manner prejudicial to public order was not justified. *In support of this submission reference is made to three cases of this Court: Dr Ram Manohar Lohia v. State of Bihar (1966) 1 SCR 709 ; Pushkar Mukherjee v. State of W.B. WP No. 179 of 1968, decided on November 7, 1968 : (1969) 1 SCC 10 and Shyamal Chakraborty v. Commissioner of Police, Calcutta WP No. 102 of 1969, decided on August 4, 1969 : (1969) 2 SCC 426. In Dr Ram Manohar Lohia case [(1966) 1 SCR 709] this Court pointed out the difference between maintenance of law and order and its disturbance and the maintenance of public order and its disturbance.* ***Public order was said to embrace more of the community than law and order. Public order is the even tempo of the life of the community taking the country as a whole or even a specified locality. Disturbance of public order is to be distinguished from acts directed against individuals which do not disturb the society to the extent of causing a general disturbance of public tranquility. It is the degree of disturbance and its affect upon the life of the community in a locality***

which determines whether the disturbance amounts only to a breach of law and order. *Take for instance, a man stabs another. People may be shocked and even disturbed, but the life of the community keeps moving at an even tempo, however much one may dislike the act. Take another case of a town where there is communal tension. A man stabs a member of the other community. This is an act of a very different sort. Its implications are deeper and it affects the even tempo of life and public order is jeopardized because the repercussions of the act embrace large sections of the community and incite them to make further breaches of the law and order and to subvert the public order. An act by itself is not determinant of its own gravity. In its quality it may not differ from another but in its potentiality it may be very different. Take the case of assault on girls. A guest at a hotel may kiss or make advances to half a dozen chamber maids. He may annoy them and also the management but he does not cause disturbance of public order. He may even have a fracas with the friends of one of the girls but even then it would be a case of breach of law and order only. Take another case of a man who molests women in lonely places. As a result of his activities girls going to colleges and schools are in constant danger and fear. Women going for their ordinary business are afraid of being waylaid and assaulted. The activity of this man in its essential quality is not different from the act of the other man but in its potentiality and in its affect upon the public tranquility there is a vast difference. The act of the man who molests the girls in lonely places causes a disturbance in the even tempo of living which is the first requirement of public order. He disturbs the society and the community. His act makes all the women apprehensive of their honour and he can be said to be causing disturbance of public order and not merely committing individual actions which may be taken note of by the criminal prosecution agencies.* ***It means therefore that the question whether a man has only committed a breach of law and order or has acted in a manner likely to cause a disturbance of the public order is a question of degree and the extent of the reach of the act upon the society.*** *The French distinguish law and order and public order by designating the latter as order publique. The latter expression has been recognised as meaning something more than ordinary maintenance of law and order. Justice Ramaswami in Writ Petition No. 179 of 1968 drew a line of demarcation between the serious and aggravated forms of breaches of public order which affect the community or endanger the public interest at large from minor breaches of peace which do not affect the public at large. He drew an analogy between public and private crimes. The analogy is useful but not to be pushed too far. A large number of acts directed against persons or individuals may total up into a breach of public order. In Dr Ram Manohar Lohia case examples were given by Sarkar and Hidayatullah, JJ. They show how similar acts in different contexts affect differently law and order on the one hand and public order on the other. It is always a question of degree of the harm and its affect upon the community.* ***The question to ask is: Does it lead to disturbance of the current of life of the community so as to amount a disturbance of the public order or does it affect merely an individual leaving the tranquility of the society undisturbed? This question has to be faced in every case on facts. There is no***

formula by which one case can be distinguished from another."

5. In the present case all acts of molestation were directed against the family of Phanindra C. Das and were not directed against women in general from the locality. Assaults also were on individuals. The conduct may be reprehensible but it does not add up to the situation where it may be said that the community at large was being disturbed or in other words there was a breach of public order or likelihood of a breach of public order. The case falls within the dictum of Justice Ramaswami and the distinction made in Dr Ram Manohar Lohia case." (emphasis supplied)

26. In **Subhash Bhandari Vs. District Magistrate and others5,** the facts mentioned in the detention order were that: -

"...on September 15, 1984 there was a tender for the supply of ballast in PWD in which tenders had been submitted by him in K.P. Singh's name. You keep share with K.P. Singh. On account of your and K.P. Singh's terror no other person submits any tender against you people for which reason you people obtain tenders at rates of your choice. If any other person submits his tender you and K.P. Singh terrorise him. On account of the rates of his tender being lower on September 15, 1984, the tender of the complainant was accepted in one group and in the remaining groups the tenders of K.P. Singh etc. were accepted. For this reason you and K.P. Singh bore a grudge against the complainant.

On September 25, 1984 at about 3.45 p.m. when Surya Kumar was going, in connection with his tender, in his Ambassador car No. USS 7418, accompanied by his brother-in-law, opposite to the National Highway Khand, he saw some contractors. On reaching near them the complainant had just started talking to them, when suddenly in two cars, you with a pistol, Phool Chand with a revolver, Jaleel with a revolver, Ashok with desi katta, Ashok Sonkar and Saarif with hand-grenade and Shankar Dey with a gun along with three other persons came and with intent to kill the complainant fired at the complainant, threw hand-grenades which fell on the car of the complainant. Consequently, there was a commotion. Traffic was obstructed and public tranquillity was disturbed....."

27. In the backdrop of the above mentioned facts, the Hon'ble Supreme Court proceeded to formulate the question to be decided as follows: -

"6. The High Court of Allahabad after hearing the parties and on a consideration of the decisions cited before it found that whether an act creates a mere law and order problem or affects the even tempo of the life of the community, it is to be seen what is the extent of the impact of the act in question upon the society as a whole; whether the effect is restricted to an individual or a few individuals alone or it creates a sense of insecurity, danger and apprehension in the minds of the people in general apart from those who are the victims of the incident; whether the act or acts disturb the even tempo of life of the society or a section of society; whether the act leads to disturbance of public order or only law and order. The High Court further found that in the context the act committed tends to teach a lesson to the complainant and to act as a warning to prospective tenderers in future who may not dare to avail of the opportunity to submit their

tenders against that of the appellants. It was also found that the impact and reach of the act in question goes beyond the individual and affects the community of contractors who take contracts for executing the public works. The court further held that the order of detention made by the detaining authority is legal and valid and the writ petitions were dismissed.

.....

8. The main question which falls for decision is whether the act referred to in the grounds of detention is directed against certain individuals creating a law and order problem or the reach and potentiality of the act is so deep as to disturb the society to the extent of causing a general disturbance of public tranquility."

28. The aforesaid question was decided by the Hon'ble Supreme Court in the following manner: -

"9. It has now been well settled by several decisions of this Court (the latest one being Gulab Mehra v. State of U.P. [(1987) 4 SCC 302] judgment which was pronounced by us on September 15, 1987) that public order is the even tempo of the life of the community taking the country as a whole or even a specified locality. Disturbance of public order is to be distinguished from acts directed against individuals which do not disturb the society to the extent of causing a general disturbance of public tranquillity. It is the degree of disturbance and its effect upon the life of the community in a locality which determines whether the disturbance amounts only to a breach of law and order or it affects public order. It has also been observed by this Court that an act by itself is not determinant of its own gravity. In its quality it may not differ from another but in its potentiality it may be very different. Therefore it is the impact, reach and potentiality of the act which in certain circumstances affect the even tempo of life of the community and thereby public order is jeopardized. Such an individual act can be taken into consideration by the detaining authority while passing an order of detention against the person alleged to have committed the act.

10. ***In the instant case the alleged act of assault by firearms is confined to the complainant Surya Kumar and not to others. It is an act infringing law and order and the reach and effect of the act is not so extensive as to affect a considerable members (sic number) of the society. In other words, this act does not disturb public tranquillity nor does it create any terror or panic in the minds of the people of the locality nor does it affect in any manner the even tempo of the life of the community. This criminal act emanates from business rivalry between the detenus and the complainant. Therefore such an act cannot be the basis for subjective satisfaction of the detaining authority to pass an order of detention on the ground that the impugned act purports to affect public order i.e. the even tempo of the life of the community which is the sole basis for clamping the order of detention....."*** (emphasis supplied)

29. The following passage from the **State of U.P. v. Kamal Kishore Saini6,** throws light on the difference between "public order" and "law and order" in a very succinct manner: -

"8. The High Court has found that the incidents mentioned in Ground 1

and 2 are confined to law and order problem and not public order inasmuch as these incidents concerned particular individuals and do not create any terror or panic in the locality affecting the even tempo of the life of the community. This Court in the case of Dr Ram Manohar Lohia v. State of Bihar [AIR 1966 SC 740 : 1966 Cri LJ 608 : (1966) 1 SCR 705] has observed:

"The contravention of law always affects order but before it can be said to affect public order, it must affect the community or the public at large. *There are three concepts according to the learned Judge (Hidayatullah, J.) i.e. "law and order', "public order' and "security of the State'. It has been observed that to appreciate the scope and extent of each of them one should imagine three concentric circles. The largest of them represented law and order, next represented public order and the smallest represented the security of the State. An act might affect law and order but not public order just as an act might affect public order but not the security of the State." (Emphasis supplied by this Court)*

30. The detention order under challenge in a Full Bench decision of this Court in **Sheshdhar Misra versus Superintendent, Central Jail, Naini7**, was passed on the allegations that (1) the accused along with his brother and father at about 5.30 p.m. shot dead Binda Prasad Misra, Advocate, at Balwaghat crossing; On the occurrence of the incident people closed the doors of their shops and houses and ran away on account of fear and an atmosphere of terror and fear gripped the public and (2) he threatened a witnesses of the Crime and in this way spread fear and terror among the people and disturbed the public order. This Court took into consideration the following previous judgments of the Hon'ble Supreme Court passed in light of similar facts of the cases: -

"31. In Dipak Bose V. State of West Bengal, (1973) 4 SCC 43 : AIR 1972 SC 2686 the grounds of detention alleged that the detenu had along with his associates committed murder on two different dates on public road as a result of which fear and terror was created in the locality which disturbed public order. The Court held that since the even tempo of the life of the community was not disturbed the grounds were not related to disturbance of public order. The Court observed:--

"Every assault in a public place like a public road and terminating in the death of a victim is likely to cause horror and even panic and terror in those who are spectators but that does not mean that all such incidents do necessarily cause disturbance or dislocation of the community life of the localities in which they are committed. There is nothing in the two incidents set out in the grounds in the present case to suggest that either of them was of that kind and gravity which would jeopardise the maintenance of public order. No doubt bombs were said to have been carried by those who are alleged to have committed the two acts stated in the grounds. Possibly that was done to terrify the respective victims to prevent them from offering resistance. But it is not alleged in the grounds that they were exploded to cause terror in the locality so that those living there would be prevented from following their usual avocations of life. The two incidents alleged against the petitioner thus pertain to specific individuals and therefore related and fell within the area of law and order. In respect of such acts the drastic

provisions of the Act are not contemplated to be resorted to and the ordinary provisions of the penal laws would be sufficient to cope with them.".

32. In Manu Bhushan v. State of West Bengal, (1973) 3 SCC 663 : AIR 1973 SC 295 it was held that ***a single incident of murderous assault on a person in a public place, though created panic among the people of the locality, could not be held to be an act prejudicial to maintenance of public order. The Court observed that a solitary assault on one individual which may well be equated with an ordinary murder can hardly be said to disturb public peace or place public order in jeopardy so as to bring the case within the purview of the Act. It can only raise a law and order problem and no more, its impact on the society as a whole cannot be said to be so extensive, widespread and forceful as to disturb the normal life of the community, thereby rudely shocking the balanced tempo of orderly life of the general public."*** *(emphasis supplied)*

31. Finally, the majority judgment of the Full Bench held as follows: -

"35. The first information report which was lodged by Jagannath brother of deceased Binda Prasad Misra, Advocate at the Police Station on the basis of which the ground was formulated, itself stated that there was a long standing enmity between the petitioner and Binda Prasad, Advocate, which clearly indicates that the murderous assault on Binda Prasad was made by the petitioner on account of personal animosity. The allegations contained in ground No. 1 do not suggest that the petitioner or his associates fired gun shots indiscriminately or that they intended to terrorise or kill the local residents. ***Since the murder was committed in a public place at a crossing of roads it was bound to have created some disorder temporarily as a result of which local residents closed the doors of their houses and shops. The question arises did this single incident cause such an impact that it disturbed the even tempo of the life of the community affecting public order? No such inference is possible on the facts stated in ground No. 1.***

36. It is not possible to hold that the single act of murder alleged to have been committed by the petitioner on account of personal animosity had its impact on the society to such an extent as to disturb the normal life of the community, thereby rudely shocking the ordinary tempo of the normal life of the public. Merely because the local residents closed the doors of their houses and shops does not mean that the balanced tempo of the life of the general public was disturbed as a result of which the members of the public could not carry on normal avocation of their life.

37. The petitioner is alleged to have committed the murder of Binda Prasad on account of enmity. There is nothing on record to suggest that the petitioner had inclination or tendency to commit murders in future also. It is true that we cannot sit in appeal over the satisfaction of the detaining authority but the satisfaction of the detaining authority must be based on material on the basis of which a reasonable person could come to the same kind of satisfaction. The material which was taken into account by the detaining authority in the instant case relates to a single incident of murderous assault on Binda Prasad. There was no material before the detaining authority, nor any such material has been placed before the Court to suggest that the

petitioner if not detained would have indulged into similar activities of murder.

38. Section 3 of the Act confers power on the detaining authority to detain a person with a view to prevent him from acting in any manner prejudicial to the maintenance of public order. This power can be exercised only if the detaining authority on the basis of the past prejudicial conduct of the detenu is satisfied about the probability of the detenu acting similarly in future. This means that the past activity of the detenu on the basis of which such a prognosis is made must be reasonably suggestive of a repetitive tendency or inclination on the part of the detenu to act likewise in future. These observations were made by the Supreme Court in Lal Kamal Dass v. State of West Bengal, (1975) 4 SCC 62 : AIR 1975 SC 753 where it was further held that a solitary incident can hardly be suggestive of a tendency or inclination of the detenu to indulge in an act likewise in future.

.....

42. A single murderous assault on an individual on account of personal animosity and holding out threat to individual witnesses to desist from deposing in court do not justify exercise of power under S. 3(2) of the Act for detaining the petitioner. If a murder has been committed or if the witnesses have been threatened or compelled to file affidavit, the police have ample power under the ordinary laws of the land to proceed against the petitioner. Preventive detention under S. 3 of the Act cannot be invoked to deal with the crimes and criminals who can adequately be proceeded against under the Penal Code and under other ordinary laws of the land. If this is permitted it would be frought with great danger. The provisions of the Act conferring power for detention of a person without trial have to be used strictly in accordance with the Act to achieve the object and purpose designated under S. 3 of the Act. The detaining authority has no power to detain a citizen merely because he is alleged to have committed certain offences unless the offence has potentiality and propensity to disturb the public peace and order. In the instant case, I am of the opinion that the two grounds on which the petitioner was detained do not relate to public order."

(emphasis supplied)

32. The law which has emerged from the precedents on this point is that public order is said to embrace more of the community than law and order. Public order is the even tempo of the life of the community taking the country as a whole or even a specified locality. The contravention of law always affects order but before it can be said to affect public order, it must affect the community or the public at large. Disturbance of public order is to be distinguished from acts directed against individuals which do not disturb the society to the extent of causing a general disturbance of public tranquility. It is the degree of disturbance and its effect upon the life of the community in a locality which determines whether the disturbance amounts only to a breach of law and order or a disturbance to public order. It means therefore that the question whether a person has only committed a breach of law and order or has acted in a manner likely to cause a disturbance of the public order is a question of degree and the extent of the reach of the act upon the society, which depends the facts of each particular case.

33. Applying the principles which emerge from the aforesaid precedents to the facts of the present case, we find that the allegation against the

petitioner is that as soon as the deceased Rakesh Yadav accompanied by his driver and two other persons, reached the P.W.D. Office, three unidentified persons present there since before started firing at Rakesh Yadav with the intention to kill him and when a person accompanying him took aim with the pistol, they fired at him also. People starting running away. Rakesh Yadav was killed and Kuldeep Jaiswal was admitted to a Hospital for treatment. It has been averred in the writ petition that there was an old animosity between the deceased Rakesh Yadav and his family members and the family members of the petitioner. The petitioner's grand father Radheyshyam had lodged a first information report in relation to murder of the petitioner's uncle Ashutosh Gupta against Giran Yadav and Kamlesh Yadav uncles of the deceased Rakesh Yadav and in that case Giran Yadav father of the deceased Rakesh Yadav had to remain in jail for a period of 18 months. Therefore, the offence was directed against an individual and not against the society. The alleged act directed against an individual was in violation of law, which obviously disturbed the order in the locality for some time. This conduct may be reprehensible and punishable, for which the petitioner is being prosecuted and tried in accordance with the penal statutes. But it does not add up to the situation where it may be said that the community at large was disturbed by the petitioner's act and there was a breach of public order or likelihood of a breach of public order.

34. Moreover, the detention order contains a bald averment that in case the petitioner comes out on bail, he may again indulge in crime but neither there is any reasonable basis to record this apprehension nor is there any averment that the apprehended activity would be prejudicial to public order and, therefore, it is necessary to detain him with a view to prevent him from acting in any manner prejudicial to the maintenance of public order. This power can be exercised only if the detaining authority on the basis of the past prejudicial conduct of the detenu is satisfied about the probability of the detenu acting similarly in future. This means that the past activity of the detenu on the basis of which such a prognosis is made must be reasonably suggestive of a repetitive tendency or inclination on the part of the detenu to act likewise in future, which is clearly missing in the present case.

35. Therefore, in our opinion, the act allegedly committed by the petitioner on 02-12-2019 did not cause a disturbance of public order as it did not disturb the society to the extent of causing a general disturbance of public tranquility and the single act of murder of a person because of old family animosity was not suggestive of a repetitive tendency or inclination on the part of the petitioner to act likewise in future so as to justify invocation of powers under Section 3 (2) of the NSA, 1980. The order of preventive detention passed under Section 3 (2) of the Act is unsustainable for this reason.

36. Now we proceed to examine the second ground of challenge, i.e. that the incident which took place on 02-12-2019 is a stale incident which is not proximate to the time when the detention order was passed on 23-01-2021 and there was no live link between the alleged prejudicial activity and the purpose of detention and for this reason, the invocation of the provisions of the NSA, 1980 after a long delay of about 14 months was neither warranted nor justified.

37. Sri. D. S. Misra, learned Senior Advocate appearing for the petitioner has placed reliance on the following dictum of the Hon'ble Supreme Court in the case **Ali Jaan Miyan Vs. District Magistrate, Dhanbad8: -**

".....when there is undue and long delay between the prejudicial

activities and the passing of detention order, the Court has to scrutinise whether the detaining authority has satisfactorily explained such a delay and afforded a tenable and reasonable explanation as to why such a delay has occasioned, when called upon to answer and further the court has to investigate whether the casual connection has been broken in the circumstances of each case.

39. *In the instant case, the last offence was committed on 3-6-1993 and the detention order was passed on 4-5-1994. No explanation is forthcoming in the return. It is argued that the S.P.'s report states that the detenu was absconding and case was filed under S. 299, Cr.P.C. The period during which he was allegedly absconding is not disclosed. In these circumstances, we are of the opinion that the live link between the alleged incident or the series of incidence and the detention order is snapped and there is no proximity between the crime committed and the order of detention."*

38. In **Jagan Nath Biswas v. State of W.B.9**, the Hon'ble Supreme Court quashed the detention order holding that

"2.The incidents themselves look rather serious but also stale, having regard to the long gap between the occurrences and the order of detention. One should have expected some proximity in time to provide a rational nexus between the incidents relied on and the satisfaction arrived at."

39. In **Mohd. Sahabuddin v. Distt. Magistrate, 24 Parganas10,** the Hon'ble Supeme Court quashed the order of preventive detention on the sole ground that the order of preventive detention was passed nearly seven months after the criminal incident.

40. In **Shalini Soni v. Union of India,11,** the Hon'ble Supreme Court while examining the validity of a detention order held as follow:-

".....It is an unwritten rule of the law, constitutional and administrative, that whenever a decision making function is entrusted to the subjective satisfaction of a statutory functionary, there is an implicit obligation to apply his mind to pertinent and proximate matters only, eschewing the irrelevant and the remote....."

(emphasis supplied)

41. In the present case, the incident in question took place on 02-12-2019, the petitioner was arrested on 22-12-2021, he was lodged in jail on 23-12-2021 and he was continuing to be in custody till 23-01-2021 - the date on which the impugned order of prevention was passed. The incident which occurred on 02-12-2019, i.e. about 14 months prior to passing of the detention order, is certainly a stale incident which is not proximate to the time when the detention order dated 23-01-2021 was passed and there was no live link between the alleged prejudicial activity and the purpose of detention and the invocation of the provisions of the NSA, 1980 against the petitioner after a long delay of about fourteen months was neither warranted nor justified.

42. The next ground of challenge to the detention order is that copies of the entire material referred to and relied upon the detention order has not been provided to the petitioner. None of the documents relating to Case Crime Nos. 93 of 2019 and 666 of 2015 which have been mentioned in the detention order dated 23.1.2021 has been provided to the petitioner. The

documents provided with the detention order have been mentioned in an index, a copy whereof has been filed as Annexure No. 5 to the writ petition and at serial No. 46 it mentions the bail application filed in case crime No. 221 of 2020 under Section 2/3 of the Gangsters Act consisting of one page only. The petitioner has filed a copy of the index of the aforesaid bail application as Annexure No. 4 to the writ petition which indicates that its index was of one page only and the entire bail application consisted of as many as of 19 pages, which vitiates the detention order.

43. Before proceeding to examine this ground, it will be apt to have a look at the Article 22(5) of the Constitution of India for a better understanding of the rival submissions. It says: -

"When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order."

44. The effect and purport of the provision contained in Article 22 (5) has been explained by the Hon'ble Supreme Court in **Shalini Soni v. Union of India (supra)**, in the following words: -

"7. The Article has two facets: (1) communication of the grounds on which the order of detention has been made; (2) opportunity of making a representation against the order of detention. Communication of the grounds presupposes the formulation of the grounds and formulation of the grounds requires and ensures the application of the mind of the detaining authority to the facts and materials before it, that is to say to pertinent and proximate matters in regard to each individual case and excludes the elements of arbitrariness and automatism (if one may be permitted to use the word to describe a mechanical reaction without a conscious application of the mind). It is an unwritten rule of the law, constitutional and administrative, that whenever a decision making function is entrusted to the subjective satisfaction of a statutory functionary, there is an implicit obligation to apply his mind to pertinent and proximate matters only, eschewing the irrelevant and the remote. Where there is further an express statutory obligation to communicate not merely the decision but the grounds on which the decision is founded, it is a necessary corollary that the grounds communicated, that is, the grounds so made known, should be seen to pertain to pertinent and proximate matters and should comprise all the constituent facts and materials that went in to make up the mind of the statutory functionary and not merely the inferential conclusions. ***Now, the decision to detain a person depends on the subjective satisfaction of the detaining authority. The Constitution and the statute cast a duty on the detaining authority to communicate the grounds of detention to the detenu. From what we have said above, it follows that the grounds communicated to the detenu must reveal the whole of the factual material considered by the detaining authority and not merely the inferences of fact arrived at by the detaining authority.*** *The matter may also be looked at from the point of view of the second facet of Article 22(5). An*

opportunity to make a representation against the order of detention necessarily implies that the detenu is informed of all that has been taken into account against him in arriving at the decision to detain him. It means that the detenu is to be informed not merely, as we said, of the inferences of fact but of all the factual material which have led to the inferences of fact. If the detenu is not to be so informed the opportunity so solemnly guaranteed by the Constitution becomes reduced to an exercise in futility. Whatever angle from which the question is looked at, it is clear that "grounds" in Article 22(5) do not mean mere factual inferences but mean factual inferences plus factual material which led to such factual inferences. ***The "grounds" must be self-sufficient and self-explanatory. In our view copies of documents to which reference is made in the "grounds" must be supplied to the detenu as part of the "grounds".***

8.This was what was decided by Bhagwati and Venkataramiah, JJ. In Icchu Devi Choraria v. Union of India [(1980) 4 SCC 531]. It was observed by Bhagwati, J., who spoke for the court: (SCC p. 539, para 6)

"Now it is obvious that when clause (5) of Article 22 and sub-section (3) of Section 3 of the COFEPOSA Act provide that the grounds of detention should be communicated to the detenu within five or fifteen days, as the case may be, what is meant is that the grounds of detention in their entirety must be furnished to the detenu. ***If there are any documents, statements or other materials relied upon in the grounds of detention, they must also be communicated to the detenu, because being incorporated in the grounds of detention, they form part of the grounds and the grounds furnished to the detenu cannot be said to be complete without them.*** *It would not therefore be sufficient to communicate to the detenu a bare recital of the grounds of detention, but copies of the documents, statements and other materials relied upon in the grounds of detention must also be furnished to the detenu within the prescribed time subject of course to clause (6) of Article 22 in order to constitute compliance with clause (5) of Article 22 and Section 3 sub-section (3) of the COFEPOSA Act. One of the primary objects of communicating the grounds of detention to the detenu is to enable the detenu, at the earliest opportunity, to make a representation against his detention and it is difficult to see how the detenu can possibly make an effective representation unless he is also furnished copies of the documents, statements and other materials relied upon in the grounds of detention. There can therefore be no doubt that on a proper construction of clause (5) of Article 22 read with Section 3 sub-section (3) of the COFEPOSA Act, it is necessary for the valid continuance of detention that subject to clause (6) of Article 22 copies of the documents, statements and other materials relied upon in the grounds of detention should be furnished to the detenu along with the grounds of detention or in any event not later than five days and in exceptional circumstances and for reasons to be recorded in writing, not later than fifteen days from the date of detention. If this requirement of clause (5) of Article 22 read with Section 3 sub-section (3) is not satisfied, the continued detention of the detenu would be illegal and void."*

45. In **M. Ahamedkutty v. Union of India12,** the Hon'ble Supreme Court was dealing with a challenge to a detention order on the ground of non-supply of bail application and bail order to the accused person and it will be useful to reproduce

the relevant portion of the judgment of the Hon'ble Supreme, which is as follows: -

*"19.The next submission is that of non-supply of the bail application and the bail order. This Court, as was observed in Mangalbhai Motiram Patel v. State of Maharashtra [(1980) 4 SCC 470: 1981 SCC (Cri) 49: (1981) 1 SCR 852] has "forged' certain procedural safeguards for citizens under preventive detention. The constitutional imperatives in Article 22(5) are twofold: (1) The detaining authority must, as soon as may be, i.e. as soon as practicable, after the detention communicate to the detenu the grounds on which the order of detention has been made, and (2) the detaining authority must afford the detenu the earliest opportunity of making the representation against the order of detention. The right is to make an effective representation and when some documents are referred to or relied on in the grounds of detention, without copies of such documents, the grounds of detention would not be complete. T**he detenu has, therefore, the right to be furnished with the grounds of detention along with the documents so referred to or relied on.** If there is failure or even delay in furnishing those documents it would amount to denial of the right to make an effective representation. This has been settled by a long line of decisions: Ramachandra A. Kamat v. Union of India [(1980) 2 SCC 270: 1980 SCC (Cri) 414: (1980) 2 SCR 1072], Frances Coralie Mullin v. W. C. Khambra [(1980) 2 SCC 275: 1980 SCC (Cri) 419: (1980) 2 SCR 1095], Ichhu Devi Choraria v. Union of India [(1980) 4 SCC 531: 1981 SCC (Cri) 25: (1981) 1 SCR 640], Pritam Nath Hoon v. Union of India [(1980) 4 SCC 525: 1981 SCC (Cri) 19: (1981) 1 SCR 682], Tushar Thakker v. Union of India [(1980) 4 SCC 499: 1981 SCC (Cri) 13], Lallubhai Jogibhai Patel v. Union of India [(1981) 2 SCC 427: 1981 SCC (Cri) 463], Kirit Kumar Chaman Lal Kundaliya v. Union of India [(1981) 2 SCC 436: 1981 SCC (Cri) 471] and Ana Carolina D'Souza v. Union of India [1981 Supp SCC 53 (1): 1982 SCC (Cri) 131 (1)]."*

*20. **It is immaterial whether the detenu already knew about their contents or not.** In Mehrunissa v. State of Maharashtra [(1981) 2 SCC 709: 1981 SCC (Cri) 592] **it was held that the fact that the detenu was aware of the contents of the documents not furnished was immaterial and non-furnishing of the copy of the seizure list was held to be fatal. To appreciate this point one has to bear in mind that the detenu is in jail and has no access to his own documents.** In Mohd. Zakir v. Delhi Administration [(1982) 3 SCC 216: 1982 SCC (Cri) 695] it was reiterated that it being a constitutional imperative for the detaining authority to give the documents relied on and referred to in the order of detention pari passu the grounds of detention, those should be furnished at the earliest so that the detenu could make an effective representation immediately instead of waiting for the documents to be supplied with. **The question of demanding the documents was wholly irrelevant and the infirmity in that regard was violative of constitutional safeguards enshrined in Article 22(5).***

21. It is also imperative that if the detenu was already in jail the grounds of detention are to show the awareness of that fact on the part of the detaining authority, otherwise there would be non-application of mind and detention order vitiated thereby. In the instant case though the order of detention ex facie did not mention

of the detenu having been in jail, in paragraph 3 of the grounds of detention it was said that he was arrested by the Superintendent (Intelligence) Air Customs, Trivandrum on January 31, 1988 and he was produced before the Additional Chief Judicial Magistrate (Economic Offences), Ernakulam the same day. It was clearly said: "You were remanded to judicial custody and you were subsequently released on bail." From the records it appears that the bail application and the bail order were furnished to the detaining authority on his enquiry. It cannot, therefore, be said that the detaining authority did not consider or rely on them. It is difficult, therefore, to accept the submission of Mr Kunhikannan that those were not relied on by the detaining authority. The bail application contained the grounds for bail including that he had been falsely implicated as an accused in the case at the instance of persons who were inimically disposed towards him, and the bail order contained the conditions subject to which the bail was granted including that the accused, if released on bail, would report to the Superintendent (Intelligence) Air Customs, Trivandrum on every Wednesday until further order, and that "he will not change his residence without prior permission of court to February 25, 1988". This being the position in law, and non-supply of the bail application and the bail order having been apparent, the legal consequence is bound to follow.

22. In Khudiram Das v. State of West Bengal [(1975) 2 SCC 81: 1975 SCC (Cri) 435: (1975) 2 SCR 832] this Court held that where the liberty of the subject is involved it is the bounden duty of the court to satisfy itself that all the safeguards provided by the law have been scrupulously observed and that the subject is not deprived of his personal liberty otherwise than in accordance with law. The constitutional requirement of Article 22(5) is that all the basic facts and particulars which influenced the detaining authority in arriving at the requisite satisfaction leading to making the detention order must be communicated to the detenu so that the detenu may have an opportunity of making an effective representation against the order of detention: (SCC p. 96, para 13)

"It is, therefore, not only the right of the court, but also its duty as well, to examine what are the basic facts and materials which actually in fact weighed with the detaining authority in reaching the requisite satisfaction. The judicial scrutiny cannot be foreclosed by a mere statement of the detaining authority that it has taken into account only certain basic facts and materials and though other basic facts and materials were before it, it has not allowed them to influence its satisfaction. The court is entitled to examine the correctness of this statement and determine for itself whether there were any other basic facts or materials, apart from those admitted by it, which could have reasonably influenced the decision of the detaining authority and for that purpose, the court can certainly require the detaining authority to produce and make available to the court the entire record of the case which was before it. That is the least the court can do to ensure observance of the requirements of law by the detaining authority."

46. Sri. Daya Shankar Mishra, learned Senior Advocate for the petitioner has placed reliance on a judgment of this Court in the case of **Lallan Goswami @ Ajaynath Goswami Vs Superintendent, Central Jail Naini, Allahabad and others13**

"10. Sri Mishra thirdly submitted that relevant materials were not placed

before the detaining authority, the District Magistrate, as stated in paragraphs 35 and 36 of the writ petition. This relevant material consisted of the bail rejection order in the case of the petitioner, the bail order granted to the co-accused Sanjay Goswami, and the judgment of this Court in the case of Sunita Goswami (copy of which is Annexure-RA-9 to the rejoinder affidavit). This fact is also not disputed by the respondent. Hence in our opinion this also vitiate the impugned order, as ***it is settled law that the relevant material must be placed before the detaining authority*** *vide Inamul Huq v. Adhikshak Mandal/Janpad Karagar, Habeas Corpus Petition No. 52650 of 2001 decided on 22.5.2001 (which decision has referred to several Supreme Court and High Court decisions on the point). ....."*

47. On the other hand, opposing this plea, Sri. Syed Ali Murtaza, the learned A.G.A. has submitted that non-supply of a copy of the entire bail application to the petitioner would not affect the validity of the detention order as the bail application was the petitioner's own document and he already knew its contents. No prejudice has been caused to the petitioner due to non-supply of a copy of his own bail application. He has placed reliance on a judgment of the Hon'ble Supreme Court in the case of **Baby Devassy Chully v. Union of India14,** in which the Hon'ble Supreme Court was pleased to hold as follows: -

"19. .....There is no quarrel as to the proposition, in fact, the sponsoring authority has to place all the relevant documents before the detaining authority. We reiterate that all the documents which are relevant, which have bearing on the issue, which are likely to affect the mind of the detaining authority should be placed before it. Further, a document which has no link with the issue cannot be construed as relevant. ....."

48. In the present case, the petitioner was arrested on 22-12-2021 and he was lodged in jail on 23-12-2021 and he was continuing to be in custody till 23-01-2021 - the date on which the impugned order of prevention was passed. Although the detention order makes a reference to Case Crime No. 93 of 2019 and Case Crime No. 666 of 2015 and the petitioner's application for bail in Case No. 221 of 2020, copies of any document regarding Case Crime Nos. 93 of 2019 and 666 of 2015 and that of the application for bail in case No. 221 of 2020 have not been supplied to the petitioner. The Court has to bear in mind that the petitioner is in jail and has no access to his own documents. It is immaterial whether the petitioner knew about the facts of Case Crime Nos. 93 of 2019 and 666 of 2015 and the contents of his bail application or not. The bail application contained the grounds for bail and it has been referred to by the detaining authority. Therefore, the Court is unable to accept the submission of Sri Murtaza that the aforesaid documents were not relevant material and non-supply of the same would not have any legal effect on the order of detention. In view of the law laid down in the cases of **Shalini Soni and M. Ahamedkutty (Supra),** we are of the view that the petitioner was entitled to receive the entire material referred to or relied upon by the detaining authority in the detention order and the non-supply of copies of the documents relating to Case Crime Nos. 93 of 2019 and 666 of 2015 and that of the bail application in case No.

221 of 2020 vitiates the detention order and its legal consequence is bound to follow.

49. Now we come to the last ground of challenge to the detention orders that on 23-01-2021, i.e. on the date of passing of the detention order, the petitioner was already in custody and he had not even filed an application for Bail in Case Crime No. 221 of 2020 under the U. P. Gangsters and Anti-Social Activities (Prevention) Act and there was no possibility of the petitioner acting in any manner prejudicial to the maintenance of public order and in these circumstances, the provisions of Section 3 (2) of the NSA, 1980 are not attracted and the detention order is unsustainable in law.

50. Sri. Syed Ali Murtaza has submitted that there is no bar against passing an order of preventive detention of a person who is already in Jail. He has placed reliance upon a decision of the Hon'ble Supreme Court in **Kamarunnissa v. Union of India15**, in which this question was decided in the following manner: -

"11. Counsel for the detenus, however, vehemently argued that since the detenus were in custody, there was no compelling necessity to pass the detention orders for the obvious reason that while in custody they were not likely to indulge in any prejudicial activity such as smuggling. In support of this contention reliance was placed on a host of decisions of this Court beginning with the case of Vijay Narain Singh v. State of Bihar [(1984) 3 SCC 14 : 1984 SCC (Cri) 361] and ending with the case of Dharmendra Suganchand Chelawat v. Union of India [(1990) 1 SCC 746 : 1990 SCC (Cri) 249]. It is necessary to bear in mind the fact that the grounds of detention clearly reveal that the detaining authority was aware of the fact that the detenus were apprehended while they were about to board the flights to Hong Kong and Dubai on October 5, 1989. He was also aware that the detenu M. M. Shahul Hameed had secreted diamonds and precious stones in his rectum while the other two detenus had swallowed 100 capsules each containing foreign currency notes. He was also aware of the fact that all the three detenus were produced before the Additional Chief Metropolitan Magistrate, Espalande, Bombay and two of them had applied for bail. He was also conscious of the fact that the hearing of the bail applications was postponed because investigation was in progress. His past experience was also to the effect that in such cases courts ordinarily enlarge the accused on bail. He was also aware of the fact that the detenu M. M. Shahul Hameed had not applied for bail. Conscious of the fact that all the three detenus were in custody, he passed the impugned orders of detention on November 10, 1989 as he had reason to believe that the detenus would in all probability secure bail and if they are at large, they would indulge in the same prejudicial activity. This inference of the concerned officer cannot be described as bald and not based on existing material since the manner in which the three detenus were in the process of smuggling diamonds and currency notes was itself indicative of they having received training in this behalf. Even the detenus in their statements recorded on October 5, 1989 admitted that they had embarked on this activity after receiving training. The fact that one of them secreted diamonds and precious stones in two balloon rolls in his rectum speaks for itself. Similarly the fact that the other two detenus had created cavities for secreting as many as 100 capsules each in their bodies was indicative of the fact that this was not to be

a solitary instance. All the three detenus had prepared themselves for indulging in smuggling by creating cavities in their bodies after receiving training. These were not ordinary carriers. These were persons who had prepared themselves for a long term smuggling programme and, therefore, the officer passing the detention orders was justified in inferring that they would indulge in similar activity in future because they were otherwise incapable of earning such substantial amounts in ordinary life. Therefore, the criticism that the officer had jumped to the conclusion that the detenus would indulge in similar prejudicial activity without there being any material on record is not justified. It is in this backdrop of facts that we must consider the contention of the learned counsel for the detenus whether or not there existed compelling circumstances to pass the impugned orders of detention. We are inclined to think, keeping in view the manner in which these detenus received training before they indulged in the smuggling activity, this was not a solitary effort, they had in fact prepared themselves for a long term programme. The decisions of this Court to which our attention was drawn by the learned counsel for the petitioners lay down in no uncertain terms that detention orders can validly be passed against detenus who are in jail, provided the officer passing the order is alive to the fact of the detenus being in custody and there is material on record to justify his conclusion that they would indulge in similar activity if set at liberty....."

51. Sri. Murtaza has also cited the decision of ***Baby Devassy Chully v. Union of India16,*** in which the Hon'ble Supreme Court upheld the preventive detention of an accused who was already in Jail on charges of smuggling, in view of the fact that he had been granted bail but he had not availed the bail order and he could come out of the Jail at any time and indulge in activities prejudicial to maintenance of public order. The relevant portion of the said judgment is being reproduced below: -

"16. It is clear that if a person concerned is in custody and there is no imminent possibility of his being released, the rule is that the power of preventive detention should not be exercised. In the case on hand, it is not in dispute that on 12-4-2005 itself, the competent court has granted bail but the appellant did not avail such benefit. In other words, on the date of the detention order i.e. 3-5-2005, by virtue of the order granting bail even on 12-4-2005, it would be possible for the detenu to come out without any difficulty. In such circumstances, while reiterating the principle of this Court enunciated in the above decision in Binod Singh case [Binod Singh v. District Magistrate, Dhanbad, (1986) 4 SCC 416 : 1986 SCC (Cri) 490] and in view of the fact that the detenu was having the order of bail in his hand, it is presumed that at any moment, it would be possible for him to come out and indulge in prejudicial activities, hence, the said decision is not helpful to the case of the appellant. In view of the above circumstances and of the fact that the detaining authority was aware of the grant of bail and clearly stated the same in the grounds of detention, we reject the contra arguments made by the learned counsel for the appellant. On the other hand, we hold that the detaining authority was conscious of all relevant aspects and passed the impugned order of detention in order to prevent the appellant from abetting the smuggling of goods in future."

52. Sri. Murtaza has also placed reliance on the decision in **Ahamed Nassar v. State of T.N.17,** in which it was held that

"in spite of rejection of the bail application by a court, it is open to the detaining authority to come to his own satisfaction based on the contents of the bail application keeping in mind the circumstances that there is likelihood of the detenu being released on bail. Merely because no bail application was then pending is no premise to hold that there was no likelihood of his being released on bail. The words "likely to be released" connote chances of being bailed out, in case there be pending bail application or in case if it is moved in future is decided."

53. Ms. Sadhana Singh Advocate appearing for the Union Of India has placed reliance on the decision of this Court in **Pankaj vs. State of U.P. and Ors.18**, in which the detaining authority has recorded its' subjective satisfaction for detaining the petitioner on the ground that *"the incident had totally disturbed the public order in the area and that the petitioner who was in judicial custody had moved his bail application and there was real possibility of his being released on bail and on his coming out of the jail he will again indulge in activities which will disturb public order not only with the area of P.S. Phugana but also in the whole district of Muzaffarnagar."* In these circumstances, the Court held that it cannot be said that the order has been passed without application of mind.

54. From a perusal of aforesaid pronouncements, it is clear that even in the case of a person in custody a detention order can validly be passed (1) if the authority passing the order is aware of the fact that he is actually in custody; (2) if he has reason to believe on the basis of reliable material placed before him (a) that there is real possibility of his being released on bail and, and (b) that on being so released he would in all probability indulge in prejudicial activity; and (3) if it is felt essential to detain him to prevent him from so doing. If the authority passes an order after recording his satisfaction in his behalf, such an order cannot be struck down on the ground that the proper course for the authority was to oppose the bail and if bail is granted notwithstanding such opposition to question the same before a higher Court.

55. In **Kamarunnissa (Supra),** one of the accused persons had secreted diamonds and precious stones in his rectum while the other two detenus had swallowed 100 capsules each containing foreign currency notes. The detaining authority was ware of the fact that two of the accused persons had applied bail and in such cases courts ordinarily enlarge the accused on bail. He was also aware of the fact that one of the detenus had not applied for bail. Conscious of the fact that all the three detenus were in custody, he passed the impugned orders of detention as he had reason to believe that the detenus would in all probability secure bail and if they are at large, they would indulge in the same prejudicial activity since the manner in which the three detenus were in the process of smuggling diamonds and currency notes was itself indicative of they having received training in this behalf. The fact that one of them secreted diamonds and precious stones in two balloon rolls in his rectum and that the other two detenus had created cavities for secreting as many as 100 capsules each in their bodies was indicative of the fact that this was not to be a solitary instance. All the three detenus had prepared themselves for indulging in smuggling by creating cavities in their bodies after receiving training. In Baby

Devassy Chully (Supra) also the Directorate of Revenue Intelligence had intercepted one sea-faring vessel by carrying diesel oil of foreign origin which was smuggled into India. The officers of the DRI seized the said diesel oil weighing about 770 MTs, worth Rs 2 crores, under the Customs Act, 1962, which was being delivered to the accused person. The accused had been granted bail but he had not availed the same. The Hon'ble Supreme Court had upheld the detention orders keeping in view the peculiar facts of the aforesaid cases that the accused persons were professional smugglers, on the ground that detention orders can validly be passed against detenus who are in jail, provided the officer passing the order is alive to the fact of the detenus being in custody and there is material on record to justify his conclusion that they would indulge in similar activity if set at liberty.

56. While examining the applicability of the aforesaid decisions, it would be appropriate to have a look at the law regarding application of precedents, as explained by the Hon'ble Supreme Court in **Roger Shashoua v. Mukesh Sharma19,** in the following words: -

"55. ....It is well settled in law that the ratio decidendi of each case has to be correctly understood. In Regional Manager v. Pawan Kumar Dubey, a three-Judge Bench ruled: (SCC p. 338, para 7)

"7. ... It is the rule deducible from the application of law to the facts and circumstances of a case which constitutes its ratio decidendi and not some conclusion based upon facts which may appear to be similar. ***One additional or different fact can make a world of difference between conclusions in two cases even when the same principles are applied in each case to similar facts."***

56. In Director of Settlements v. M.R. Apparao, another three-Judge Bench, dealing with the concept whether a decision is "declared law", observed: (SCC p. 650, para 7)

"7. ... But ***what is binding is the ratio of the decision and not any finding of facts.*** *It is the principle found out upon a reading of a judgment as a whole, in the light of the questions before the Court that forms the ratio and not any particular word or sentence. To determine whether a decision has "declared law" it cannot be said to be a law when a point is disposed of on concession and what is binding is the principle underlying a decision. A judgment of the Court has to be read in the context of questions which arose for consideration in the case in which the judgment was delivered. ..."*

57. In this context, a passage from CIT v. Sun Engg. Works (P) Ltd. would be absolutely apt: (SCC pp. 385-86, para 39)

"39. ... It is neither desirable nor permissible to pick out a word or a sentence from the judgment of this Court, divorced from the context of the question under consideration and treat it to be the complete "law" declared by this Court. The judgment must be read as a whole and the observations from the judgment have to be considered in the light of the questions which were before this Court. ***A decision of this Court takes its colour from the questions involved in the case in which it is rendered and while applying the decision to a later case, the courts must carefully try to ascertain the true principle laid down by the decision of this Court and not to pick out words or sentences from the judgment, divorced from the context of the questions under***

consideration by this Court, to support their reasonings. ..."

58. In this context, we recapitulate what the Court had said in Ambica Quarry Works v. State of Gujarat: (SCC p. 221, para 18)

*"18. ... **The ratio of any decision must be understood in the background of the facts of that case. It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it.** (See Lord Halsbury in Quinn v. Leathem43.) ..."*

*59. From the aforesaid authorities, it is quite vivid that a ratio of a judgment has the precedential value and it is obligatory on the part of the court to cogitate on the judgment regard being had to the facts exposited therein and the context in which the questions had arisen and the law has been declared. It is also necessary to read the judgment in entirety and if any principle has been laid down, it has to be considered keeping in view the questions that arose for consideration in the case. One is not expected to pick up a word or a sentence from a judgment dehors from the context and understand the ratio decidendi which has the precedential value. That apart, **the court before whom an authority is cited is required to consider what has been decided therein but not what can be deduced by following a syllogistic process."***

57. Keeping in view the aforesaid dictum of the Hon'ble Supreme Court, the aforesaid principles laid down in **Kamarunnissa, Baby Devassy Chully, Ahmad Nassar and Pankaj (Supra)** in view of the peculiar facts of those cases are not applicable to the facts of the present case.

58. Moreover, even in **Baby Devassy Chully (Supra)**, the Hon'ble Supreme Court has held that if a person is in custody and there is no imminent possibility of his being released, the rule is that the power of preventive detention should not be exercised. The allegation against the petitioner is that he committed murder of a person, regarding whom the petitioner claims to have an old family animosity. He is not alleged to be a professional killer who would again start indulging in similar activities as soon as he comes out on bail. Moreover, a F.I.R. was lodged against the petitioner on the ground of the same incident, under Sections 2/3 of the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986 as Case Crime No. 221/20 in Police Station Sadar Bazar, Shahjahanpur, in which the petitioner was in custody since 01-05-2020 and as on the date of passing of the detention order, he had not even filed an application for bail. The bail application in the aforesaid case was filed on 25-01-2021, although as per the submissions of Mr. Murtaza, a copy of the bail application had been served on 21-01-2021.

59. In a case under the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986 a bail order cannot be passed in a manner in which it is passed in case of any offence under the I.P.C. Section 19 of the aforesaid Act provides as follows: -

"19. Modified application of certain provisions of the Code. - (1) Notwithstanding anything contained in the Code every offence punishable under this Act or any rule made thereunder shall be deemed to be a cognizable offence within the meaning of clause (c) of Section 2 of the

Code and cognizable case as defined in that clause shall be construed accordingly.

(2) Section 167 of the Code shall apply in relation to case involving an offence punishable under this Act or any rule made thereunder subject to the modifications that-

(a) the reference in sub-section (1) thereof to "Judicial Magistrate" shall be construed as a reference to "Judicial Magistrate or Executive Magistrate";

(b) the references in sub-section (2) thereof to "fifteen days", "ninety days" and "sixty days", wherever they occur, shall be construed as references to "sixty days", "one year" and "one year", respectively;

(c) sub-section (2A) thereof shall be deemed to have been omitted.

(3) Sections 366, 367, 368 and 371 of the Code shall apply in relation to a case involving an offence triable by a Special Court, subject to the modification that the reference to "Court of Session" wherever occurring herein, shall be construed as reference to "Special Court".

(4) Notwithstanding anything contained in the Code, no person accused of an offence punishable under this Act or any rule made thereunder shall, if in custody, be released on bail or on his own bond unless :

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

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

(5) The limitations on granting of bail specified in sub-section (4) are in addition to the limitations under the Code."

60. Keeping in view the fact that the petitioner was already in Jail in a case under Sections 2/3 of the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986, that he had not filed an application for bail in the aforesaid case and that even when he would file an application for bail, he would not be released on bail unless (a) the Public Prosecutor is given an opportunity to oppose the application for such release, and (b) the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail, it cannot be accepted that there was any material for recording the satisfaction of the detaining authority that with a view to preventing the petitioner from acting in any manner prejudicial to the maintenance of public order it was necessary to detain the petitioner under the NSA, 1980. The satisfaction that it is necessary to detain the petitioner for the purpose of preventing him from acting in a manner prejudicial to the maintenance of public order is thus, the basis of the order under section 3 (2) of the NSA, 1980 and this basis is clearly absent in the present case. Therefore, the detention order dated 23-01-2021 is unsustainable in law on this ground also.

61. In view of the aforesaid discussion, the present Writ Petition is **allowed.** The impugned order dated 23-01-2021 passed by the District Magistrate, Shahjahanpur ordering detention of the petitioner Abhay Raj Gupta under Section 3 (3) of the NSA, 1980 is hereby quashed. The Respondents are commanded to release the petitioner from detention under the aforesaid order dated 23-01-2021 forthwith.

(2022)01ILR A198
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.08.2021

BEFORE

THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Habeas Corpus Writ Petition No. 467 of 2021

Vahin Saxena (Minor Corpus) & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Piyush Dubey

Counsel for the Respondents:
A.G.A., Sri Sanjay Singh

A. Constitution of India - Article 226 - Habeas corpus writ petition - Custody of minor child - parens patriae jurisdiction i.e. looking into the welfare of the child - principal duty of the court is to ascertain whether the custody of child is unlawful or illegal and whether the welfare of the child requires that his present custody should be changed and the child be handed over to the care and custody of any other person - paramount consideration must be about the welfare of the child - a writ of habeas corpus would be entertainable only where it is established that the detention of the minor child by the parent or others is illegal and without authority of law - where the court is of a view that a detailed enquiry would be required, it may decline to exercise the extraordinary jurisdiction and direct the parties to approach the appropriate forum under the Hindu Minority and Guardianship Act, 195613 or the Guardians and Wards Act, 189014 (Para 9, 14, 22)

B. Hindu Marriage Act, 1955 - Section 26 - Custody of children during the pendency of the proceedings under HMA - section applies to "any proceeding" under the HMA and it gives power to the court to make provisions in regard to: (i) custody, (ii) maintenance, and (iii) education of minor children - court may also pass interim orders during the pendency of the proceedings and all such orders even after passing of the decree (Para 19)

Minor child aged about nine years, continuously under the care and custody of his mother/respondent who is living separately from her - not the case of the petitioner/father that the corpus was forcibly taken away by the mother from his custody - Held - it may be presumed that the custody of the child with his mother is not unlawful - other parent can take resort to the substantive statutory remedy in respect of his claim regarding custody of the child - regarding claim for visitation rights on behalf of the father, held since Divorce petition pending between the parties before the Family Court, all ancillary reliefs & claims are open to be raised before the said forum.(Para 18, 21)

Dismissed. (E-5)

List of Cases cited :

1. Mohammad Ikram Hussain Vs St. of U.P. & ors. AIR 1964 SC 1625

2. Kanu Sanyal Vs District Magistrate Darjeeling (1973) 2 SCC 674

3. Sayed Saleemuddin Vs Dr. Rukhsana & ors. (2001) 5 SCC 247

4. Nithya Anand Raghvan Vs State (NCT of Delhi) & anr (2017) 8 SCC 454

5. Tejaswini Gaud & 5 ors.Vs Shekhar Jagdish Prasad Tewari & ors. (2019) 7 SCC 42

6. Rachhit Pandey (Minor) & anr. Vs St. of U.P.& ors. 2021 (2) ADJ 320

7. Master Manan @ Arush Vs St. of U.P.& ors. 2021 (5) ADJ 317

8. Krishnakant Pandey (Corpus) & ors. Vs St. of U.P.& ors. 2021 2 AWC 1053 ALL

9. Master Tarun @ Akchhat Kumar & anr. Vs St. of U.P. & ors. MANU/UP/0599/2021

10. Priyanshu (Minor) Vs St.of U.P. & ors. HCWP No. 429 of 2021 dt 2.8.2021

11. Gaurav Nagpal Vs Sumedha Nagpal (2009) 1 SCC 42

(Delivered by Hon'ble Dr. Yogendra Kumar Srivastava, J.)

1. Heard Sri Piyush Dubey, learned counsel for the petitioners, Sri Sanjay Singh, learned counsel for respondent no.4 and Ms. Sushma Soni, learned Additional Government Adovate appearing for State respondents.

2. The petitioner no.2 asserting himself to be the father of petitioner no.1-corpus, has filed the present habeas corpus petition alleging that the corpus is under illegal custody of his mother-respondent no.4.

3. As per the pleadings in the petition, the petitioner no.1 is stated to have been born in the year 2012. On 6.01.2019, the respondent no.4 is said to have left her matrimonial home along with her minor child-petitioner no.1 and since then he is with his mother-respondent no.4. A divorce petition, registered as Case No. 1714/2020, is stated to be pending between the parties before the Principal Judge, Family Court, Agra.

4. Pursuant to the *rule nisi* issued on 23.7.2021, the petitioner no.1-corpus has been produced in court by his mother-respondent no.4, and they have been identified by Sri Sanjay Singh, learned counsel for the respondent no.4.

5. Counsel for the parties do not dispute the fact that the child being a minor, it would be very difficult to ascertain his wishes and matters relating to custody and guardianship may have to be decided by the Court in exercise of its *parens patriae jurisdiction* i.e. looking into the welfare of the child.

6. Learned Additional Government Advocate has interacted with the child, in Court, and submits that child has stated that he is living comfortably with the respondent no.4, his mother, under her care and guardianship. The child has stated that he is being taken good care of and is being accorded love, affection and guardianship. There is nothing to suggest that the child is under any kind of threat or coercion or that he is under any kind of illegal detention.

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 vs. State of U.P. and others1** and **Kanu Sanyal vs. District Magistrate Darjeeling2.**

8. The object and scope of a writ of habeas corpus in the context of a claim relating to custody of a minor child fell for consideration in **Sayed Saleemuddin vs. Dr. Rukhsana and others3,** and it was held that in a habeas corpus petition seeking transfer of custody of a child from

one parent to the other, the principal consideration for the court would be to ascertain whether the custody of the child can be said to be unlawful or illegal and whether the welfare of the child requires that the present custody should be changed. It was stated thus:-

"11. ...it is clear that in an application seeking a writ of Habeas Corpus for custody of minor children the principal consideration for the Court is to ascertain whether the custody of the children can be said to be unlawful or illegal and whether the welfare of the children requires that present custody should be changed and the children should be left in care and custody of somebody else. The principle is well settled that in a matter of custody of a child the welfare of the child is of paramount consideration of the Court..."

9. Taking a similar view in the case of **Nithya Anand Raghvan v State (NCT of Delhi) and another4,** it was held that the principal duty of the court in such matters is to ascertain whether the custody of the child is unlawful and illegal and whether the welfare of the child requires that his present custody should be changed and the child be handed over to the care and custody of any other person. The relevant observations made in the judgement are as follows:-

"44. The present appeal emanates from a petition seeking a writ of habeas corpus for the production and custody of a minor child. This Court in *Kanu Sanyal v. District Magistrate, Darjeeling, (1973) 2 SCC 674*, has held that habeas corpus was essentially a procedural writ dealing with machinery of justice. The object underlying the writ was to secure the release of a person who is illegally deprived of his liberty. The writ of habeas corpus is a command addressed to the person who is alleged to have another in unlawful custody, requiring him to produce the body of such person before the court. On production of the person before the court, the circumstances in which the custody of the person concerned has been detained can be inquired into by the court and upon due inquiry into the alleged unlawful restraint pass appropriate direction as may be deemed just and proper. The High Court in such proceedings conducts an inquiry for immediate determination of the right of the person's freedom and his release when the detention is found to be unlawful.

45. In a petition for issuance of a writ of habeas corpus in relation to the custody of a minor child, this Court in *Sayed Saleemuddin v. Rukhsana,* (2001) 5 SCC 247, has held that the principal duty of the court is to ascertain whether the custody of child is unlawful or illegal and whether the welfare of the child requires that his present custody should be changed and the child be handed over to the care and custody of any other person. While doing so, the paramount consideration must be about the welfare of the child. In *Elizabeth Dinshaw v. Arvand M. Dinshaw, (1987) 1 SCC 42*, it is held that in such cases the matter must be decided not by reference to the legal rights of the parties but on the sole and predominant criterion of what would best serve the interests and welfare of the minor. The role of the High Court in examining the cases of custody of a minor is on the touchstone of principle of parens patriae jurisdiction, as the minor is within the jurisdiction of the Court [see *Paul Mohinder Gahun Vs. State (NCT of Delhi)*, 2004 SCC OnLine Del 699, relied upon by the appellant]. It is not necessary to multiply the authorities on this proposition.

46. The High Court while dealing with the petition for issuance of a writ of habeas corpus concerning a minor child, in a given case, may direct return of the child or decline to change the custody of the child keeping in mind all the attending facts and circumstances including the settled legal position referred to above. Once again, we may hasten to add that the decision of the court, in each case, must depend on the totality of the facts and circumstances of the case brought before it whilst considering the welfare of the child which is of paramount consideration. The order of the foreign court must yield to the welfare of the child. Further, the remedy of writ of habeas corpus cannot be used for mere enforcement of the directions given by the foreign court against a person within its jurisdiction and convert that jurisdiction into that of an executing court. Indubitably, the writ petitioner can take recourse to such other remedy as may be permissible in law for enforcement of the order passed by the foreign court or to resort to any other proceedings as may be permissible in law before the Indian Court for the custody of the child, if so advised.

47. In a habeas corpus petition as aforesaid, the High Court must examine at the threshold whether the minor is in lawful or unlawful custody of another person (private respondent named in the writ petition). For considering that issue, in a case such as the present one, it is enough to note that the private respondent was none other than the natural guardian of the minor being her biological mother. Once that fact is ascertained, it can be presumed that the custody of the minor with his/her mother is lawful. In such a case, only in exceptionable situation, the custody of the minor (girl child) may be ordered to be taken away from her mother for being given to any other person including the husband (father of the child), in exercise of writ jurisdiction. Instead, the other parent can be asked to resort to a substantive prescribed remedy for getting custody of the child."

10. The question of maintainability of a habeas corpus petition under Article 226 of the Constitution of India for custody of a minor was examined in **Tejaswini Gaud and others vs. Shekhar Jagdish Prasad Tewari and others5,** and it was held that the petition would be maintainable where detention by parents or others is found to be illegal and without any authority of law and the extraordinary remedy of a prerogative writ of habeas corpus can be availed in exceptional cases where ordinary remedy provided by the law is either unavailable or ineffective. The observations made in the judgment in this regard are as follows:-

"14. Writ of habeas corpus is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from an illegal or improper detention. The writ also extends its influence to restore the custody of a minor to his guardian when wrongfully deprived of it. The detention of a minor by a person who is not entitled to his legal custody is treated as equivalent to illegal detention for the purpose of granting writ, directing custody of the minor child. For restoration of the custody of a minor from a person who according to the personal law, is not his legal or natural guardian, in appropriate cases, the writ court has jurisdiction.

x x x

19. Habeas corpus proceedings is not to justify or examine the legality of the custody. Habeas corpus proceedings is a medium through which the custody of the child is addressed to the discretion of the court. Habeas corpus is a prerogative writ

which is an extraordinary remedy and the writ is issued where in the circumstances of the particular case, ordinary remedy provided by the law is either not available or is ineffective; otherwise a writ will not be issued. In child custody matters, the power of the High Court in granting the writ is qualified only in cases where the detention of a minor by a person who is not entitled to his legal custody. In view of the pronouncement on the issue in question by the Supreme Court and the High Courts, in our view, in child custody matters, the writ of habeas corpus is maintainable where it is proved that the detention of a minor child by a parent or others was illegal and without any authority of law.

20. In child custody matters, the ordinary remedy lies only under the Hindu Minority and Guardianship Act or the Guardians and Wards Act as the case may be. In cases arising out of the proceedings under the Guardians and Wards Act, the jurisdiction of the court is determined by whether the minor ordinarily resides within the area on which the court exercises such jurisdiction. There are significant differences between the enquiry under the Guardians and Wards Act and the exercise of powers by a writ court which is of summary in nature. What is important is the welfare of the child. In the writ court, rights are determined only on the basis of affidavits. Where the court is of the view that a detailed enquiry is required, the court may decline to exercise the extraordinary jurisdiction and direct the parties to approach the civil court. It is only in exceptional cases, the rights of the parties to the custody of the minor will be determined in exercise of extraordinary jurisdiction on a petition for habeas corpus."

11. A similar view has been taken by this Court in recent judgements in **Rachhit Pandey (Minor) And Another vs. State of U.P. and 3 others6, Master Manan @ Arush vs. State of U.P. and 8 others7, Krishnakant Pandey (Corpus) And 2 Others vs. State of U.P. And 3 Others8, Master Tarun @ Akchhat Kumar And Another vs. State of U.P. And 3 Others9, and Priyanshu (Minor) vs. State of U.P. And 5 Others10.**

12. The exercise of the extraordinary jurisdiction for issuance of a writ of habeas corpus would, therefore, be seen to be dependent on the jurisdictional fact where the applicant establishes a prima facie case that the detention is unlawful. It is only where the aforementioned jurisdictional fact is established that the applicant become entitled to the writ as of right.

13. In an application seeking a writ of habeas corpus for custody of minor child, as is the case herein, the principal consideration for the court would be to ascertain whether the custody of the child can be said to be unlawful and illegal and whether his welfare requires that the present custody should be changed and the child should be handed over in the care and custody of somebody else other than in whose custody he presently is.

14. Proceedings in the nature of habeas corpus may not be used to examine the question of the custody of a child. The prerogative writ of habeas corpus, is in the nature of extraordinary remedy, and the writ is issued, where in the circumstances of a particular case, the ordinary remedy provided under law is either not available or is ineffective. The power of the High Court, in granting a writ, in child custody matters, may be invoked only in cases where the detention of a minor is by a person who is not entitled to his/her legal custody.

15. The role of the High Court in examining cases of custody of a minor, in a petition for a writ of habeas corpus, would have to be on the touchstone of the principle of *parens patriae jurisdiction* and the paramount consideration would be the welfare of the child. In such cases the matter would have to be decided not solely by reference to the legal rights of the parties but on the predominant criterion of what would best serve the interest and welfare of the minor.

16. In a given case, while dealing with a petition for issuance of a writ of habeas corpus concerning a minor child, directions may be issued for return of the child or the Court may decline to change the custody of the child, keeping in view all the attending facts and circumstances and taking into view the totality of the facts and circumstances of the case brought before the Court; the welfare of the child being the paramount consideration.

17. Counsel for the petitioners has fairly admitted that respondent no.4 left her matrimonial home on 06.1.2019 on account of differences with the petitioner no.2, and thereafter, the petitioner no.1-corpus has been continuously under her custody. Learned counsel has also not disputed the fact that the custody of the petitioner no. 1, minor child of age around nine years, with his mother cannot be said to be illegal. The only claim which is sought to be put forward is for grant of visitation rights.

18. It is therefore, undisputed that the petitioner no.1, minor child, presently of age about nine years, has been continuously under the care and custody of his mother-respondent no.4, who is living independently and separately from her husband since 06.1.2019, the date when she left her matrimonial home along with the minor child. It is also not the case of the petitioner no. 2-father, that the petitioner no.1-corpus was forcibly taken away by the mother from his custody.

19. The subject matter relating to custody of children during the pendency of the proceedings under the Hindu Marriage Act, 195511 is governed in terms of the provisions contained under Section 26 thereof. The aforesaid section applies to "any proceeding" under the HMA and it gives power to the court to make provisions in regard to: (i) custody, (ii) maintenance, and (iii) education of minor children. For this purpose the court may make such provisions in the decree as it may deem just and proper and it may also pass interim orders during the pendency of the proceedings and all such orders even after passing of the decree.

20. The provisions under Section 26 of the HMA were considered in **Gaurav Nagpal v Sumedha Nagpal12,** and it was held as follows:-

"Section 26 of the Hindu Marriage Act, 1955 provides for custody of children and declares that in any proceeding under the said Act, the Court could make, from time to time, such interim orders as it might deem just and proper with respect to custody, maintenance and education of minor children, consistently with their wishes, wherever possible."

21. In a petition for a writ of habeas corpus concerning a minor child, the Court,

in a given case, may direct to change the custody of the child or decline the same keeping in view the attending facts and circumstances. For the said purpose it would be required to examine whether the custody of the minor with the private respondent, who is named in the petition, is lawful or unlawful. In the present case, the private respondent is none other than the biological mother of the minor child. This being the fact, it may be presumed that the custody of the child with his mother is not unlawful. It would only be in an exceptional situation that the custody of a minor may be directed to be taken away from the mother for being given to any other person-including father of the child, in exercise of writ jurisdiction. This would be so also for the reason that the other parent, in the present case, the father, can take resort to the substantive statutory remedy in respect of his claim regarding custody of the child.

22. In a child custody matter, a writ of habeas corpus would be entertainable where it is established that the detention of the minor child by the parent or others is illegal and without authority of law. In a writ court, where rights are determined on the basis of affidavits, in a case where the court is of a view that a detailed enquiry would be required, it may decline to exercise the extraordinary jurisdiction and direct the parties to approach the appropriate forum. The remedy ordinarily in such matters would lie under the Hindu Minority and Guardianship Act, 195613 or the Guardians and Wards Act, 189014, as the case may be.

23. Counsel for the petitioners has not disputed the aforesaid factual position and the only grievance, which is sought to be raised, is with regard to a claim for visitation rights on behalf of the father.

24. The contention which has been sought to be raised by the counsel for the petitioner with regard to the father's claim for custody and/or visitation rights, are matters which are to be agitated in appropriate proceedings. This would be more so for the reason that in the case at hand proceedings under the HMA are pending between the parties before the Family Court and all ancillary reliefs and claims are open to be raised before the said forum or in other appropriate proceedings.

25. Having regard to the aforestated facts and circumstances, the *rule nisi* issued earlier is not required to be made absolute. It is discharged.

26. The petitioner no. 1-corpus is at liberty to go back alongwith the respondent no.4, his mother to the place from where they have come.

27. The petition stands accordingly, **dismissed.**

(2022)01ILR A204
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 05.01.2022

BEFORE

THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.
THE HON'BLE MRS. SAROJ YADAV, J.

P.I.L. Civil No. 28404 of 2021

Sheshmani Nath Tripathi ...Petitioner
Versus
E.C.I., New Delhi & Anr. ...Respondents

Counsel for the Petitioner:
In Person

Counsel for the Respondents:

A.S.G., Vijay Vikram Singh

A. Interpretation of Statute - The Representation of People Act, 1951 - Section 29A - The Election Symbols (Reservation and Allotment) Order, 1968 - The Election Symbols (Reservation and Allotment) (Second Amendment) Order, 1989 - The Court rejected the contention of the petitioner that the Election Commission does not have any authority t recognize a political party or to reserve an election symbol. (Para 28)

Writ Petition Rejected. (E-10)

List of Cases cited:

1. Shraddha Tripathi, Advocate Vs the Election Commission of India & ors. Misc. Bench No. 12092 of 2016

2. Desiya Murpokku Dravida Kazhagam & anr. Vs Election Commission of India (2012) 7 SCC 340

(Delivered by Hon'ble Devendra Kumar Upadhyaya, J.)

1. These proceedings under Article 226 of the Constitution of India have ostensibly been instituted in public interest challenging paragraphs 3 of an order issued on 19th September, 1989 by the Election Commission of India (hereinafter referred to as "Election Commission"), whereby it has been observed that Bhartiya Janta Party shall be recognized as a National Party, for which symbol "Lotus" shall be reserved for it in terms of the provisions contained in sub paragraph 2 of paragraph 7 of the Election Symbols (Reservation and Allotment) (Second Amendment) Order 1989 (hereinafter referred to as "Second Amendment Order, 1989).

2. Similar prayer has been made challenging paragraph 3 of another order dated 23rd September, 1989 issued by the Election Commission, whereby it has been observed that Indian National Congress shall be a National Party for which symbol "Hand" shall be reserved.

3. Heard Shri Sheshmani Nath Tripathi, petitioner in person and Shri Vijay Vikram Singh, learned counsel representing the Election Commission.

4. At the outset, we may observe that though this petition has purportedly been filed in "public interest", however, from the pleadings available on record, it can very well be inferred that the petitioner has attempted to espouse a personal cause as well. In this regard, it is noted that in paragraph 6 of the petition it has been stated that the petitioner is a primary member of Samajwadi Party in U.P. which is a registered political party under section 29A of the Representation of People Act, 1951 (hereinafter referred to as the "Act") and plea of discrimination in issuance of Letters of Registration under section 29A of the Act has been raised by stating that paragraph 3 in the impugned orders dated 19th September, 1989 and 23rd September, 1989 issued by the Election Commission in respect of two political parties, namely, Bhartiya Janta Party and Indian National Congress, it has been provided that these parties shall be National Parties and their election symbols shall also be reserved, however, similar provision is missing in the registration letter issued in respect of Samajwadi Party on 21st May, 1993. Thus a cause on behalf of the Samajwadi Party has also been attempted to be pleaded in this writ petition. In the same breath, however, the petitioner also states in the writ petition that he does not have any personal or private interest in this writ

petition in any manner whatsoever and that the petition has been filed in public interest and also that the entire cost of litigation is being borne by the petitioner himself. The petitioner has also stated that he is a public spirited person and that the matter raised herein carries immense importance as such he has filed this petition. In paragraph 4 of the writ petition, it has also been averred by the petitioner that the result of this litigation will not lead to any undue gain to himself or to any one associated with him or any undue loss to any one, body of persons or the State, though the petitioner, admittedly, is a member of another political party, namely, Samajwadi Party.

5. The writ petition also, in our considered opinion, suffers from non-joinder of necessary parties. In this regard, it is noticeable that though it has been prayed in the writ petition that paragraph 3 of the letters of recognition dated 19th September, 1989 and 23rd September, 1989 may be quashed and struck down, however, the political parties, which are likely to be affected in case the prayer made in this petition is granted, have not been impleaded as respondents.

6. As noticed above, letters of registration issued by the Election Commission way back in the year 1989 are now being challenged after a lapse of about 32 years offering an explanation that in case of violation of fundamental rights conferred on the citizenary of this country in part III of the Constitution of India, delay is not material. Further explanation which has been sought to be given is that the impugned letters of registration have been challenged as the petitioner received reply to a query made by him under the Right to Information Act from the Election Commission by its letter dated 12.05.2021 enclosing therewith the impugned letters of registration in response to his application dated 15.04.2021. The said reply, it has been stated, was received by the petitioner on 27.10.2021. The explanation offered for such inordinate delay in instituting this petition though is not satisfactory, however, we are entertaining the petition for the reasons given hereinafter.

7. Having observed as above, we have, nonetheless, entertained this writ petition and proceed to decide the same as an important issue has been raised in the petition pertaining to scope and ambit of section 29A of the Act and also the powers and jurisdiction of Election Commission under Article 324 of the Constitution of India.

8. It has been argued by the petitioner that the letters of registration dated 19th September, 1989 and 23rd September, 1989 have been issued by the Election Commission in exercise of its power vested in it under section 29A of the Act which clearly does not empower the Election Commission either to declare a political party as a National Party or to reserve its election symbol, therefore paragraph 3 of the said letters of registration are bad in law.

9. Drawing attention of the Court to the language used in section 29A of the Act, it has vehemently been submitted by the petitioner that the said provision empowers the Election Commission only to decide either to register an association or a body as a political party or not so to register it on consideration of the particulars and other relevant factors as required by the said section. It has, thus, been urged that as per the scheme envisaged in section 29A of the Act, an association or a body of individuals is required to make an application for its registration as a political party giving particulars/information required under sub sections 2, 3, 4 and 5 of section 29-A of the Act and the Election

Commission after receiving the particulars/ information, is mandated to consider the same and take a decision either to register the applicant as a political party or not to register it. The petitioner has thus, submitted that section 29-A of the Act does not in its ambit encompass the powers of recognizing a political party as a National Party or a State Party or to reserve the Election Symbol for such a political party.

10. On the strength of the aforesaid submission, it has thus, been argued that the impugned paragraph 3 of the letters of registration dated 19th September, 1989 and 23rd September, 1989 whereby the political parties concerned have been recognized as National Parties and election symbols have also been reserved, is unlawful, without jurisdiction and amounts to transgression of its authority and power by the Election Commission as vested in it under section 29A of the Act. It has further been argued that the impugned stipulation contained in paragraph 3 of the letters of registration dated 19th September, 1989 and 23rd September, 1989 is not available in the letters of registration issued by the Election Commission in respect of other political parties, such as Samajwadi Party, Rashtriya Rashtrawadi Party, Bahujan Samajwadi Party and Vikas Party. The letters of registration of these parties issued by the Election Commission have been annexed as annexures 2, 3, 7 and 8 to the writ petition which are dated 21.05.1993, 02.04.2014, 30.09.1989 and 06.11.1996 respectively. It has, thus, been argued that the impugned stipulation in paragraph 3 in the letters of registration of two parties is missing in the letters of registration issued under section 29A of the Act in respect of other political parties, which is violative of Article 14 of the Constitution of India. The petitioner has also pleaded that stipulation of impugned paragraphs in the letters of registration in respect of aforementioned two political parties is violative of Articles 19(1)(C) , 19(4) and 21 of the Constitution of India. It has also been stated by the petitioner that the impugned paragraphs of the letters of registration are non-est in view of the provisions contained in Article 13 of the Constitution of India.

11. Shri Tripathi has also submitted that it is not only that under section 29A of the Act the Election Commission is not allowed to allot symbols and grant recognition but also that there is no other authority available to the Election Commission to grant recognition or grant symbol to any political party. Reference in this regard has been made by the petitioner to the Election Symbols (Reservation and Allotment) Order, 1968 (hereinafter referred to as "Allotment Order, 1968") who has stated that if a field is already covered by the statutory provisions (in this case section 29A of the Act), the Election Commission has to act within its bounds as circumscribed by the said statute and even Article 324 of the Constitution of India does not permit the Election Commission to travel beyond the scope of section 29A of the Act.

12. On the other hand, Shri Vijay Vikram Singh, learned counsel representing the Election Commission, has stated that the instant petition does not espouse the cause of any public interest and that the petition has been filed as Public Interest Litigation only as a camouflage for serving personal interest. He has also argued that delay of about 32 years in filing this petition has not been explained. On the merit, learned counsel representing the Election Commission has submitted that the impugned paragraph 3 contained in the letters of registration dated 19th September, 1989 and 23rd September, 1989 does not suffer from

any illegality and as a matter of fact, the same are only a communication of the fact that these political parties were National Parties and that their symbols were reserved. He has, thus, argued that even though paragraphs 3 of these two letters of registration are not referable to section 29A of the Act, however, the same being only a communication of an existing fact, cannot be faulted with on any count. On behalf of Election Commission, it has also been argued that Article 324 of the Constitution of India vests plenary powers in the Election Commission so far as superintendence, direction and control of the elections are concerned. His submission, thus, is that recognition of a political party as a National Party or a State Party and reservation of symbols are the matters related to control of elections as such the Election Commission is fully empowered to issue Allotment Order, 1968 and that the impugned paragraphs 3 of the letters of registration are referable to the said Order, 1968.

13. The Parliament has enacted Representation of People Act, 1951 to provide for conduct of elections to the Houses of Parliament and to the House or the Houses of Legislature of each State and the matters connected thereto. Part IV A was inserted in the Representation of People Act by way of enacting Act 1 of 1989 by the Parliament, whereby section 29A was added. Section 29A of the Act which came into force w.e.f.15.06.1989, is extracted herein below:-

"29A. Registration with the Election Commission of associations and bodies as political parties.--(1) Any association or body of individual citizens of India calling itself a political party and intending to avail itself of the provisions of this Part shall make an application to the Election Commission for its registration as a political party for the purposes of this Act.

(2) Every such application shall be made,--

(a) if the association or body is in existence at the commencement of the Representation of the People (Amendment) Act, 1988 (1 of 1989), within sixty days next following such commencement;

(b) if the association or body is formed after such commencement, within thirty days next following the date of its formation.

(3) Every application under sub-section (1) shall be signed by the chief executive officer of the association or body (whether such chief executive officer is known as Secretary or by any other designation) and presented to the Secretary to the Commission or sent to such Secretary by registered post.

(4) Every such application shall contain the following particulars, namely:--

(a) the name of the association or body;

(b) the State in which its head office is situate;

(c) the address to which letters and other communications meant for it should be sent;

(d) the names of its president, secretary, treasurer and other office-bearers;

(e) the numerical strength of its members, and if there are categories of its members, the numerical strength in each category;

(f) whether it has any local units; if so, at what levels;

(g) whether it is represented by any member or members in either House of Parliament or of any State Legislature; if so, the number of such member or members.

(5) The application under sub-section (1) shall be accompanied by a copy of the memorandum or rules and regulations of the association or body, by whatever name called, and such memorandum or rules and regulations shall contain a specific provision that the association or body shall bear true faith and allegiance to the Constitution of India as by law established, and to the principles of socialism, secularism and democracy, and would uphold the sovereignty, unity and integrity of India.

(6) The Commission may call for such other particulars as it may deem fit from the association or body.

(7) After considering all the particulars as aforesaid in its possession and any other necessary and relevant factors and after giving the representatives of the association or body reasonable opportunity of being heard, the Commission shall decide either to register the association or body as a political party for the purposes of this Part, or not so to register it; and the Commission shall communicate its decision to the association or body:

Provided that no association or body shall be registered as a political party under this sub-section unless the memorandum or rules and regulations of such association or body conform to the provisions of sub-section (5).

(8) The decision of the Commission shall be final.

(9) After an association or body has been registered as a political party as aforesaid, any change in its name, head office, office-bearers, address or in any other material matters shall be communicated to the Commission without delay.]

Registration of political party-Scope and effect

Registration of political party is not compulsory, but optional. However, registration enables a political party to claim certain benefits under law such as accepting of a contribution from any person or company. Similarly, under Election Symbols Order, certain symbols are reserved fo a recognized political party for the exclusive allotment to the candidate seet up by such political party; Jeevan Chandrabhan Idnani v. Divisional Commissioner, Konkan Bhavan, AIR 2012 SC 1210: (2012)(2) SCC 794: 2012 (2)JT 134: 2012(2) SCALE 48: 2012 (1) SLT 78."

14. A perusal of the aforequoted section 29A of the Act reveals that the said provision was added for the purposes of registration of political parties. It provides that an association or body of individual citizens of India which intends to avail itself of the provisions of part IVA of the Act shall make an application to the Election Commission for its registration as a political party. Sub section 2 of section 29A provides for time period within which such association or body may make an application seeking registration as a political party. Sub sections 3, 4 and 5 stipulate the information and other material to be furnished for registration. Sub section 6 permits the Election Commission to call for such other particulars as may be deemed fit from the association or the body seeking its registration as a political party. Sub section 7 provides that the Commission on consideration of the application and after giving reasonable opportunity of being heard to the representative of the applicant shall decide either to register the applicant as a political party or not so to register it for the purposes of Part IVA of the Act. Section 29B and Section 29C were inserted later in the Principal Act w.e.f. 11.09.2003 and

01.04.2017 respectively, which entitle a registered political party to accept contributions and require such political party to declare the donation received by it. Accordingly, registration of an association or a body of citizens of India as a political party enables it to claim certain benefits under law, such as accepting contributions. It also obligates the political party to declare donations received by it. Registration of a political party under section 29A, as is apparent from a bare reading of the said provision, is for the purposes of availing such political party of the provisions of Part IVA of the Act.

15. No doubt section 29A or any other provision contained in Part IVA of the Act, 1951 does not empower the Election Commission either to recognize a political party or to reserve the election symbols. However, the power to recognize a National Party or a State Party and to reserve the election symbol is in terms of the provisions contained in the Allotment Order, 1968 which has been issued by the Election Commission in exercise of its power conferred by Article 324 of the Constitution of India and Rules 5 and 10 of the Conduct of Elections Rule, 1961 and all other powers enabling it in that behalf. Clause 4 of the Allotment Order, 1968 provides that a symbol shall be allotted to a contesting party in accordance with the provisions of the said order in every contested election. Clause 5 classifies the election symbols into two categories, namely, (i) reserved symbol which is a symbol reserved for a recognized political party for exclusive allotment to the contesting candidates set up by that party and (ii) a free symbol which is a symbol other than a reserved symbol. Clause 6 classifies recognized political parties either as a National Party or a State Party. Clause 6A and 6B of the said Allotment Order provides for eligibility for recognition as a State Party or a National Party. Clause 6C provides for conditions for continued recognition as a National Party or State Party. Clause 8 provides for choice of symbols and allotment thereof, according to which a candidate set up by a National Party or State Party in an election shall be allotted the symbol reserved for that party and no other symbol. The Allotment Order, 1968 also contains the provisions for allotment of free symbols as well. Clause 17 mandates the Election Commission to publish list in the Gazette of India specifying the National Parties, State Parties and symbols reserved for them.

16. Thus, so far as recognition of political parties as a National Party or a State Party is concerned, the Allotment Order, 1968 contains provisions empowering the Election Commission to do so.

17. When we examine the impugned paragraphs 3 of the letters of registration dated 19th September, 1989 and 23rd September, 1989, what we find is that the same owes its existence not to section 29A of the Act but to the provisions contained in the Second Amendment Order, 1989 issued on 11.08.1989 by the Election Commission. Though the Second Amendment Order, 1989 is specifically mentioned the impugned paragraph 3 of the letters of registration dated 19th September, 1989 and 23rd September, 1989 issued with regard to two different political parties, however, it appears that the said provision has completely been overlooked by the petitioner. The entire basis of the instant writ petition, in our considered opinion, is misreading of paragraph 3 of the letters of registration dated 19th September, 1989 and 23rd September, 1989. It appears

that the said paragraphs 3 has been understood by the petitioner as if the same has been issued by the Election Commission in exercise of its power vested in section 29A of the Act and is thus referable to the said provision. The provisions of the Second Amendment Order, 1989 have completely been overlooked by the petitioner.

18. In order to properly appreciate the issue, it would be appropriate to quote the entire Second Amendment Order, 1989 notified on 11.08.1989 which is extracted herein below:

"ELECTION COMMISSION OF INDIA
NEW DELHI, the l lth August, 1989
THE ELECTION SYMBOLS (RESERVATION AND ALLOTMENT)
(SECOND AMENDMENT) ORDER, 1989.

O. N.73(E):- In exercise of the powers conferred by article 324 of the Constitution, read with section 29A of the Representation of the People Act, 1951 (43 of 1951), and rules 5 and 10 of the Conduct of Elections Rules, 1961, and all other powers enabling it in this behalf, the Election Commission of India hereby makes the following Order further to amend the Election Symbols (Reservation and Allotment) Order 1968, namely:-

1. Short title and commencement.- (1) This Order may be called the Election Symbols (Reservation and Allotment) (Second Amendment) Order, 1989.

(2) It shall come into force on the date of its publication in the Gazette of India.

2. Amendment of paragraph 7 :- In the Election Symbols (Reservation and Allotment) Order, 1968, in paragraph 7, for sub-paragraphs (2) and (3) the following sub-paragraphs shall be substituted, namely:-

"(2) Notwithstanding anything contained in sub-paragraph (1), every political party which, immediately before the l5th day of June, 1989 is a National Party, shall, on its registration under section 29A of the Representation of the People Act, 1951, be a National party and shall, subject to the other provisions of this Order, continue to be so until it ceases to be a National Party on the result of any general election held after the said date.

(3) Notwithstanding anything contained in sub paragraph (I), every political party which, immediately before the l5th day of June, 1989, is a State party in a State, shall, on its registration under section 29A of the Representation of the People Act, 1951 be a State party in that state and shall subject to the other provisions of this Order, continue to be so until it ceases to be a State party in that State on the result of any general election held after the said date."

By order
[No.56/89]
BALWANT SINGH,
SECRETARY,
ELECTION COMMISSION OF INDIA."

19. As per clause 1(2) of the Second Amendment Order, it came into force on the date of its publication in Gazette of India. Second Amendment Order was published on 11.08.1989 in the official gazette. Thus, the same was enforced w.e.f. 11.08.1989. Clause 2 of the Second Amendment Order, 1989 amends paragraph/(clause) 7 of the principal Order of 1968. In paragraph 7, sub paragraphs 2 and 3 were substituted. Newly added sub paragraph 2 of paragraph 7 provides that every political party which was a National

Party immediately before the 15th day of June, 1989, on its registration under section 29A of the Act shall be a National Party and shall continue to be so until the same is ceased to be a National Party. Similarly, newly added sub paragraph 3 of paragraph 7 provides that every political party which was a State Party immediately before 15th day of June,1989, on its registration under section 29A of the Act shall be a State Party in that State and shall continue to be so until is ceased to be a State Party.

20. The date 15th June of 1989 in newly added sub paragraphs 2 and 3 of the Order is of significance. It is noticeable at this juncture itself that section 29A which was inserted in the Representation of People Act by the Act 1 of 1989 came into force w.e.f. 15.06.1989. Sub section 2(a) of section 29A provides that if an association or a body was in existence at the commencement of the Act 1 of 1989, such an association or body shall make an application seeking its registration within 60 days next following such commencement. Act 1 of 1989 came into force on 15th of June, 1989. Thus, from the said date, within sixty days if any association or body intended to seek registration, application could have been made within sixty days from 15th of June, 1989. The provision contained in newly added sub clauses 2 and 3 of the Order thus was made with a purpose which has a rationale too. The purpose was to maintain continuity of any association or a body as a National or State Party, which was in existence before 15th of June, 1989 even after its registration as a National Party or a State Party and to maintain continued reservation of election symbol. This provision in the Order vide notification dated 11.08.1989 appears to have been made to avoid confusion which, in the absence of continued recognition as a National Party or a State Party and also in absence of continued reservation of election symbols, would have arisen once a political party was registered under section 29 of the Act.

21. As already observed above, clause 3 of the letters of registration dated 19th September, 1989 and 23rd September, 1989 clearly refer to Second Amendment Order, 1989 dated 11.08.1989. We have,thus, no doubt in our mind that the impugned clause 3 of these two letters of registration are not referable to section 29A of the Act, rather they are referable to the provisions contained in the newly added sub paragraphs 2 and 3 of Paragraph 7 of the order vide notification issued on 11.08.1989 by the Election Commission.

22. Submission of the petitioner that the impugned clause 3 of the aforementioned letters of registration are beyond statutory powers vested in the Election Commission under section 29A of the Act may or may not be correct, however, that in itself will not render these stipulations contained in paragraph 3 bad or without jurisdiction for the reason that the same are referable to Second Amendment Order, 1989. Submission of the petitioner that the impugned clause 3 of two letters of registration are without jurisdiction, is thus, highly misconceived.

23. We may also note that it is not the case of the petitioner that prior to issuance of the letters of registration dated 19th September, 1989 and 23rd September, 1989 the political parties concerned were not recognized as National Parties or their symbols were not reserved. There is no challenge in this petition to the recognition of the political parties or to their reserved

symbols. The challenge is only to the existence of clause 3 in the letters of registration which as observed above, is referable to the Second Amendment Order, 1989 and in our opinion the Election Commission was well within its power and jurisdiction to have provided for the same.

24. Submission made by the petitioner based on the ground that the impugned paragraphs 3 of the letters of registration is violative of Article 14 of the Constitution of India as the same is itself discriminatory, is also highly misconceived and is thus hereby rejected for the reason that it has not been pleaded as to whether the other political parties in respect of whom the letters of registration have been issued (including Samajwadi Party to which the petitioner belongs to) were recognized as National/State Party or their elections symbols were reserved or by virtue of non-existence of similar clause in their letters of registration, the parties concerned have been de-recognized and their election symbols have been de-reserved.

25. For the reasons aforesaid, challenge made in this petition on the ground of violation of Articles 19 and 21 of the Constitution of India also fails. The petitioner has also submitted that in absence of any statutory powers vested in the Election Commission of India in the field covered by the Act, the power to recognize a political party and to reserve the election symbol could not have been exercised by the Election Commission. The said submission is completely misconceived and is untenable. The recognition of a political party as a National Party or a State Party and reservation of election symbol are the functions which are exercised by the Election Commission under the provisions of Election Symbols (Reservation and Allotment) Order, 1968, as amended from time to time.

26. The issue relating to the scope and powers in respect of superintendence, directions and control of elections under Article 324 of the Constitution of India is no more *res integra*. A Division Bench of this Court, in this regard, in the case of **Shraddha Tripathi, Advocate vs. the Election Commission of India and others, Misc. Bench No.12092 of 2016 decided on 11.01.2021 has observed as under:**

"As regards contention of the petitioner that the Election Commission of India does not have any power to allot symbols to a recognized National or State level political party or to reserve a symbol for them, firstly, we are of the view that Article 324 vests ample power on the Election Commission of India for superintendence, direction and control of elections and in this context if such reservation or allotment is made it is in furtherance of the constitutional goal contained in Part XV of the Constitution of India. The only limitation is that this exercise of power cannot violate any constitutional or statutory provision or any rule made there under. We have already noticed that there is no such violation by the Election Commission of India in issuing Order, 1968 for allotment and reservation of symbols. There is no provision in the Act, 1951 or the Rules, 1961 which prohibits the Commission from reserving or allotting

symbols as has been done by the Order, 1968. In fact, the said Act, 1951 and the Rules, 1961, hint or suggest such reservation and allotment of symbols, as already noticed. Vires of the Act, 1951 or Rules, 1961 are not under challenge before us. We therefore reject this contention. In fact, the vires of Order, 1968 was put to challenge before the Supreme Court of India in the case of Kanhiya Lal Omar Vs. R.K. Trivedi and others, 1985 (4) SCC 628. The Order, 1968 was held to be intra vires the Constitution, the Act, 1951 and the Rules, 1961. "

27. Hon'ble Supreme Court in the case of **Desiya Murpokku Dravida Kazhagam and another vs. Election Commission of India, reported in [(2012) 7 SCC 340]** in paragraphs 14, 49 and 50 has observed as under:

"14. The authority of the Election Commission under the Election Symbols Order, 1968 as a whole was also challenged before this Court in *Kanhiya Lal Omar v. R.K. Trivedi* [(1985) 4 SCC 628] , wherein it was urged on behalf of the petitioner that the said Order, being legislative in character, could not have been issued by the Election Commission, which was not entrusted by law with power to issue such an Order regarding the specification, reservation, choice and allotment of symbols that might be chosen by the candidates during elections in the parliamentary and assembly constituencies. It was also urged that Article 324 of the Constitution which vests the power of superintendence, direction and control of all elections to Parliament and to the Legislative Assemblies, in the Commission, could not be construed as conferring power on the Commission to issue the Symbols Order. Rejecting the said contention, this Court held that the expression "election" in Article 324 of the Constitution is used in a wide sense so as to include the entire process of election which consists of several stages, some of which had an important bearing on the result of the process and that every norm which laid down a Code of Conduct could not possibly be elevated to the status of legislation or even delegated legislation. It was emphasised that there are certain authorities or persons who may be the source of rules of conduct and who at the same time could not be equated with authorities or persons who are entitled to make law in the strict sense.

49. The submissions made on behalf of the writ petitioners regarding the constitutional validity of the Election Symbols Order, 1968, and the power of the Election Commission to settle issues relating to claims of splinter groups to be the original party, had fallen for the decision of this Court about forty years ago in Sadiq Ali case [(1972) 4 SCC 664] , when this Court had occasion to observe that the Election Commission had been clothed with plenary powers by Rules 5 and 10 of the Conduct of Elections Rules, 1961 in the matter of conducting of elections, which included the power to allot symbols to candidates during elections. The challenge to the vires of the Symbols Order, 1968 was, accordingly, repelled.

50. The view in *Sadiq Ali case* [(1972) 4 SCC 664] has since been followed in*All Party Hill Leaders' Conference case*[(1977) 4 SCC 161] , *Roop Lal Sathi case*[(1982) 3 SCC 487] , *Kanhiya Lal Omar case* [(1985) 4 SCC 628] and as recently as in *Subramanian*

Swamy case **[(2008) 14 SCC 318] , to which reference has been made in the earlier part of this judgment, where the provisions of Article 324 of the Constitution vesting the superintendence, direction and control of elections, were considered in detail and it was, inter alia, held that in addition to Rules 5 and 10 of the Conduct of Elections Rules, 1961, the powers vested in the Election Commission could be traced to Article 324 of the Constitution."**

28. Thus, the argument of the petitioner that the Election Commission does not have any authority to recognize a political party or to reserve an election symbol also fails.

29. For the discussions made and reasons given above, we find that the writ petition is highly misconceived which is hereby dismissed.

30. There will be no order as to costs.

(2022)01ILR A215
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 13.01.2022

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Application U/S 482 No. 165 of 2022

Rajesh Singh & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Saharsh, Tushar Bhushan

Counsel for the Opposite Parties:
G.A.

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power - Mines and Mineral (Development and Regulation) Act, 1957 - Sections 4, 21 - Prevention of Damage to Public Property Act, 1984 - Section 3 (2) (a) - ulterior motives and malafide intention - Judicial order's cannot be allowed to be passed in a mechanical manner either by filling in blanck on a printed proforma or by affixing a ready made seal etc. of the order on a plain paper - Application U/S 482 No. -11334 of 2021 (Pankaj Jaiswal Vs. State of U.P. & Anr.)

Charge sheet filed by Investigating Officer in a mechanical manner - without considering the evidence on record - Magistrate without application of mind and in a routine manner took cognizance - passed the cognizance order on printed proforma by filling the blanks of Sections of I.P.C. and Police Station etc. - application filed by applicants with a prayer to quash the summoning order.(Para - 3,4)

HELD:-Impugned cognizance and summoning orders passed Magistrate are hereby quashed . Matter remitted back to Magistrate with a direction to decide afresh the issue for taking cognizance and summoning the applicants and pass appropriate orders in accordance with law. (Para - 9)

Application u/s 482 Cr.P.C. allowed. (E-7)

List of Cases cited:-

Pankaj Jaiswal Vs St. of U.P. & anr. , Application U/S 482 No. - 11334 of 2021

(Delivered by Hon'ble Shamim Ahmed, J.)

1. The Court convened through video conferencing.

2. Heard Sri Tushar Bhushan, learned counsel for the applicants as well as learned A.G.A. for the State and perused the record.

3. The instant application has been filed by the applicants with a prayer to quash the summoning order dated 25.03.2021 passed by the learned Judicial Magistrate Ist, Gonda, under Sections 4, 21 of Mines and Mineral (Development and Regulation) Act, 1957 and under Section 3 (2) (a) Prevention of Damage to Public Property Act, 1984 along with the cognizance order dated 25.03.2017 taken on charge sheet dated 30.12.2017, arising out of Case Crime No. 0384 of 2017 (State Vs. Meghnath and others), Police Station, Paraspur, District Gonda.

4. Learned counsel for the applicants submits that the applicants has been falsely implicated in the present case only with ulterior motives and malafide intention. He further submits that charge sheet was filed by the Investigating Officer in a mechanical manner without considering the evidence on record and thereafter, the learned Magistrate without application of mind and in a routine manner took cognizance and passed the cognizance order on printed proforma by filling the blanks of Sections of I.P.C. and Police Station etc.

5. Learned counsel for the applicants further argued that the order of cognizance dated 25.03.2017 passed by learned Magistrate is abuse of process of law and the same is liable to be quashed in view of the several orders passed by this Court and the latest order passed by this Court on 9.8.2021 in **Application U/S 482 No. -11334 of 2021 (Pankaj Jaiswal Vs. State of U.P. & Anr.;)** and the present case may also be decided on the same terms and conditions.

6. Per contra, learned A.G.A. opposed the argument made by learned counsel for the applicants but does not dispute this fact that the present case may also be decided in terms of the order passed by this Court dated 9.8.2021 in **Application U/S 482 No. -11334 of 2021 (Pankaj Jaiswal Vs. State of U.P. & Anr.;).**

7. In view of the submission made by learned counsel for the parties and after perusal of record, this application is being finally allowed in terms of order dated 9.8.2021 passed in **Application U/S 482 No. - 11334 of 2021 (Pankaj Jaiswal Vs. State of U.P. & Anr.;).**

8. Accordingly, present Criminal Misc. Application U/S 482 Cr.P.C succeeds and is **allowed.**

9. The impugned cognizance and summoning orders dated 25.03.2021 passed by learned Judicial Magistrate Ist, Gonda in Case Crime No. 0384 of 2017: State Vs. Meghnath and others), under Sections 4, 21 of Mines and Mineral (Development and Regulation) Act, 1957 and under Section 3 (2) (a) Prevention of Damage to Public Property Act, 1984, are hereby quashed and the matter is remitted back to learned Judicial Magistrate Ist, Gonda with a direction to decide afresh the issue for taking cognizance and summoning the applicants and pass appropriate orders in accordance with law keeping in view the observations made by this Court as well as the direction contained in the judgments and order referred to above within a period of two months from the date of production of a copy of this order.

(2022)01ILR A217
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 11.01.2022

BEFORE

THE HON'BLE RAJEEV SINGH, J.

Application U/S 482/378/407 No. 1979 of 2020

Ishwar Singhal @ Tinu & Ors. ...Applicants
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicants:
Durgesh Kumar Singh

Counsel for the Opposite Parties:
G.A., Vinod Kumar

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power - Indian Penal Code, 1860 - Sections 323, 354, 498A & 504 , Dowry Prohibition Act, 1961 - Section 3/4 - after lodging the FIR, which discloses the commission of a cognizable offence, statutory powers of Police, under Section 156 Cr.P.C. to investigate the case registered on the basis of information - no interference is permissible in the investigation in the exercise of its inherent powers, under Section 482 Cr.P.C. - this Court has no jurisdiction to direct a police officer not to arrest the accused during the pendency of investigation of the case - but High Court can always issue a writ of mandamus, under Article 226 of the Constitution restraining the police officer for misusing his legal power in relation to arrest - Fir can be quashed under section 482 Cr.P.C .(Para - 9)

First Information lodged by opposite party No.4 - during the course of investigation - FIR and its consequential proceedings challenged before Court - matter referred to the Mediation and Conciliation Centre of Court - on the first date it was successfully concluded - opposite party No.4 enjoying her matrimonial life and residing with her husband and children .(Para - 18)

HELD:-Impugned FIR and its consequential proceedings is liable to be quashed in terms of settlement agreement of parties before Mediation and Conciliation Centre of this Court. First Information Report is hereby quashed. (Para - 18,19)

Application u/s 482 Cr.P.C. allowed. (E-7)

List of Cases cited:-

1. Ram Lal Yadav & ors. Vs The St. of U.P. & ors. , 1989 Cr. LJ 1013

2. Narinder Singh & ors. Vs St. of Punj. & anr. , (2014) 6 SCC 466

3. Jitendra Raghuvanshi & ors. Vs Babita Raghuwanshi & anr. , (2013) 4 SCC 58

4. Parbatbhai Aahir & ors. Vs St. of Guj. & anr. , (2017) 9 SCC 641 B.S.

5. Joshi & ors. Vs St. of Har. & anr. , (2003) 4 SCC 675

6. Gian Singh Vs St. of Punj. & anr. , (2012) 10 SCC 303

7. Ramawatar Vs St. of M.P. , 2021 SCC Online SC 966

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

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

1. Heard Sri Durgesh Kumar Singh, learned counsel for the applicant, Shri Anirudh Singh, learned A.G.A. for the State and Shri Vinod Kumar, learned counsel for the opposite party No.4.

2. This application (u/s 482 Cr.P.C.) has been filed with request that the matter

may be referred to the Mediation and Conciliation Centre of this Court in relation to FIR No.501 of 2019, under Sections 323, 354, 498A, 504 I.P.C. and Section 3/4 of Dowry Prohibition Act, 1961, Police Station Mandion, District Lucknow and also quashed the entire proceeding in relation to FIR No.501 of 2019 (supra).

3. Learned A.G.A. raised preliminary objection that in the present case, First Information Report and its consequential proceedings are challenged as the investigation is still pending, therefore, application (u/s 482 Cr.P.C.) is not maintainable in terms of law laid down by Full Bench of this Court in the case of ***Ram Lal Yadav and Others vs. The State of U.P. and Others*** reported in ***1989 Cr. LJ 1013,*** decided on 01.02.1989 and answered that after lodging the FIR, no interference is permissible by this Court in exercise of its inherent powers, hence, no relief can be granted despite the issue is already resolved in the Mediation Centre.

4. Learned counsel for the applicants has submitted that marriage of applicant No.1 was solemnized with the opposite party No.4 on 01.07.2009 and they were enjoying their matrimonial life and out of their wedlock, two children were born, namely, Shourya and Tejal, but due to some trivial issues, FIR in question was lodged on 14.06.2019 by the opposite party No.4. In the present case, investigation was started and mediation was also initiated before the court below, but the applicant No.1 was not satisfied with the mediation proceeding initiated before the court below, hence, present application (u/s 482 Cr.P.C.) was filed and with the consent of learned counsel for the applicant as well as learned counsel for the opposite party No.4, matter was sent to the Mediation and Conciliation Centre of this Court on 31.07.2020. The order dated 31.07.2020 reads as under:-

"'Vakalatnama' filed by Shri Vinod Kumar, Advocate on behalf of opposite party No.4 is taken on record.

Heard learned counsel for the applicants as well as learned A.G.A. for the State and Shri Vinod Kumar, learned counsel for opposite party No.4.

The present 482 Cr.P.C. application has been filed to quash the entire proceedings arising out of F.I.R. dated 14.06.2019 lodged by the complainant (O.P. No.4) against the applicants in Case Crime No. 501 of 2019, under Sections 323, 354, 498-A, 504 of I.P.C. and 3/4 Dowry Prohibition Act, 1961, Police Staton Madiaon, District Lucknow and to refer this matter to the Mediation and Conciliation Center, High Court.

The instant dispute is the outcome of strained matrimonial relations between applicant No.1 and opposite party No.4. It has been submitted by learned counsel for the applicant that earlier the mediation process was started to amicably settle the dispute between applicant No.1 and opposite party No.4, however, due to some wrong advice given by the Advocate of the applicants they could not take part in the mediation process and, therefore, one more opportunity be provided to the parties to settle their disputes amicably, if possible, through the process of mediation.

Learned counsel for the opposite party No.4 is not having any objection to the request of learned counsel for the applicants.

Having regard to the submissions advanced by learned counsel for the applicants and learned counsel for opposite party No.4, the matter is referred to the Mediation Center of this Bench on deposit

of Rs. 15,000/-, which shall be deposited by the applicants within a week from today with the Senior Registrar of this Bench. When the Mediation Center will start functioning, a communication will be sent by the Mediation Center of this Bench to the parties and on the first appearance of opposite party No.4 before the Mediation Centre Rs. 13,000/- out of Rs. 15,000/-, which shall be deposited by the applicants shall be paid to her to meet out her expenses of travelling, etc.

Mediation Center will try its best to persuade the parties to arrive at a settlement and will submit a report to this Court within two months from the start of mediation.

List this case in the Ist week of November, 2020.

Till then no coercive measure shall be taken against the applicants in the aforementioned case."

5. Learned counsel for the applicants has submitted that mediation was successfully concluded and opposite party No.4 join her matrimonial home with her husband and children on 07.07.2021 and settlement agreement was singed at the Mediation and Conciliation Centre of this Court by the applicant No.1 (husband) and opposite party No.4 (wife) along with their respective counsels of the parties and they also agreed to withdraw the proceeding of Case, i.e. (i) Case Crime No.501 of 2019 (challenged in the present application) and (ii) Case No.990 of 2019, pending before the Principal Judge, Family Court, District-North West, Rohini Court, Delhi.

6. Learned counsel for the applicant as well as learned counsel for the opposite party No.4 fairly accepted that investigation is going on, but the Investigating Officer has not taken into consideration the settlement agreement for dropping the investigation, therefore, it is appropriate that First Information Report and its consequential proceedings may be quashed in terms of settlement agreement dated 22.02.2021, executed in the Mediation and Conciliation Centre of this Court.

7. Learned counsel for the applicants has relied on the decisions of Hon'ble Supreme Court in the Case of ***Narinder Singh and Others vs. State of Punjab and Another*** reported in ***(2014) 6 SCC 466***. The relevant part of the judgment reads as under:-

"29.7. While deciding whether to exercise its power under Section 482 of the Code or not, timings of settlement play a crucial role. Those cases where the settlement is arrived at immediately after the alleged commission of offence and the matter is still under investigation, the High Court may be liberal in accepting the settlement to quash the criminal proceedings/investigation. It is because of the reason that at this stage the investigation is still on and even the charge-sheet has not been filed. Likewise, those cases where the charge is framed but the evidence is yet to start or the evidence is still at infancy stage, the High Court can show benevolence in exercising its powers favourably, but after prima facie assessment of the circumstances/material mentioned above. On the other hand, where the prosecution evidence is almost complete or after the conclusion of the evidence the matter is at the stage of argument, normally the High Court should

refrain from exercising its power under Section 482 of the Code, as in such cases the trial court would be in a position to decide the case finally on merits and to come to a conclusion as to whether the offence under Section 307 IPC is committed or not. Similarly, in those cases where the conviction is already recorded by the trial court and the matter is at the appellate stage before the High Court, mere compromise between the parties would not be a ground to accept the same resulting in acquittal of the offender who has already been convicted by the trial court. Here charge is proved under Section 307 IPC and conviction is already recorded of a heinous crime and, therefore, there is no question of sparing a convict found guilty of such a crime."

Jitendra Raghuvanshi And Others vs. Babita Raghuwanshi and another *reported in* ***(2013) 4 SCC 58.*** *The relevant part of the judgment reads as under:-*

8. It is not in dispute that matrimonial disputes have been on considerable increase in recent times resulting in filing of complaints under Sections 498-A and 406 IPC not only against the husband but also against the relatives of the husband. The question is when such matters are resolved either by the wife agreeing to rejoin the matrimonial home or by mutual settlement of other pending disputes for which both the sides approached the High Court and jointly prayed for quashing of the criminal proceedings or the FIR or complaint by the wife under Sections 498-A and 406 IPC, whether the prayer can be declined on the sole ground that since the offences are non-compoundable under Section 320 of the Code, it would be impermissible for the Court to quash the criminal proceedings or FIR or complaint.

9. It is not in dispute that in the case on hand subsequent to the filing of the criminal complaint under Sections 498-A and 406 IPC and Sections 3 and 4 of the Dowry Prohibition Act, 1961, with the help and intervention of family members, friends and well-wishers, the parties concerned have amicably settled their differences and executed a compromise/settlement. Pursuant thereto, the appellants filed the said compromise before the trial court with a request to place the same on record and to drop the criminal proceedings against the appellants herein. It is also not in dispute that in addition to the mutual settlement arrived at by the parties, the respondent wife has also filed an affidavit stating that she did not wish to pursue the criminal proceedings against the appellants and fully supported the contents of the settlement deed. It is the grievance of the appellants that not only the trial court rejected such prayer of the parties but also the High Court failed to exercise its jurisdiction under Section 482 of the Code only on the ground that the criminal proceedings relate to the offences punishable under Sections 498-A and 406 IPC which are non-compoundable in nature.

12. After considering the law laid down in State of Haryana v. Bhajan Lal [1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426] and explaining the decisions rendered in Madhu Limaye v. State of Maharashtra [(1977) 4 SCC 551 : 1978 SCC (Cri) 10] , Surendra Nath Mohanty v. State of Orissa [(1999) 5 SCC 238 : 1999 SCC (Cri) 998] and Pepsi Foods Ltd. v. Judicial Magistrate [(1998) 5 SCC 749 : 1998 SCC (Cri) 1400] this Court held: (B.S. Joshi case [(2003) 4 SCC 675 : 2003 SCC (Cri) 848] , SCC p. 680, para 8)

"8. ... We are, therefore, of the view that if for the purpose of securing the

ends of justice, quashing of FIR becomes necessary, Section 320 would not be a bar to the exercise of power of quashing. It is, however, a different matter depending upon the facts and circumstances of each case whether to exercise or not such a power."

Considering matrimonial matters, this Court also held: (B.S. Joshi case [(2003) 4 SCC 675 : 2003 SCC (Cri) 848] , SCC p. 682, para 12)

"12. The special features in such matrimonial matters are evident. It becomes the duty of the court to encourage genuine settlements of matrimonial disputes."

17. In the light of the above discussion, we hold that the High Court in exercise of its inherent powers can quash the criminal proceedings or FIR or complaint in appropriate cases in order to meet the ends of justice and Section 320 of the Code does not limit or affect the powers of the High Court under Section 482 of the Code.

Parbatbhai Aahir and Others vs. State of Gujrat and Another reported in ***(2017) 9 SCC 641.*** *The relevant part of the judgment reads as under :-*

"16. The broad principles which emerge from the precedents on the subject, may be summarised in the following propositions:

16.1. 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 recognises and preserves powers which inhere in the High Court.

16.2. 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.

16.3. 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.

16.4. 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.

16.5. 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.

16.6. 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.

16.7. 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 insofar as the exercise of the inherent power to quash is concerned.

16.8. Criminal cases involving offences which arise 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.

16.9. 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

16.10. There is yet an exception to the principle set out in propositions 16.8. and 16.9. 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."

B.S. Joshi And Others vs. State of Haryana And Another *reported in* ***(2003) 4 SCC 675.*** *The relevant part of the judgment reads as under :-*

8. It is, thus, clear that Madhu Limaye case [(1977) 4 SCC 551 : 1978 SCC (Cri) 10] does not lay down any general proposition limiting power of quashing the criminal proceedings or FIR or complaint as vested in Section 482 of the Code or extraordinary power under Article 226 of the Constitution of India. We are, therefore, of the view that if for the purpose of securing the ends of justice, quashing of FIR becomes necessary, Section 320 would not be a bar to the exercise of power of quashing. It is, however, a different matter depending upon the facts and circumstances of each case whether to exercise or not such a power. Considering matrimonial matters, this Court also held:

12. The special features in such matrimonial matters are evident. It becomes the duty of the court to encourage genuine settlements of matrimonial disputes.

15. In view of the above discussion, we hold that the High Court in exercise of its inherent powers can quash criminal proceedings or FIR or complaint and Section 320 of the Code does not limit or affect the powers under Section 482 of the Code.

Gian Singh vs. State of Punjab and Another *reported in* ***(2012) 10 SCC 303.*** The relevant part of the judgment reads as under:-

"61. the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz. : (i) to secure the ends of justice, or (ii) to prevent abuse of the process of any court. In what cases power to quash the criminal proceeding or complaint or FIR may be exercised where the offender and the victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the

nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have settled the dispute. Such offences are not private in nature and have a serious impact on society. Similarly, any compromise between the victim and the offender in relation to the offences under special statutes like the Prevention of Corruption Act or the offences committed by public servants while working in that capacity, etc.; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and predominatingly civil flavour stand on a different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, the High Court may quash the criminal proceedings if in its view, because of the compromise between the offender and the victim, the possibility of conviction is remote and bleak and continuation of the criminal case would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and the wrongdoer and whether to secure the ends of justice, it is appropriate that the criminal case is put to an end and if the answer to the above question(s) is in the affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding."

8. Learned counsel for the applicants has also relied on the recent judgment of Hon'ble Supreme Court in the case of ***Ramawatar vs. State of Madhya Pradesh*** reported in ***2021 SCC Online SC 966.*** The relevant part of the judgment reads as under:-

"19. Having considered the peculiar facts and circumstances of the present case in light of the afore-stated principles, as well as having meditated on the application for compromise, we are inclined to invoke the powers under Article 142 and quash the instant Criminal proceedings with the sole objective of doing complete justice between the parties before us. We say so for the reasons that:

Firstly, *the very purpose behind Section 3(1)(x) of the SC/ST is to deter caste-based insults and intimidations when they are used with the intention of demeaning a victim on account of he/she belonging to the Scheduled Caste/Scheduled Tribe community. In the present case, the record manifests that there was an undeniable pre-existing civil dispute between the parties. The case of the Appellant, from the very beginning, has been that the alleged abuses were uttered solely on account of frustration and anger over the pending dispute. Thus, the genesis of the deprecated incident was the afore-stated civil/property dispute. Considering*

this aspect, we are of the opinion that it would not be incorrect to categorise the occurrence as one being overarchingly private in nature, having only subtle undertones of criminality, even though the provisions of a special statute have been attracted in the present case.

Secondly, *the offence in question, for which the Appellant has been convicted, does not appear to exhibit his mental depravity. The aim of the SC/ST Act is to protect members of the downtrodden classes from atrocious acts of the upper strata of the society. It appears to us that although the Appellant may not belong to the same caste as the Complainant, he too belongs to the relatively weaker/backward section of the society and is certainly not in any better economic or social position when compared to the victim. Despite the rampant prevalence of segregation in Indian villages whereby members of the Scheduled Caste and Scheduled Tribe community are forced to restrict their quartes only to certain areas, it is seen that in the present case, the Appellant and the Complainant lived in adjoining houses. Therefore, keeping in mind the socio-economic status of the Appellant, we are of the opinion that the overriding objective of the SC/ST Act would not be overwhelmed if the present proceedings are quashed.*

Thirdly, *the incident occurred way back in the year 1994. Nothing on record indicates that either before or after the purported compromise, any untoward incident had transpired between the parties. The State Counsel has also not brought to our attention any other occurrence that would lead us to believe that the Appellant is either a repeat offender or is unremorseful about what transpired.*

Fourthly, *the Complainant has, on her own free will, without any compulsion, entered into a compromise and wishes to drop the present criminal proceedings against the accused.*

Fifthly, *given the nature of the offence, it is immaterial that the trial against the Appellant had been concluded.*

Sixthly, *the Appellant and the Complainant parties are residents of the same village and live in very close proximity to each other. We have no reason to doubt that the parties themselves have voluntarily settled their differences. Therefore, in order to avoid the revival of healed wounds, and to advance peace and harmony, it will be prudent to effectuate the present settlement."*

9. Learned counsel for the applicants has submitted that in the law laid down by the Full Bench of this Court in the case of ***Ram Lal Yadav*** (supra) relied by learned A.G.A. is wrongly interpreted as in the aforesaid judgment, it is held that after lodging the FIR, which discloses the commission of a cognizable offence, statutory powers of Police, under Section 156 Cr.P.C. to investigate the case registered on the basis of information, no interference is permissible in the investigation in the exercise of its inherent powers, under Section 482 Cr.P.C. and this Court has no jurisdiction to direct a police officer not to arrest the accused during the pendency of investigation of the case, but High Court can always issue a writ of mandamus, under Article 226 of the Constitution restraining the police officer for misusing his legal power in relation to arrest.

10. Learned counsel for the applicants has submitted that provisions of anticipatory bail, under Section 438 Cr.P.C. was omitted in the State of U.P., vide U.P. Act No.16 of 1976 w.e.f. 28.11.1975, the

protection of pre arrest was not available, therefore, application (u/s 482 Cr.P.C.) was being filed restraining the police from arrest during investigation and in the case of ***Ram Lal Yadav*** (supra), this controversy was decided that under Section 482 Cr.P.C., Police Officer cannot be restrained from arresting the accused persons during the course of investigation, but by way of writ of mandamus, this power can be used. This question is already settled in the case of ***State of Haryana and Others vs. Bhajan Lal and Others*** reported in ***(1992) Supp 1 SCC 335,*** that First Information Report can be quashed either under Section 482 Cr.P.C. or under Article 226 of the Constitution. The relevant part of the judgment reads as under:-

"102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

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

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

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

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

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

11. Learned counsel for the applicants has submitted that in the case of

Ramawatar (supra), the Hon'ble Supreme Court has held that even at the stage of appeal against the conviction order, power of inherent jurisdiction can be invoked to do the complete justice, therefore, in the present case, First Information Report and its consequential proceedings may be quashed in terms of settlement agreement executed before the Mediation and Conciliation Centre of this Court.

12. Learned A.G.A. as well as learned counsel for the opposite party No.4 fairly conceded this fact that matter was sent to the Mediation and Conciliation Centre of this Court on 31.07.2020 and it was successfully concluded and presently, opposite party No.4 is residing with her husband (applicant No.1) and children.

13. Considering the arguments of learned counsel for the applicants, learned counsel for the opposite party No.4 as well as learned A.G.A. and going through the record, it is evident that FIR was lodged by the opposite party No.4 (wife of applicant No.1) due to some trivial issues and during the course of investigation, First Information Report and its consequential proceedings were challenged before this Court, and thereafter, matter was referred to the Mediation and Conciliation Centre of this Court with the consent of counsel for the opposite party No.4 on the first date and it was successfully concluded and settlement agreement was executed between the parties and opposite party No.4 join her matrimonial home on 07.03.2021 and enjoying her life with her husband (applicant No.1) and children.

14. As in the case of ***Ram Lal Yadav*** (supra) there is no bar from interference in the FIR in application (u/s 482 Cr.P.C.) as this question was already decided in the case of ***Bhajan Lal*** (supra) that inherent powers can be invoked in seven conditions, which reads as under:-

(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

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

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

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

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

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

redress for the grievance of the aggrieved party.

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

15. As in Criminal Procedure Code 1898, there was no such provision in relating to inherent jurisdiction of High Court, but the legislature added Section 561-A by inserting in 1923 Act No.XVII of 1923. Section 561-A of the Criminal Procedure Code 1898, which reads as under:-

"Saving of inherent power of High Court-Nothing in this Code shall be deemed to limit or affect the inherent power of the High Court to make such orders as ma 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"

16. The Law Commission in its 40th report observed that the statutory power under Section 561 A Cr.P.C. is extended only the inherent power of High Court. One may compare it with the recognition of the inherent powers of all civil courts by Section 151 Cr.P.C. Later on, Law Commission in its 41st reports recommended that inherent power of Section 561-A Cr.P.C. be extended to all Criminal Courts to prevent abuse of process of any Court or otherwise to secure the ends of justice, but the legislature did not accept the recommendation of commission to extend the inherent power as mentioned in Section 561-A of Criminal Procedure Code, 1898. Para 46.23 of 41st report of Law Commission is reproduced as under:-

"Section 561 A recognises the inherent powers of the Section 561 A, High Court to do real and substantial justice between parties. Assuming its existence, the Section provides that nothing in the Code shall be deemed to limit or affect the inherent power of the High Court to give effect to any order under the Code (whether made by itself or by a subordinate Court) or to prevent abuse of the process of any Court (including subordinate Courts) or otherwise to secure the ends of justice.

Fourteenth Report. Vol. II, page 829, the Law Commission observed:-

"This statutory recognition, however, extends only to the inherent powers of the High Court. One may compare it with the recognition of the inherent powers of all civil courts by Section 151, Criminal Procedure Code.

In a number of decisions before and after the enactment of Section 561A, various High Courts have also recognised the existence of such power in subordinate Courts. We would, therefore, recommend a statutory recognition of such inherent power which has been recognized as vesting in all subordinate criminal courts.

However, the general principle of law is that the inherent power of a court can be exercised only to give effect to orders made by it or to prevent abuse of its own processes.

We agree with this recommendation. We do not, however consider it necessary or desirable to go further and recognise and inherent power in Courts of Session and other Courts of Appeal to pass appropriate orders to prevent the abuse of the process of any subordinate Court.

We propose that the Section may be expanded as follows:-

"561 A. Nothing in this Code shall be deemed to limit or saving of

inherent powers of Criminal Courts, affect the inherent power-

(a) 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, or (b) of any Criminal Court to make such orders as may be necessary to prevent abuse of its process or otherwise to secure the ends of justice."

17. In the case of ***Ram Lal Yadav*** (supra) the provision of anticipatory bail, under Section 438 Cr.P.C. was not existing, therefore, there was a delima to get the remedy of pre arrest during investigation, then it was clarified by this Court that High Court has no inherent powers, under Section 482 Cr.P.C. to interfere with the arrest of accused persons during the course of investigation, but it was clarified that High Court can always issue a writ of mandamus, under Article 226 of the Constitution restraining the police officer for misusing his legal power in relation to arrest and FIR can be quashed, under Section 482 Cr.P.C., which is covered under the principle laid down by Hon'ble Supreme Court in the Case of ***Bhajan Lal*** (supra) and the present case law laid down by the Hon'ble Supreme Court in the cases as discussed above.

18. In the present case, First Information Report No. 501 of 2019, under Sections 323, 354, 498A, 504 I.P.C. and Section 3/4 of Dowry Prohibition Act, 1961, Police Station Mandion, District Lucknow was lodged on 14.06.2019 by the opposite party No.4 and during the course of investigation, FIR and its consequential proceedings were challenged before this Court, and thereafter, matter was referred to the Mediation and Conciliation Centre of this Court with the consent of counsel for the opposite party No.4 on the first date and it was successfully concluded and presently opposite party No.4 is enjoying her matrimonial life and residing with her husband and children. As in the case of ***Ram Lal Yadav*** (supra), this Court held that Investigating Officer can not be restrained from arresting the accused of a cognizable offence. The Hon'ble Supreme Court in the case of ***Bhajan Lal*** (supra) and ***Ramawatar*** (supra) already held that FIR and its consequential proceedings can be quashed (u/s 482 Cr.P.C.), therefore, this Court is of the view that impugned FIR and its consequential proceedings is liable to be quashed in terms of settlement agreement of parties before Mediation and Conciliation Centre of this Court.

19. For the discussions made above, the present application (u/s 482 Cr.P.C.) is ***allowed*** and First Information Report No.501 of 2019, under Sections 323, 354, 498A, 504 I.P.C. and Section 3/4 of Dowry Prohibition Act, 1961, Police Station Mandion, District Lucknow, is hereby ***quashed.***

20. Office is directed to communicate this order to the Chief Judicial Magistrate, concerned, forthwith.

(2022)01ILR A228
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 17.12.2021

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Application U/S 482/378/407 No. 3274 of 2018
connected with
Application U/S 482/378/407 No. 3015 of 2020
with
Application U/S 482/378/407 No. 2210 of 2018

Giri Raj Sharma ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Nandit Kumar Srivastava, Pranjal Krishna

Counsel for the Opposite Party:
Bireshwar Nath, Anurag Kumar Singh

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power - Indian Penal Code, 1860 - Sections 120-B, 420, 468 and 471 , The Prevention of Corruption Act, 1860 - Sections 13(2) & 13(1)(d) - once the sanction order is refused, in absence of fresh material, it cannot be reviewed or reconsidered. (Para -47)

Petitioners along with other officials of Airports Authority of India and a private contractor - entered into a criminal conspiracy - committed offence of cheating, forgery and criminal misconduct - caused a huge wrongful loss - competent authority initially did not grant sanction for prosecution - ground - evidence available on record not sufficient to prosecute the officers of AAI - on the direction of Central Vigilance Commission, such sanction for prosecution was granted .(Para - 9, 11,25)

HELD:-Impugned sanction order not a valid order in as much as no fresh material was produced before the sanctioning authority and no further investigation of any kind whatsoever has been carried out by the investigating agency. Hence, the sanction order is unwarranted. Sanctioning authority has got no authority or power to review or reconsider its earlier order whereby he has refused to grant the sanction to prosecute the officers of AAI, the petitioners hereto. Impugned prosecution sanction order,cognizance order and order passed by trial court quash/set aside.(Para - 51,52,53,54)

Petitions allowed. (E-7)

List of Cases cited:-

1. R.S. Nayak Vs A.R. Antulay, AIR 1984 SC 684,

2. Mansukhlal Vithaldas Chauhan Vs St. of Guj., 1997 Cri.L.J. 4059,

3. Gopikant Choudhary Vs St. of Bihar & Ors., (2000) 9 SCC 53,

4. Ramanand Chaudhary Vs St. of Bihar & Ors., (2002) 1 SCC 153,

5. St. of H. P. Vs Nishant Sareen, (2010) 14 SCC 527,

6. St. of Punj. & anr. Vs Mohammed Iqbal Bhatti, [2009 (67) ACC 350] (SC),

7. Suresh Kumar Bhikamchand Jain Vs Pandey Ajay Bhushan & ors., 1998 Cri.L.J. 1242 (SC)

8. Nanjappa Vs St. of Karn., (2015) 14 SCC 186.

9. Vivek Batra Vs U. O I. & Ors., (2017) 1 SCC 69

10. Parkash Singh Badal & anr. Vs St. of Punj. & Ors., (2007) 1 SCC 1

11. Dinesh Kumar Vs Chairman, A. A.I. & Anr., (2012) 1 SCC 532

12. Bachhittar Singh Vs St. of Punj. & anr., AIR 1963 SC 395

13. Romesh Mirakhur Vs St. of Mah., 2017 SCC OnLine Bom 9552

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Nandit Kumar Srivastava, learned Senior Advocate assisted by Sri Pranjal Krishna, Sri Mohammed Amir Naqvi and Sri Ishan Baghel, learned counsel for the petitioners in all the petitions, which are connected as well as Sri Anurag Kumar Singh, learned counsel for the C.B.I.

2. Sri Anurag Kumar Singh has produced the original file from Airports

Authorities of India, showing the order dated 28.06.2013 of Sri V.P. Agrawal, the then Chairman of the Authority, the order dated 29.08.2013 of one Ms. Upma Srivastava, the Chief Vigilance Officer and order dated 13.09.2013 of Sri S. Lakra, AM (HR).

3. Since those papers have been provided to Sri Dilip Kumar, who has filed petition bearing U/S 482/378/407 No.2210 of 2018 and learned counsel for the petitioner has provided a photocopy of those papers so the same are taken on record.

4. The aforesaid papers are the same, which are available on the original papers, therefore, the original file has been returned to the counsel for the CBI.

5. By means of leading petition bearing U/S 482/378/407 No.3274 of 2018, the following prayers have been made:-

"WHEREFORE, it is most respectfully prayed that this Hon'ble court may kindly be pleased to hold the Sanction Order dated 01.10.2013 invalid and quash the petitioner's prosecution in the Criminal Case No.06 of 2013 [State Vs. Giriraj Sharma and others] under sections 120-B, 420, 468 and 471 Indian Penal Code 1960 and 13 (2) r/w 13 (1) (d) of Prevention of Corruption Act 1988 before the Ld. Special Judge, C.B.I., Court No.3, Lucknow;

And it is prayed that the cognizance order dated 12.11.2013 as well as the order dated 06.01.2018 may kindly be quashed.

And/ or this Hon'ble Court may further be pleased to pass any other order or orders which this Hon'ble court may deem fit & proper in the interest of justice."

6. By means of petition bearing U/S 482/378/407 No.3015 of 2020, the following prayers have been made:-

"WHEREFORE, it is most respectfully prayed that this Hon'ble Court may kindly be pleased to:

a. To quash the prosecution sanction order dated 01.10.2013 (Contained in Annexure No.1 of this petition), passed by Sanctioning Authority, namely, Shri V.P. Agarwal (P.W.-1);

b. To quash the entire proceedings of Criminal Case No. 06 of 2013 (CBI Versus Griraj Sharma & others) pending before the court of Learned Special Judge, CBI, Court No. 3, Lucknow, arising out of R.C. No. 0062011A0013, u/s 120-B, 420, 468, 471 IPC and 13 (2) read with 13 (1) D of Prevention of Corruption Act, P.S.- CBI, ACB, Lucknow, against the petitioner.

c. Issue any other order, order or direction in the nature, which this Hon'ble Court may deem fit and proper in the facts and circumstances of the case."

7. By means of petition bearing U/S 482/378/407 No.2210 of 2018, the following prayers have been made:-

"Wherefore, it is most respectfully prayed that this Hon'ble court may kindly be pleased to stay the order passed by the Learned Special Judge, C.B.I. (IIIrd), Lucknow on dated 06.01.2018 in Case No. 6/2013, R.C. No.13A2011 (CBI Vs Giriraj Sharma & Others) contained as annexure No. 1 with this petition.

It is further prayed that drop the proceedings in connection with petitioner of the Criminal Case No. 06/2013 u/s 120B, 420,471 IPC and 13(2) read with 13(1) d of PC Act, P.S. CBI/ACB, Lucknow pending before Learned Special Judge, C.B.I.

(IIIrd), Lucknow (CBI VS. Giriraj Sharma & Others).

Such any other or direction may also kindly be passed which is deemed fit and proper in the circumstances of the case in favour of the petitioner."

8. Since the questions of law and fact of all the petitions are the same, therefore, with the consent of the parties, all the aforesaid petitions are being decided by a common judgment and order.

9. The fate of the present petitions and the impugned orders is dependent upon the question involved in the matter i.e. (i) as to whether the sanction for prosecution, which has been refused by the competent authority, can be reviewed on the recommendation of the Central Vigilance Commission (hereinafter referred to as "CVC" in short) in terms of Section 197 Cr.P.C.; (ii) as to whether second prosecution sanction on the same material is legally permissible under the law.

10. Facts and circumstances of all the cases are almost identical but the petition bearing U/S 482/378/407 No.3274 of 2018 is being treated as leading petition.

11. Brief facts of the case are that a first information report was registered at Lucknow, Police Station - CBI/ACB with FIR No.RC0062011A00013 on the basis of source information. The FIR was registered against six persons including the petitioners under Sections 120-B, 420, 468 and 471 IPC read with Sections 13(2) & 13(1)(d) of the Prevention of Corruption Act, 1860 and the allegations in nutshel were that the petitioners along with other officials of Airports Authority of India and a private contractor had entered into a criminal conspiracy during the period 2008-2010 and in pursuance of criminal conspiracy committed the offence of cheating, forgery and criminal misconduct and thus caused a huge wrongful loss worth Rs.25,74,065/-.

12. On 30.10.2013, the Chargesheet was filed arraying the petitioner and six others as accused, under Sections 120B, 420, 468 and 471 IPC read with Sections 13(2) & 13(1)(d) of the Prevention of Corruption Act 1860. The alleged Sanction of Prosecution vide Sanction Order C140 15/7/12-Disc (Pt.) dated 01.10.2013 was obtained in respect of the petitioner and other accused persons from Mr. Vijay Prakash Agrawal, Chairman, Airports Authority of India.

13. As per learned counsel for the petitioners, after the examination-in-chief of the Sanctioning Authority, namely Mr. Vijay Prakash Agarwal (Prosecution Witness-1), the then Chairman of AAI, when he was subjected to the cross examination, he revealed that at the first instance he had refused to grant sanction for prosecution in respect of the petitioner and the accused persons and it is only after passage of three-four months, on the basis of the advisory report from the Chief Vigilance Commission, he reviewed his sanction rejection order and proceeded to grant sanction for prosecution in respect of the petitioner and other accused persons vide sanction order dated 01.10.2013.

14. On 04.10.2017, an "Application for Holding/Declaring the Prosecution Sanction invalid and Dropping of Applicant's Prosecution for want of valid Prosecution Sanction" was file before the

learned Special Judge, CBI, Count No.3, Lucknow and on 06.01.2018, the learned Special Judge, CB1, Court No.3, Lucknow was pleased to reject the application dated 04.10.2017 filed by the petitioner on the ground that the validity of the Prosecution Sanction would only be decided at the final stage of the trial.

15. In the present case, this Court so as to verify as to whether the competent authority has refused sanction against the petitioners or not has summoned the original file vide order dated 10.11.2021. Such original file was received by the learned counsel for the CBI on 17.11.2021 and the same was shown to the Court on 25.11.2021.

16. There is no dispute on the point that the Chairman of Airports Authority of India (hereinafter referred to as "AAI" for short) is a competent authority to grant sanction for prosecution against the petitioners.

17. So as to understand properly as to whether the Chairman of AAI has granted the sanction or refused the sanction, it would be necessary to reproduce such order herein below, which is the order dated 28.6.2013 of Sri VP Agrawal, the then Chairman of AAI:-

"I have gone through the CBI report as well as the comments made by Member (Plg) on the pre-pages. CBI has sought prosecution sanction against Sh. Giriraj Sharma, the then Senior Manager (Engg.-Civil), Varanasi; Sh. Bhupendra Singh, the then Manager (Engg.-Civil), Varanasi; Sh. Jonas Lal Marandi, the then Manager (Engg.-Civil), Sh. Dilip Kumar, the then Assistant Manager (Engg.-Civil) and Sh. Prabhat Chand Gopalan, the then Junior Executive (Engg.-Civil) and major penalty proceedings against Sh. Pradeep Kumar, the then Jt. GM (Engg.-Civil), Varanasi.

The Investigation carried out by CBI is based on the certain claims of the contractor in respect to cement, recron and bitumen through submission of fake bills during the progress of the work at Varanasi. These bills were accepted and processed by the above named officers. CBI in its report further concluded that the material was not used up to the quantity prescribed under the contract which resulted in inferior quality of work. Accordingly, they finally concluded that the payments were made against the fake bills in connivance with the officers of the AAI and the inferior quality of work was executed which caused loss of revenue to the Authority for Rs.92,63,712.60.

Member (Plg) in his note at pre-page has examined the test report of CRRI, New Delhi in respect of flexural strength of PQC. Report, as analysed in reference to provisions under IS-456-2000, brings out that the flexural strength of concrete is within the parameters of acceptance criteria. Further, Structure Cell of AAI has also carried out PCN evaluation and PCN for extended runway (flexible) and apron/ additional taxiway (rigid) is 89/F/C/W/T and 94/R/C/W/T & 91/R/C/W/T respectively as against design requirement of 68 & 59 for flexible & rigid respectively. Analysis of test reports of PQC cores is available on file at Flag 'A'. Thus it can be concluded that work done at site was not of inferior quality.

In view of the observations Member (Plg.), it appears that quality of work cannot be treated as Inferior which is further substantiated by the test reports and relied upon by the CBI. As such, once quantity of the work is in terms of the

contract and passed in the tests carried out by an independent agency, thus it cannot be assumed that less quantity of material was used. The officers of the AAI were responsible for execution of work as per the standards prescribed in the contract and in case test establishes that the executed work meets the standards provided in the contract, their involvement/ connivance with the contract in any manner cannot or should not be assumed.

The entire investigation is revolving to the genuinity of the bills. The contractor has submitted fake bills which has also been substantiated by the suppliers as well as the other corroborative evidence collected by the CBI, but the said evidence may not be treated sufficient to establish involvement/ connivance of the above named officers of AAI.

The responsibility for execution and completion of the awarded work within a stipulated period lies with the officers of AAI, which includes processing of bills as well as to ensure the quality of work, but the contract agreement does not prescribe any manner, for verification of bills submitted by the contractor. Even the officers responsible for processing of bills cannot assume that the bills submitted by the contractor are fake, as the quantity required for execution of work has been supplied and utilized, which is established from the test reports.

As such, the above named officers may have processed the bills on confirmation of quality of work and thus may not have verified genuinity of bills which in any case is not mandatory in terms of the contract unless there is any doubt. The investigation carried out and the evidence collected may be treated sufficient to establish that the bills submitted by the contractor were fake but the evidence/ material available on record cannot be treated as sufficient to conclude that execution of work is of inferior quality and this is based on assumption only. However, considering the report, an order has already been issued to recover/ adjust the said amount of Rs.92,63,712.60 which was released to the contractor on the fake bills. An action for debarment of the said contractor from participating in AAI's future tender has also been initiated.

In view of the above, I find that the evidence available on record is not sufficient to establish involvement of above named officers of AAI and the conclusion drawn in this respect needs reconsideration. At the most, as per the available evidence, these officers may be held responsible for negligence as they failed to detect genuinity of bills while processing the payment.

The CBI has recommended major penalty charge-sheet against Sh. Pradeep Kumar, the then Jt. GM (Engg.-Civil) and the Project In charge for Varanasi Project. An action for initiation of major penalty proceedings against him has already been taken, hence it would be more appropriate to initiate departmental action against the above named officers along with Sh. Pradeep Kumar. The Inquiry could be conducted by CDI nominated by CVC to reach on just and fair conclusion.

(V P Agrawal)
Chairman"

18. After perusing the aforesaid order dated 28.6.2013, it is clear that the competent authority was of the firm view that the evidence available on record is not sufficient to grant sanction to prosecute the above named Officers of AAI. Such

authority further observed that at the most, as per the available evidence, these officers may be held responsible for negligence as they failed to detect the genuinity of bills while processing the payment so departmental enquiry can be held against them.

19. On the aforesaid order dated 28.6.2013, the Director, Central Vigilance Commission has written a letter dated 20.8.2013 to the Chief Vigilance Officer of AAI recommending prosecution against the petitioners showing its agreement with CBI.

20. After receiving the letter dated 20.8.2013 of Director, Central Vigilance Commission, the Chief Vigilance Officer of AAI wrote letter to the Chairman apprising the aforesaid letter/advisory seeking sanction against the officers of AAI, vide letter dated 29.8.2013 and on the said letter, the Chairman of AAI has granted sanction for prosecution against the petitioners and formal letter to this effect has been issued on 1.10.2013 which has been enclosed as Annexure No.4 to the petition. The letter of Chief Vigilance Officer dated 29.8.2013 is being reproduced herein below:-

"This case pertains to CBI's recommendations dated 02.03.2013 made on the basis of investigations conducted into alleged acts of Criminal misconduct committed during the execution of project work at LBS Airport, Varanasi for granting prosecution sanction against S/Shri G.R. Sharma, then Sr Manager, Bhupendra Singh, then Manager, J.L. Marandi, then Manager, Dilip Kumar, then AM and P.C. Gopalan, then JE all from Engg-Civil discipline.

2. The matter was put up before the Competent Authority vide note dated 02.04.2013 of the undersigned at page 1-2/N for taking decision for granting prosecution sanction. Chairman vide his note at page 7-8/N had observed that the evidence available on record is not sufficient to establish involvement of these officers as the work done at site was not of inferior quality. Hence, the conclusion drawn by CBI in this respect needs reconsideration and it would be more appropriate to initiate departmental action against these officers.

3 In view of difference in opinion between CBI and Competent Authority, the case was referred to CVC for its advise vide this office letter dated 12.07.2013 in terms of provision contained in Para-10 of Special Chapter on Vigilance Management in PSES & the Role and Functions of the CVC (Copy at page 26-25/c).

4. The Commission vide office Memorandum No. 013/TCA/034-223045 dated 20.08.2013 (Copy at page 28-27/c) has tendered its advice. Observations of the Commission may please be seen at Para-2(a) to (e) of the OM. The Commission in agreement with CBI advises prosecution against the five officers mentioned in Para-1 above. The Commission has also advised to intimate details of action taken against M/s BR Arora & Associates (P) Ltd.

5. In view of Commission's advice, Chairman may please consider granting of prosecution sanction by the Competent Authority against the 5 officers as recommended by CBI in its report. The Commission is being separately informed about the action taken against M/s BR Arora & Associates (P) Ltd.

6. In this regard, it is also pertinent to mention that this case has already crossed the prescribed time limit fixed by the Apex Court in taking decision in such matters, Secretary (Personnel), DOPT had convened a meeting on 24.07.2013 in North Block to review all

such delayed cases and had emphasized to expedite the decision making process within the prescribed time frame. A copy of D.O. letter dated 14.07.2013 of Jt. Director (Policy), CBI, North Block addressed to JS & CVOMOCA is also placed in this file at page-21-19/c for perusal.

(Upma Srivastava)
Chief Vigilance Officer"

21. The order of Chairman on the file granting sanction for prosecution is reproduced herein below:-

"Considering circumstances in totallity prosecution sanction against officers is granted as sought by CBI."

However, formal order to this effect has been issued on 01.10.2013.

22. Sri Anurag Kumar Singh, learned counsel for the CBI has submitted that earlier the competent authority had only given his opinion to the effect that the evidence available on record is not sufficient to establish the involvement of officers of AAI and at the best, the departmental enquiry against such officers may be initiated. As per Sri Anurag Kumar Singh, such opinion may not be treated as an order. The order is as such dated 01.10.2013 whereby the competent authority has granted sanction against the officers as sought by the CBI.

23. Learned counsels for the petitioners have cited some judgments of the Apex Court in re; **R.S. Nayak vs. A.R. Antulay, AIR 1984 SC 684, Mansukhlal Vithaldas Chauhan vs. State of Gujarat, 1997 Cri.L.J. 4059, Gopikant Choudhary vs. State of Bihar and others, (2000) 9 SCC 53, Ramanand Chaudhary vs. State of Bihar and others, (2002) 1 SCC 153, State of Himachal Pradesh vs. Nishant Sareen, (2010) 14 SCC 527, State of Punjab and another vs. Mohammed Iqbal Bhatti, [2009 (67) ACC 350] (SC), Suresh Kumar Bhikamchand Jain vs. Pandey Ajay Bhushan and others, 1998 Cri.L.J. 1242 (SC) and Nanjappa vs. State of Karnataka, (2015) 14 SCC 186.**

24. The Apex Court in re; **Mansukhlal Vithaldas Chauhan** (supra) has held that validity of sanction depends upon the applicability of mind by the sanctioning authority to the facts of the case as also the material and evidence collected during investigation. Paras 18 & 19 of the aforesaid case are being reproduced herein below:-

"18. The validity of the sanction would, therefore, depend upon the material placed before the sanctioning authority and the fact that all the relevant facts, material and evidence have been considered by the sanctioning authority. Consideration implies application of mind. The order of sanction must ex facie disclose that the sanctioning authority had considered the evidence and other material placed before it. This fact can also be established by extrinsic evidence by placing the relevant files before the Court to show that all relevant facts were considered by the sanctioning authority. (See also Jaswant Singh v. State of Punjab [AIR 1958 SC 124 : 1958 SCR 762] and State of Bihar v. P.P. Sharma, 1991 Cri LJ 1438: (1991) AIR SCW 1034).

19. Since the validity of "sanction" depends on the applicability of mind by the sanctioning authority to the facts of the case

as also the material and evidence collected during investigation, it necessarily follows that the sanctioning authority has to apply its own independent mind for the generation of genuine satisfaction whether prosecution has to be sanctioned or not. The mind of the sanctioning authority should not be under pressure from any quarter nor should any external force be acting upon it to take a decision one way or the other. Since the discretion to grant or not to grant sanction vests absolutely in the sanctioning authority, its discretion should be shown to have not been affected by any extraneous consideration. If it is shown that the sanctioning authority was unable to apply its independent mind for any reason whatsoever or was under an obligation or compulsion or constraint to grant the sanction, the order will be bad for the reason that the discretion of the authority "not to sanction" was taken away and it was compelled to act mechanically to sanction the prosecution."

25. In the present case, the competent authority has initially did not grant sanction for prosecution by saying that the evidence available on record is not sufficient to prosecute the officers of AAI. However, on the direction of Central Vigilance Commission, such sanction for prosecution was granted.

26. Sri Nandit Srivastava, learned Senior Advocate, has submitted that when all the material was perused by the competent authority and has found that the sanction for prosecution may not be granted, in the absence of any new material granting sanction for prosecution is illegal and unwarranted.

27. Thereafter, Sri Srivastava has referred the dictum of the Apex Court in re; **State of State of Himachal Pradesh vs. Nishant Sareen** (supra) referring paras-12, 13 & 14 thereof, which are as under:-

"12. It is true that the Government in the matter of grant or refusal to grant sanction exercises statutory power and that would not mean that power once exercised cannot be exercised again or at a subsequent stage in the absence of express power of review in no circumstance whatsoever. The power of review, however, is not unbridled or unrestricted. It seems to us a sound principle to follow that once the statutory power under Section 19 of the 1988 Act or Section 197 of the Code has been exercised by the Government or the competent authority, as the case may be, it is not permissible for the sanctioning authority to review or reconsider the matter on the same materials again. It is so because unrestricted power of review may not bring finality to such exercise and on change of the Government or change of the person authorised to exercise power of sanction, the matter concerning sanction may be reopened by such authority for the reasons best known to it and a different order may be passed. The opinion on the same materials, thus, may keep on changing and there may not be any end to such statutory exercise.

13. In our opinion, a change of opinion per se on the same materials cannot be a ground for reviewing or reconsidering the earlier order refusing to grant sanction. However, in a case where fresh materials have been collected by the investigating agency subsequent to the earlier order and placed before the sanctioning authority and on that basis, the matter is reconsidered by the sanctioning authority and in light of the fresh materials an opinion is formed that sanction to prosecute the public servant may be granted, there may not be any impediment to adopt such a course.

14. Insofar as the present case is concerned, it is not even the case of the

appellant that fresh materials were collected by the investigating agency and placed before the sanctioning authority for reconsideration and/or for review of the earlier order refusing to grant sanction. As a matter of fact, from the perusal of the subsequent Order dated 15-3-2008 it is clear that on the same materials, the sanctioning authority has changed its opinion and ordered sanction to prosecute the respondent which, in our opinion, is clearly impermissible."

28. On the basis of aforesaid dictum of the Apex Court, Sri Srivastava has submitted that the CBI has concealed this fact before the learned trial court that by means of second prosecution sanction on the same material, the case is being proceeded whereas the second prosecution sanction on the same material and without any further investigation is not permissible under the law.

29. Sri Nandit Srivastava, learned Senior Advocate, has further submitted that while rejecting the application of the petitioner dated 4.10.2017 (Annexure No.6) vide impugned order dated 6.1.2018 (Annexure No.8), learned court below has misinterpreted the dictum of the Apex Court in re; **Vivek Batra vs. Union of India and others, (2017) 1 SCC 69,** inasmuch as the ratio of aforesaid judgment would not be applicable in the present case. In the case of **Vivek Batra** (supra), the competent authority was the Finance Minister, who had granted sanction and in the interregnum period, some official notings were made in the file in question whereby there was difference of opinion amongst officers, who made the notings but ultimately the competent authority i.e. the Finance Minister had granted sanction after applying his mind. However, in the present case, there is no official notings on the file inasmuch as the competent authority had earlier refused to grant sanction for prosecution against the officers of AAI and on the advisory/ recommendation of CVC, he reviewed his earlier decision and granted sanction for prosecution by impugned order dated 1.10.2013. Besides, the observation of learned court below in the impugned order to the effect that as to whether the competent authority had earlier refused the sanction or not would be considered during the course of the trial, is not proper inasmuch as the material available with the learned court below wherein the competent authority has deposed before the trial court to say that he had earlier refused the sanction against the officers of AAI but on the advisory of CVC, though which was not binding upon him, reviewed his earlier decision and granted sanction. Hence, as per Sri Srivastava, there is nothing remain to prove during the course of the trial so far as the validity of sanction is concerned.

30. Therefore, Sri Srivastava has prayed that the instant petition may be allowed and the impugned orders may be quashed/set aside.

31. Sri Ishan Baghel and Sri Mohammed Amir Naqvi, learned counsel for the petitioners in other connected petitions, have adopted aforesaid arguments of Sri Nandit Srivastava, learned Senior Advocate and made same prayer as has been prayed by Sri Srivastava.

32. *Per contra,* Sri Anurag Kumar Singh, learned counsel for the CBI has

placed reliance upon the decision of the Apex Court in re; **Vivek Batra** (supra), which has been referred by the learned court below while rejecting the application of the petitioner dated 4.10.2017 referring paras 12 & 14, which reads as under:-

"12. In view of the law laid down by this Court, as above, we are of the opinion that the sanction cannot be held invalid only for the reason that in the administrative notings different authorities have opined differently before the competent authority took the decision in the matter. It is not a case where the Finance Minister was not the competent authority to grant the sanction. What is required under Section 19 of the Prevention of Corruption Act, 1988 is that for taking the cognizance of an offence, punishable under Sections 7, 10, 11, 13 and 15 of the Act committed by the public servant, sanction is necessary by the Central Government or the State Government, as the case may be, and in the case of a public servant, who is neither employed in connection with affairs of the Union or the State, from the authority competent to remove him. Sub-section (2) of Section 19 of the Act provides that:

"19. (2) Where for any reason whatsoever any doubt arises as to whether the previous sanction as required under sub-section (1) should be given by the Central Government or the State Government or any authority, such sanction shall be given by that Government or authority which would have been competent to remove the public servant from his office at the time when the offence was alleged to have been committed."

14. Having gone through the copy of note-sheets relating to sanction in question placed before us as part of rejoinder-affidavit, it is evident that there had been proper application of mind on the part of the competent authority before the sanction was accorded. Our perusal of the said record does not indicate that any decision was taken by the competent authority, at any point of time, not to grant sanction so as to give the decision to grant sanction the colour of a review of any such earlier order, as has been contended before us. The opinion of CVC, which was reaffirmed and ultimately prevailed in according the sanction, cannot be said to be irrelevant for the reason that clause (g) of Section 8(1) of the Central Vigilance Commission Act, 2003 provides that it is one of the functions of the CVC to tender advice to the Central Government on such matters as may be referred to it by the Government."

33. Sri Anurag Kumar Singh has submitted that as per the Apex Court in administrative notings, if the different authorities have opined differently, is inconsequential since business of State being complicated it has to be conducted through agency of large number of officials and authorities and ultimate decision to accord sanction was taken by the Finance Minister, who was the competent authority and such authority has accorded sanction after proper application of mind, therefore, the sanction order may not be vitiated. In the same manner, as per Sri Anurag Kumar Singh, the earlier order of the competent authority was not order and it was only an opinion and after due deliberation with the CVC he has passed the order on 1.10.2013, therefore, in view of the dictum of the Apex Court in re; **Vivek Batra** (supra), the order dated 01.10.2013 is a proper order and may not be interfered with under Section 482 Cr.P.C.

34. While referring the decision of the Apex Court in re; **Parkash Singh Badal**

and Another vs. State of Punjab and Others, (2007) 1 SCC 1, he has submitted that the Apex Court is of the view that if the sanction for prosecution order has been passed after applying the judicious mind considering the facts and circumstances, the same may not be interfered with. Sri Anurag Kumar Singh has submitted that the aforesaid view has been taken by the Apex Court in subsequent judgments, one of which is **Dinesh Kumar vs. Chairman, Airport Authority of India and Another, (2012) 1 SCC 532**. Referring the decision of **Dinesh Kumar** (supra), Sri Anurag Kumar Singh has further submitted that the Apex Court has held that the ground of sanction can be raised in the course of trial.

35. While referring the decision of the Constitution Bench of the Apex Court in re; **Bachhittar Singh vs. State of Punjab and Another, AIR 1963 SC 395**, Sri Anurag Kumar Singh has submitted that the Apex Court has held that merely writing something on the file does not amount to an order. Before something amounts to an order of the State Government, two things are necessary. The order has to be expressed in the name of Governor as required by Clause (1) of Article 166 of the Constitution of India and then, it has to be communicated. Therefore, Sri Singh has requested that the present petitions may be dismissed as there is no infirmity or illegality in the order dated 1.10.2013 granting sanction of prosecution by the competent authority.

36. Heard learned counsel for the parties and pursued the material available on record. The attention of the Court has been drawn towards Annexure No.5 to the petition, which is the statement of PW-1, the sanctioning authority i.e. Vijay Prakash Agrawal recorded before the court concerned. As per Sri Nandit Srivastava, the relevant fact that the competent authority had refused to grant sanction for prosecution against the present petitioners has come into the picture during the course of cross-examining the aforesaid authority i.e. PW-1. Such authority on his cross-examination has categorically admitted that on the basis of documents and report so produced by the CBI, he had refused the sanction to prosecute the petitioners. He had also admitted that after refusing the sanction for prosecution, no new fact or evidence was brought into his notice when he granted sanction for prosecution later on. Relevant typed portion of the statement of PW-1 is being reproduced herein below:-

"यह कहना सही है कि C.B.I. द्वारा भेजे गये दस्तावेज व रिपोर्ट के आधार पर पहली बार मैने अभियोजन स्वीकृत देने से मना कर दिया था। मैने अभियोजन स्वीकृत जारी करने से मना करने की नोटिंग / आदेश अपने तत्कालीन C.B.O. Smt. उपमा श्रीवास्तव को भेजा था। उन्होंने मेरे रिफूजल नोटिंग को C.B.C. को भेजा था।

दोबारा C.B.C. ने अभियोजन देने के लिए कहा इसलिए अभियोजन स्वीकृत दोबारा देखकर जारी किया।

यह कहना सही है कि पहली बार सेन्शन देने से मना करने में और दोबारा सेन्शन जारी करने में कोई नया तथ्य मेरे समक्ष प्रस्तुत नहीं किया गया।"

अभियोजन प्रदान करने की सामग्री वही थी।"

37. On being further asked from PW-1 as to whether the advisory of CVC was

binding upon him inasmuch as the PW-1 had granted sanction for prosecution against the petitioners after refusing the same, PW-1 has categorically submitted that such advisory is not binding upon him. Then a next question was put up from him that if such advisory was not binding upon him, then why he accepted such advisory and granted sanction for prosecution against the petitioners, PW-1 has reiterated that he is a Central Government officer and advisory of CVC is not binding upon him but normally the advisory of CVC is not ignored unless there is any specific reason to that effect. He has further stated that had he not received the advisory of CVC, he would have not granted sanction for prosecution against Sri G.R. Sharma. Relevant typed portion of the statement of PW-1 is being reproduced herein below:-

"स्वीकृत न जारी करके मैं अपने स्तर पर फाइल बन्द कर दी थी। यह कहना सही है कि मैं सेन्ट्रल गवर्नमेंट का कर्मचारी था और सी०बी०सी० की एडवाइजरी की बाद्धता न होने के बावजूद सी०बी०सी० की एडवाइजरी से डिफर नहीं करते हैं जब तक कि कोई विशेष कारण न दें।

यह कहना सही है कि यदि सी०बी०सी० की एडवाइजरी न आती तो मैं इस केस में जी० आर० शर्मा के विरूद्ध अभियोजन स्वीकृत जारी न करता।"

38. As per Sri Nandit Srivastava, as soon as the cross-examination of the competent authority i.e. PW-1 is completed, the present petitioner filed an Application for Holding/Declaring the Prosecution Sanction Invalid and Dropping of Applicant's Prosecution for want of valid Prosecution Sanction, which has been filed as Annexure No.6 to the petition. The aforesaid application of the petitioner was rejected vide order dated 6.1.2018, which is impugned in the leading petition.

39. Sri Nandit Srivastava has submitted that in view of the trite law that in case there is no fresh material or evidence with the prosecution or there was any cogent and relevant material with the prosecution but could not be put forth before the sanctioning authority thereby he refused the sanction for prosecution, on the basis of same material, the competent authority may not be permissible to review or reconsider the matter again granting sanction for prosecution. In the present case, the competent authority i.e. PW-1 had deposed before the court concerned to the effect that he had refused the sanction for prosecution in the issue in question and when he reviewed its refusal order, there was no fresh material or evidence put forth before him and he granted sanction only on the basis of advisory of the CVC, which was admittedly not binding upon him. He has also deposed that had such advisory of CVC been not received by him, he would have not granted sanction for prosecution in the issue in question. While rejecting the aforesaid application of the petitioner, the learned court below vide impugned order dated 6.1.2018 has observed on the basis of decision of the Apex Court in re; **Vivek Batra** (supra) that the question as to whether the competent authority has refused the sanction or not would be considered and established during the course of the trial and such ground of the petitioners would be decided before taking final decision in the issue, therefore, the judgment of the court, if any, shall be dependent upon the adjudication regarding the competence of the authority as to whether he had reviewed its earlier decision or he had granted sanction for prosecution vide subsequent order.

40. The Constitution Bench of the Apex Court in re; **R.S. Nayak** (supra) has categorically observed in para-19 that the existence thus of a valid sanction is a pre-requisite to the taking of cognizance of the enumerated offences alleged to have been committed by a public servant. The bar is to the taking of cognizance of the offence by the court. Therefore, when the court is called upon to take cognizance of such offences, it must enquire whether there is a valid sanction to prosecute the public servant for the offence alleged to have been committed by him as public servant. Further, a trial without valid sanction has been held to be a trial without jurisdiction by the court.

41. In the same judgment vide para-23, the Apex Court has held that the authority entitled to grant sanction must apply its mind to the facts of the case, evidence collected and other incidental facts before granting sanction. A grant of sanction is not an idle formality but a solemn and sacrosanct act which removes the umbrella of protection of Government servants against frivolous prosecutions and the aforesaid requirement must, therefore, be strictly complied with before any prosecution could be launched against the public servants.

42. The Apex Court in re; **Nanjappa** (supra) vide para 22, 26 & 27 has held as under:-

"22. ...The question regarding validity of such sanction can be raised at any stage of the proceedings. The competence of the court trying the accused so much depends upon the existence of a valid sanction. In case the sanction is found to be invalid the court can discharge the accused relegating the parties to a stage where the competent authority may grant a fresh sanction for the prosecution in accordance with law. If the trial court proceeds, despite the invalidity attached to the sanction order, the same shall be deemed to be non est in the eyes of law and shall not forbid a second trial for the same offences, upon grant of a valid sanction for such prosecution.

26. In State of Goa v. Babu Thomas, (2005) 8 SCC 130, also this Court after holding the order of sanction to be invalid, relegated the parties to a position, where the competent authority could issue a proper order sanctioning prosecution, having regard to the nature of the allegations made against the accused in that case.

27. The High Court has not, in our opinion, correctly appreciated the legal position regarding the need for sanction or the effect of its invalidity. It has simply glossed over the subject, by holding that the question should have been raised at an earlier stage. The High Court did not, it appears, realise that the issue was not being raised before it for the first time but had been successfully urged before the trial court."

43. Now, I will deal the submission of Sri Anurag Kumar Singh, learned counsel for the CBI, which has been made referring the decision of the Apex Court in re; **Bachhittar Singh** (supra) to the effect that merely writing something on the file does not amount to an order. I have perused the order dated 28.6.2013 of the competent authority i.e. Chairman, AAI wherein he has categorically indicated that he does not find any evidence on record, which is sufficient to grant the sanction for prosecution against the officers of AAI, however, the departmental enquiry can be conducted against such officers by the enquiry officer so nominated by the CVC to reach on just and fair conclusion. This order may not be treated, in any manner, as official notings, to the contrary, it is an unambiguous opinion of the competent authority given after applying the judicious

mind and perusing the material available on record, so it would be treated as an order.

44. In the case of **Vivek Batra** (supra), the Apex Court vide para-9 has considered that in that case, the competent authority is Finance Minister. Before the competent authority grants sanction in that case, there are some official notings as per the business of the State. For the convenience, para-9 is being reproduced herein below:-

*"9. There is no dispute that for an IRS officer cadre, controlling authority is the Finance Minister of the Government of India. In **Bachhittar Singh** v. State of Punjab, 1962 Supp (3) SCR 713, the Constitution Bench of this Court has held that the business of the State is a complicated one and has necessarily to be conducted through the agency of a large number of officials and authorities."*

45. The Apex Court in re; **Vivek Batra** (supra) has also considered the fact that after some official notings wherein there was some difference of opinion but finally the Finance Minister has granted sanction for prosecution after applying his mind, therefore, such sanction for prosecution is perfectly valid. In the present case, it is admitted at the Bar that the competent authority is Chairman, AAI, who had refused the sanction for prosecution on 28.6.2013 but on the advisory/recommendation of CVC, he reviewed his earlier decision and granted sanction on the file and formal order to that effect has been issued on 01.10.2013 (Annexure No.4).

46. Since the impugned order dated 01.10.2013 is subsequent order as considered above, and by means of this order, the competent authority has reviewed its earlier decision on the same material and without any further investigation, therefore, the same is not permissible under the law in view of the decision of the Apex Court in re; **Nishant Sareen** (supra). At this juncture, I am considering one judgment of the Bombay High Court in re; **Romesh Mirakhur vs. State of Maharashtra, 2017 SCC OnLine Bom 9552**, wherein the Bombay High Court while considering the judgments of **Nishant Sareen** (supra), **Vivek Batra** (supra), **Bachhittar Singh** (supra) etc. has observed in para 25 as under:-

"25. Perusal of the above observations, makes it clear that mere change of opinion per se on the same materials cannot be a ground for reviewing or reconsidering the earlier order refusing to grant sanction. However, it is permissible in a case where fresh materials have been collected by the investigating agency subsequent to the earlier order and placed before the sanctioning authority. It is clear from the ratio of this decision that once the sanction order is refused, in the absence of fresh materials, it cannot be reviewed or reconsidered. In our considered opinion, this decision does not come to the rescue of the petition inasmuch as we have held that there is only one sanction order and the earlier documents, on which, the petitioner has heavily relied upon are merely tentative views or department notings."

47. As per Bombay High Court, only one sanction order was issued by the competent authority and others are departmental notings, therefore, despite the contention of the petitioner of that petition having carried weight to the effect that once a sanction order is refused, in absence

of fresh material, it cannot be reviewed or reconsidered, no relief was granted to the petitioner of that petition. However, the law is trite on the point that once the sanction order is refused, in absence of fresh material, it cannot be reviewed or reconsidered.

48. The Apex Court in re; **Gopikant Choudhary** (supra) has observed in para-5 that it is contended on behalf of the appellant that no fresh materials were collected subsequent to the earlier order refusing to sanction prosecution and the appropriate authority having applied its mind and having passed the said order, the subsequent order was wholly uncalled for and unjustified. Further in para-6, the Apex Court has observed that there has been no application of mind when the subsequent order was passed in 1997, it further appears that between the order refusing to sanction and the order that was passed in 1997 the investigating agency had not collected any fresh materials requiring a fresh look at the earlier order.

49. The Apex Court in re; **Mohammed Iqbal Bhatti** (supra) has observed in para-22 that the High Court in its judgment has clearly held, upon perusing the entire records, that no fresh material was produced. There is also nothing to show as to why reconsideration became necessary. On what premise such a procedure was adopted is not known. Application of mind is also absent to show the necessity for reconsideration or review of the earlier order on the basis of the materials placed before the sanctioning authority or otherwise.

50. It appears that the competent authority considered the recommendation/advisory of the CVC which was not binding upon him. It would be apt to quote the observation of Lord Denning as under:-

"If the decision-making body is influenced by considerations which ought not influence it; or fails to take into account matters which it ought to take into account, the Court will interfere: see, Padfield v. Minister of Agriculture, Fisheries and Food, 1968 AC 997."

51. Therefore, in view of the above, I find that the impugned sanction order dated 1.10.2013 is not a valid order inasmuch as no fresh material was produced before the sanctioning authority and no further investigation of any kind whatsoever has been carried out by the investigating agency. Hence, the sanction order dated 1.10.2013 is unwarranted. The sanctioning authority has got no authority or power to review or reconsider its earlier order whereby he has refused to grant the sanction to prosecute the officers of AAI, the petitioners hereto.

52. Since the prosecution sanction order dated 1.10.2013 has not been issued properly, in conformity with the settled proposition of law, the cognizance order dated 12.11.2013 is also not sustainable in the eyes of law.

53. The order of the learned trial court dated 6.1.2018 whereby the application of the petitioner (Giri Raj Sharma) dated 4.10.2017 i.e. "Application for Holding/Declaring the Prosecution Sanction Invalid and Dropping of Applicant's Prosecution for Want of Valid Prosecution Sanction" has been rejected is also not proper, rather the same is

unwarranted and uncalled for inasmuch as the reasons so assigned vide order dated 6.1.2018 are not proper and justifiable.

54. Accordingly, I hereby quash/ set aside the impugned prosecution sanction order dated 1.10.2013.

55. I also hereby quash/ set aside the cognizance order dated 12.11.2013 and the order dated 6.1.2018 passed by the learned trial court.

56. I am not interfering with the charge sheet, therefore, it is open for the prosecution/investigating agency i.e. Central Bureau of Investigation to take appropriate steps in the issue in question, which are permissible under the law.

57. In view of the aforesaid terms, the petitions are **allowed.**

58. No order as to costs.

(2022)01ILR A244
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 17.12.2021

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Application U/S 482/378/407 No. 4542 of 2021
with
Application U/S 482/378/407 No. 4525 of 2021
with
Application U/S 482/378/407 No. 4539 of 2021

Shamshad Ahmad ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Vikas Vikram Singh, Adeel Ahmad, Akram Azad, Yash Bharadwaj

Counsel for the Opposite Parties:
G.A.

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power - Sectio 220 - Trial for more than one offence , Indian Penal Code, 1860 - Sections 147, 148, 149, 332, 336, 307, 353, 341, 427, 188 & 120-B - Public Property (prevention of Damage) Act, 1985 - Section 3/4, Criminal Law (Amendment) Act, 1932 - Section 7 - Test of sameness - where there is proximity of time, or place or unity of purposes and design or continuity of action in respect of series of acts, the safe inference may be drawn that they form part of the same transactions - Merely because two separate complaints had been lodged, did not mean that they could not be clubbed together and one charge-sheet could not be filed. (Para -20,)

There are three FIRs - date of incidence same - Time of incidence different - protesters were opposing the implementation of CAA and NRC. - In all the three FIRs, the sections of I.P.C. are almost same except one or two charges - in first two FIRs Section 3/4 of Act, 1985 and Section 7 of Act, 1932 are involved - in third FIR Section 7 of Act, 1932 is not involved - In all the three FIRs, the complainants are Officers/ Officials of Police Station - three separate chargesheet filed. (Para - 32)

HELD:- Merely because three separate FIRs have been filed do not mean that they could not be clubbed together and one charge-sheet could not be filed. Direction issued for clubbing all the three Charge-sheets together in as much as the occurrence indicated in the second and third FIR is prima-facie appearing as a fall out of the first occurrence indicated in the first FIR. Cognizance order quashed. petitioner is directed to appear/ surrender before the learned court below and may file bail application. (Para - 34,37,40)

Three Petitions disposed of finally. (E-7)

List of Cases cited:-

1. T.T. Antony Vs St. of T.N., (2001) 6 SCC 181 referring para-27

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

3. Anju Chaudhary Vs St. of U.P. , (2013) 6 SCC 384

4. C. Muniappan Vs St. of T.N., (2010) 9 SCC 567

5. Fakhruddin Ahmad Vs St. of Uttaranchal , (2008) 17 SCC 157

6. M/S. Leo Meridian Infrastructure Vs C.B.I., (WP No.21487 of 2018)

7. St. of Jharkhand Vs Lalu Prasad Yadav , (2017) 8 SCC 1

8. Satender Kumar Antil Vs C.B.I.& Anr, Petition(s) for Special Leave to Appeal (Crl.) No(s).5191/2021

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Vikas Vikram Singh, learned counsel for the petitioner and Sri Anurag Varma, learned Additional Government Advocate-I for the State.

2. In all the aforesaid petitions, the same prayer has been made by the same petitioner, therefore, these petitions are being decided together with the consent of learned counsel for the parties. Further, all the petitions are being decided together by a common judgment and **Case :-** U/S 482/378/407 No.-4542 of 2021 is being treated as a leading case/petition and the facts of the case have been taken from that petition.

3. For the convenience, the prayers of the aforesaid petitions are being reproduced here-in-below:-

"(i) By means of this petition i.e. ***Case :-*** *U/S 482/378/407 No. - 4542 of 2021, the petitioner has prayed for quashing the Charge-sheet No.100-A of 2020 dated 26.04.2020, under Sections 147, 148, 149, 332, 336, 307, 353, 341, 427, 188 & 120-B I.P.C read with Section 3/4 of Public Property (prevention of Damage) Act, 1985 and Section 7 of Criminal Law (Amendment) Act, 1932 and order dated 05.08.2020 whereby cognizance of the said offences has been taken and for quashing the entire proceedings of Case No.8070 of 2020 (State of U.P. vs. Shadab and others) arising out of Case Crime No.490 of 2019, Police Station-Dargah Sharif, District-Bahraich, pending before the learned Additional Chief Judicial Magistrate, Bahraich.*

(ii) By means of this petition i.e. ***Case :-*** *U/S 482/378/407 No. - 4525 of 2021, the petitioner has prayed for quashing the Charge-sheet No.99-A of 2020 dated 25.04.2020, under Sections 147, 148, 149, 332, 353, 336, 395, 397, 341, 427, 307, 188 & 120-B I.P.C, read with 3/4 of Public Property (Prevention of Damage) Act, 1985 and Section 7 of Criminal Law (Amendment) Act, 1932 and order dated 26.11.2020 whereby the cognizance of the said offences has been taken and for quashing the entire proceedings of Case No.8556 of 2020 (State of U.P. vs. Siraj Ahmad and others) arising out of Case Crime No.490 of 2019, Police Station-Dargah Sharif, District-Bahraich, pending before the learned Additional Chief Judicial Magistrate, Bahraich.*

(iii) By means of this petition i.e. ***Case :-*** *U/S 482/378/407 No. - 4539 of 2021, the petitioner has prayed for quashing the Charge-sheet No.33-A of*

2020 dated 25.04.2020, under Sections 120-B, 147, 148, 149, 332, 336, 353, 427, 34, 188 I.P.C. read with Section 3/4 of Public Property (Prevention of Damage) Act, 1985 and order dated 26.08.2020 whereby the cognizance of the said offences has been taken and for quashing the entire proceedings of Case No.8557 of 2020 (State of U.P. vs. Sonu and others), arising out of Case Crime No.492 of 2019, Police Station-Dargah Sharif, District-Bahraich, pending before the learned Additional Chief Judicial Magistrate, Bahraich."

4. Learned counsel for the petitioner has assailed 03 Charge-sheets bearing Charge-sheet No.100-A of 2020 dated 26.04.2020, Charge-sheet No.99-A of 2020 dated 25.04.2020 and Charge-sheet No.33-A of 2020 dated 25.04.2020 submitted against the same petitioner on 25/26.04.2020 under more or less the same sections for the incidence which took place on the same day in the short interval. More importantly, the present petitioner was not named in any of the First Information Reports (in short F.I.Rs.), but he has been implicated during investigation and charge-sheet has been filed invoking section 120-B I.P.C.

5. Learned counsel for the petitioner has submitted that since there is no evidence of prior meeting of mind of the present petitioner with other accused persons, therefore, the provisions of Section 120-B I.P.C. may not be invoked against him. So in the absence of Section 120-B I.P.C. no charge-sheet against the petitioner in other sections can be filed.

6. He has, however, also submitted that if the prosecution wants to prosecute the present petitioner in the aforesaid cases, all the aforesaid three charge-sheets could have been clubbed together and the second charge-sheet and third charge-sheet in the same incidence may be treated as a part of the first charge-sheet. In other words, he has submitted that instead of trying the petitioner in three separate charge-sheets, which are impugned herein, the present petitioner may be tried in the first charge-sheet treating second and third charge-sheet as a part of first charge-sheet inasmuch as the alleged second and third occurrence were nothing but a fall out of the first occurrence. He has also submitted that since the incidence in question is of the same day and the accused persons are almost the same then a single charge-sheet could have been filed in all three crime cases, so that the petitioner who has been implicated subsequently invoking the provisions of Section 120-B I.P.C. has to face one trial in all the three crime cases and in that situation the prosecution would not suffer any inconvenience or prejudice and it would be also convenient for the petitioner to face a single trial. However, the learned counsel for the petitioner has reiterated that the petitioner has been falsely implicated in this case as he has not committed any offence as alleged.

7. The brief facts of the case are that on 20.12.2019, at about 22:23 hours an F.I.R. No.490 of 2019 (First F.I.R.) regarding the alleged incidence, which took place around 14:15 hours, has been lodged under Sections 147, 148, 149, 332, 336, 307, 353, 341, 427, 188 & 120-B I.P.C read with Section 3/4 of Public Property (prevention of Damage) Act, 1985 and Section 7 of Criminal Law (Amendment) Act, 1932, Police Station-Dargah Sharif, District-Bahraich, has been lodged.

8. It has been alleged in the F.I.R. that on 20.12.2019, around 14:15 hours, a Constable Sri Sumit Kumar Pal had

informed the complainant i.e. SSI- Sri Vijay Kumar Singh, Police Station-Dargah Sharif, District-Bahraich about the protest in front of Badi Takiya by the people after attending the Friday prayer (Jumme-ki-Namaj). It has been further alleged that the protesters were raising slogans against the Government for implementing CAA and NRC and about 100-150 unknown people were allegedly throwing the bricks and stones upon the police officials. Out of those persons, 14 individuals had been identified by the complainant.

9. The second F.I.R. bearing Case Crime No.491 of 2019 was lodged on 21.12.2019 at about 22:23 hours for the incidence which took place on 20.12.2019, at around 15:00 hours, under Sections 147, 148, 149, 332, 353, 336, 395, 397, 341, 427, 307, 188 & 120-B I.P.C, read with 3/4 of Public Property (Prevention of Damage) Act, 1985 and Section 7 of Criminal Law (Amendment) Act, 1932, Police Station-Dargah Sharif, District-Bahraich. In this FIR, the allegations are almost same only this much has been indicated that about 600-700 people have been gathered throwing bricks and stones upon the police officials and 11 individuals had been identified by the complainant i.e. SHO Sri Vinay Kumar Saroj, Police Station-Dargah Sharif, District-Bahraich.

10. The third F.I.R. was lodged on 21.12.2019 at about 00:16 hours bearing F.I.R. No.492 of 2019, under Sections 120-B, 147, 148, 149, 332, 336, 353, 427, 34, 188 I.P.C. read with Section 3/4 of Public Property (Prevention of Damage) Act, 1985, Police Station-Dargah Sharif, District-Bahraich.

11. The aforesaid third F.I.R. was lodged by the Constable Driver Sri Dileep Kumar Gautam, Police Station-Dargah Sharif, District-Bahraich, driver of Additional Superintendent of Police (City) (in short A.S.P.). As per allegation of this FIR, around 15:30 hours the complainant was present on West side of Chhawani Chauraha and in front of Kanha Restaurant the crowd of about 600-700 people came from Chandpura and some people came from Digiya-ki-Dargah road by throwing stones on the vehicle, due to which the A.S.P. moved forward along with his associate Constables. Due to that incidence, the vehicle of the A.S.P. got damaged and two Constables sustained injuries.

12. Learned counsel for the petitioner has submitted that the present petitioner is a Manager of the Committee looking after the day-to-day affairs of one Mosque situated at Dargah Sharif, Barabanki. Further, the present petitioner being a Manager of the said Mosque was extending full co-operation with the investigation and his statement has been recorded by the Investigating Officer, as copy of his statement has been annexed with this petition as Annexure No.8. Not only the above, the petitioner was co-operating with the District Administration and the State Government for ensuring peaceful marches and protest as he was regularly called for meeting at the office of the District Magistrate, Bahraich along with other Police Officers of the district.

13. As per Sri Vikas Vikram Singh, the petitioner was absolutely unaware as to what information has been collected by the Investigating Officer suggesting against the present petitioner regarding his

involvement in the incidence in question. However, the present petitioner has been implicated in the issue in question by the Investigating Officer invoking the provisions of Section 120-B I.P.C.

14. Learned counsel for the petitioner reiterates that no one can be implicated invoking the provisions of Section 120-B I.P.C. unless the Investigating Officer has got concrete proof of prior meeting of mind of the person with the other co-accused against whom the FIR has been lodged. Therefore, the implication of the petitioner in the incidence in question is apparently illegal and unwarranted and the learned Magistrate before taking cognizance of the aforesaid charge-sheet must have satisfied on the aforesaid legal necessity, but without being satisfied on such point, the Magistrate has taken cognizance against the present petitioner also.

15. Sri Singh has submitted that though the Magistrate has not taken cognizance of the charge-sheet against the petitioner properly, without careful perusal of the material available on record, on 05.08.2020 when the cognizance of the Charge-sheet No.100-A of 2020 dated 26.04.2020 has been taken, he should have not taken cognizance of the Charge-sheet No.33-A of 2020 dated 25.04.2020 on 26.08.2020 and the Charge-sheet No.99-A of 2020 dates 25.04.2020 on 26.11.2020, instead he must have treated the Charge-sheet No.33-A of 2020 and Charge Sheet No.99-A of 2020 as a part of the Charge-Sheet No.100-A of 2020 clubbing of the aforesaid charge-sheets together, holding trial pursuant to the aforesaid single charge-sheet.

16. Sri Singh has also submitted that the petitioner despite the fact that he has been falsely implicated but would not avoid the trial and he shall be appearing before the learned court concerned to face the trial as he is fully confident that being a fully innocent he will get justice. However, in the same occurrence relating to the same cognizable offence neither 03 FIRs should have not been lodged nor 03 charge-sheets should have been filed. So as to strengthen the aforesaid contention Sri Singh has placed reliance upon the judgment of Hon'ble Apex Court rendered in re: ***T.T. Antony vs. State of Tamil Nadu*** reported in ***(2001) 6 SCC 181 referring para-27***, which reads as under:-

"27..... However, the sweeping power of investigation does not warrant subjecting a citizen each time to fresh investigation by the police in respect of the same incident, giving rise to one or more cognizable offences, consequent upon filing of successive FIRs whether before or after filing the final report under Section 173 (2) Cr.P.C. It would clearly be beyond the purview of Sections 154 and 156 Cr.P.C. nay, a case of abuse of the statutory power of investigation in a given case. In our view a case of fresh investigation based on the second or successive FIRs, not being a counter case, filed in connection with the same or connected cognizable offence alleged to have been committed in the course of the same transaction and in respect of which pursuant to the first FIR either investigation is underway or final report under Section 173 (2) has been forwarded to the Magistrate, may be a fit case for exercise of power under Section 482 Cr.P.C. or under Article 226/227 of the Constitution."

17. Sri Singh has further submitted that in an identical circumstances, the Hon'ble Apex Court has interpreted the

'Test of Sameness'. He cited the decision of Hon'ble Apex Court in re: ***Babubhai vs. State of Gujarat*** reported in ***(2010) 12 SCC 254*** referring para-21, which reads as under:-

"21....whether both the FIRs relate to the same incident in respect of the same occurrence or are in regard to the incidents which are two or more parts of the same transaction.

The Supreme Court further held that if the answer to above question is in the affirmative, then the second FIR is liable to be quashed."

18. He has also cited the dictum of Hon'ble Apex Court rendered in re: ***Anju Chaudhary vs. State of U.P.*** reported in ***(2013) 6 SCC 384*** referring para-22, which reads as under:-

"22.....The possibility that more than one piece of information is given to the police officer in charge of a police station, in respect of the same incident involving one or more than one cognizable offences, cannot be ruled out. Other materials and information given to or received otherwise by the investigating officer would be statements covered under Section 162 of the Code. The Court in order to examine the impact of one or more FIRs has to rationalise the facts and circumstances of each case and then apply the test of "sameness' to find out whether both FIRs relate to the same incident and to the same occurrence, are in regard to incidents which are two or more parts of the same transaction or relate completely to two distinct occurrences. If the answer falls in the first category, the second FIR may be liable to be quashed."

19. Sri Singh has submitted that it is admitted from bare perusal of the FIR that the date of incident is the same, all the FIRs have reference to the mob, however, only in third FIR the complainant/ Constable Driver does not make reference to the cause of agitation while in other two FIRs it has been clearly stated that the protesters were agitating against the implementation of CAA & NRC after attending Friday prayer (Jumme-ki-Namaj). The place of incidence in all the F.I.Rs. is in the vicinity of 'Badi Takiya' where the Mosque is situated. Thus, for one incident which took place on the same day in the proximity of time, three different FIRs should have not been lodged. The FIR No.491 of 2019 and FIR No.492 of 2019 are mere statements of S.H.O. and Constable Driver of the same Police Station regarding the protests taking place in the vicinity of 'Badi Takiya', hence, the subsequent two charge-sheets should have been clubbed in the first charge-sheet.

20. Learned counsel for the petitioner has cited the dictum of Hon'ble Apex Court rendered in re: ***C. Muniappan vs. State of Tamil Nadu*** reported in ***(2010) 9 SCC 567*** referring para-37, which reads as under:-

"37.....There was no wrong in clubbing together of the two crimes. Keeping in view the totality of circumstances and evidence, the second occurrence was nothing but a fall out of the first occurrence. Merely because two separate complaints had been lodged, did not mean that they could not be clubbed together and one charge-sheet could not be filed."

21. Sri Vikas Vikram Singh has also referred the Circular No.DG-21/2016 dated

26.04.2016 issued by the Director General of Police, U.P. prohibiting the **depracable** practice of lodging of multiple FIRs with regard to one incident. The aforesaid circular also states at serial No.4 that the investigation of other subsequent FIRs shall be recorded in one case diary. Therefore, Sri Singh has submitted that in the present case the aforesaid circular have been flouted by the Investigating Officer for no cogent reasons.

22. Sri Vikas Vikram Singh, learned counsel for the petitioner, has reiterated that the summoning order reflects absolutely non-application of mind The Apex Court in re: ***Fakhruddin Ahmad vs. State of Uttaranchal*** reported in ***(2008) 17 SCC 157*** has held that it is incumbent upon the Magistrate that before taking cognizance of an offence it is imperative that he must have taken notice of accusation and applied his mind to the allegations made in the complaint or in the police report or in the information received from the sources other than the police report, as the case may be, and the material filed therewith. It is only when the Magistrate applies his mind and is satisfied that the allegations, if proved, would constitute an offence and decides to initiate proceedings against alleged offender, that it can be positively stated that he has taken cognizance of the offence. Cognizance is in regard to the offence and not the offender. In the present case, it is prima-facie clear that the Magistrate has not applied his mind judicially and has taken cognizance mechanically without going through the material available on record carefully.

23. Therefore, Sri Singh has submitted that this Court may interfere with the impugned charge-sheets or the subsequent cognizance orders dated 26.08.2018 for Charge-sheet No.33-A of 2020 and 26.11.2020 for Charge-sheet No.99-A of 2020, (both Charge-sheets are dated 25.04.2020), may be quashed and appropriate direction may be issued for clubbing the second and third charge-sheet with the first charge-sheet i.e. Charge-sheet No.100-A of 2020 dated 26.04.2020 and the trail in question be conducted pursuant to the Charge-sheet No.100-A of 2020 in the interest of justice as the petitioner is ready to appear before the learned court below pursuant to the summoning order dated 05.08.2020.

24. Per contra, Sri Anurag Varma, learned Additional Government Advocate for the State has opposed the aforesaid prayer of learned counsel for the petitioner referring Section 220 Cr.P.C. by submitting that the situation in question has been dealt with by the aforesaid statutory provision which provides that the present petitioner will have to face one trial for all the three charge-sheets. It would be apt to reproduce Section 220 (1) Cr.P.C. as under:-

"Section 220 in The Code Of Criminal Procedure, 1973.

220. Trial for more than one offence. (1) *If, in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with, and* tried at one trial for, every such offence."

25. Sri Anurag Varma has cited one decision of Telangana High Court rendered in re: ***M/S. Leo Meridian Infrastructure.... vs. Central Bureau of Investigation (WP No.21487 of 2018),*** wherein the same prayer was made by the petitioner of that petition to the effect that the registration of multiple FIRs on the basis of allegations

which are essentially the same in all the complaints is nothing but abuse of process of law. Therefore, all the complaints be clubbed in each one. The Telangana High Court has held that since the petitioner of that petition and its Promoters of company availed loan facilities from consortium of banks and the translations are different, therefore, all the complaints may not be clubbed together.

26. He has also cited the decision of Hon'ble Apex Court rendered in re: ***State of Jharkhand vs. Lalu Prasad Yadav*** reported in ***(2017) 8 SCC 1,*** whereby the Hon'ble Apex Court has explained the term of *'same offence'* which is different from *'same kind of offence'* and has held that if *'same kind of offence'* was committed multiple times then each time it constitutes a separate offence and therefore accused can be tried in different trials.

27. On the basis of the statutory prescription under Section 220 Cr.P.C. and the aforesaid judgments, Sri Anurag Varma has submitted that since the present petitioner has not committed the same offence but of same kind of offence, therefore, in view of the dictum of Hon'ble Apex Court in re: ***Lalu Prasad Yadav*** *(supra),* he will have to be tried for all the charge-sheets.

28. In rejoinder arguments Sri Vikas Vikram Singh has submitted that so far as the judgment of Telangana High Court rendered in re: ***M/S. Leo Meridian Infrastructure*** *(supra)* is concerned, such decision would not be binding of this Court. Further, the facts and circumstances of the present case are different to the case of ***M/S. Leo Meridian Infrastructure*** *(supra)* inasmuch as in the case before Telangana High Court admittedly the transactions from consortium banks were different and loan agreement and amount lent by the banks were different, though they constituted as a consortium, therefore, the multiple complaints were lodged but in the present case the cause of incidence, date of incidence, place of incidence and sections under which the charge-sheet has been filed are similar.

29. So far as the dictum of Hon'ble Apex Court in re: ***Lalu Prasad Yadav*** *(supra)* is concerned, the facts and circumstances of ***Lalu Prasad Yadav*** *(supra)* are absolutely different from the present case inasmuch as in the case of ***Lalu Prasad Yadav*** *(supra)* the same kind of offence had allegedly been committed on different place and different time, therefore, the Hon'ble Apex Court has held that for separate offence the accused will have to face different trials. The case of ***Lalu Prasad Yadav*** *(supra)* has not be dealt with under Section 220 (1) Cr.P.C. whereas in the present case there is no quarrel by the prosecution that petitioner can be tried in one trial but for different charge-sheets. Therefore, the cases so cited by the learned Additional Government Advocate, as submitted by Sri Singh, would not be applicable in the present case.

30. Having heard learned counsel for the parties and having perused the material available on record as well as the decisions so cited, I am also of the considered opinion that the principle regarding *'Test of Sameness'* should be followed by the Investigating Agency.

31. The Police Department is also conscious about the aforesaid proposition, therefore, the Director General of Police

issued a detailed Circular NO.DG-21/2016 dated 26.04.2016 prohibiting the depracable practice of lodging of multiple F.I.Rs with regard to one incident. It would be apt to reproduce para-4 of the aforesaid Circular, which is as under:-

"4. यदि प्रकरण में Multiple FIR दर्ज है परन्तु cross FIR दर्ज नही है, तो बाद में दर्ज समस्त FIRs को 162 सी0आर0पी0सी0 के अन्तर्गत कार्यवाही मानते हुए प्रथम थ्र्ट की विवेचना में सम्मिलित किया जाए। ऐसी सभी FIRs के सम्बन्ध में एक ही केस डायरी किता की जाए जिसमें सभी FIRs के तथ्यों का समावेश करके विवेचना की जाए।

इस सन्दर्भ में माननीय उच्चतम् न्यायालय द्वारा T.T. Antony Vs. State of Kerala & Ors. (2001) 6 SCC 181 में दिये गये निर्णय का उद्धहरण आपके मार्गदर्शन हेतु निम्नांकित है–

"This court dealt with a case wherein in respect of the same cognizable offence and same occurrence two FIRs had beenl lodged and the court held that there can be no second FIR and no fresh investigation on receipt of every subsequent information in respect of the same cognizable offence or same occurrence giving rise to one or more cognizable offences. The investigating agency has to proceed only on the information about commission of a cognizable offence which is first entered in the Police Station diary by the Officer Incharge under Section 158 of the Code of Criminal Procedure, 1973 (here-in-after called the Cr.P.C.) and all other subsequent information would be covered by Section 162 Cr.P.C. for the reason that it is the duty of the Investigating Officer not merely to investigate the cognizable offence report in the FIR but also other connected offences found to have been committed in the curse of the same transaction or the same occurrence and the Investigating Officer has to file one or more reports under Section 173 Cr.P.C.

32. In the present case, there are three FIRs, first bearing Case Crime No.490 of 2019, second bearing Case Crime No.491 of 2019 and third is bearing Case Crime No.492 of 2019. In all the aforesaid FIRs the date of incidence is 20.12.2019. Time of incidence in all the three FIRs is 4:15 P.M., 15:00 P.M. and 15:30 P.M. respectively. In all the three FIRs, the protesters were opposing the implementation of CAA and NRC. In all the three FIRs, the sections of I.P.C. are almost same except one or two charges and in first two FIRs Section 3/4 of Act, 1985 and Section 7 of Act, 1932 are involved. However, in third FIR Section 7 of Act, 1932 is not involved. In all the three FIRs, the complainants are Officers/ Officials of Police Station-Dargah Sharif, District-Bahraich.

33. Therefore, *'Test of Sameness'* which says that where there is proximity of time, or place or unity of purposes and design or continuity of action in respect of series of acts, the safe inference may be drawn that they form part of the same transactions, therefore, the aforesaid test appears to have been applied in the present case.

34. In view of the above, I find it appropriate that the direction may be issued for clubbing all the three Charge-sheets together inasmuch as the occurrence indicated in the second and third FIR is prima-facie appearing as a fall out of the first occurrence indicated in the first FIR. Therefore, I am an agreement with the dictum of Hon'ble Apex Court in re: ***C. Muniappan*** *(supra)* to the effect that merely because three separate FIRs have been filed do not mean that they could not be clubbed together and one charge-sheet could not be filed.

35. In the present case, Investigating Officer should have clubbed all the FIRs and should have filed one charge-sheet. Such act of clubbing would have been in conformity with the Circular No.DG-21/2016 dated 26.04.2016, which has been issued by the Director General of Police, Uttar Pradesh in consonance with the direction of Hon'ble Apex Court issued in re: ***T.T. Anthony*** *(supra)*.

36. So far as the manner in which the learned Magistrate has taken cognizance in all the three impugned charge-sheets is concerned, I must observe that while taking cognizance it appears that he has not applied his judicious mind and has not appreciated and perused the material available on record, particularly, not examined the complicity and involvement of the present petitioner who has been implicated in the present case invoking Section 120-B I.P.C. Even if the Magistrate has appreciated and perused the material available on record while taking cognizance of the FIR dated 05.08.2020, at least while taking cognizance of second and third charge-sheet, the Magistrate must have asked the Investigating Agency as to why after carrying out separate investigation in all the three, more or less similar, incidents, three separate charge-sheets have been filed therein. The Magistrate must have asked as to why all the three charge-sheets have not been clubbed together for the purposes of trial. The learned Magistrate must have seen that what prejudice would be caused to the prosecution if the single charge-sheet is filed clubbing all the charge-sheets together inasmuch as Section 220 Cr.P.C. itself authorizes that in a similar situation the accused person should be tried in one trial. Therefore, the guidelines of Hon'ble Apex Court in re:***Fakhruddin Ahmad*** *(supra)* must have been followed by the learned Magistrate while taking cognizance of the charge-sheet.

37. Therefore, without interfering with the impugned charge-sheets, I hereby quash the cognizance order dated 26.08.2020 whereby the cognizance has been taken of the Charge-sheet No.33-A of 2020 dated 25.04.2020 and the cognizance order dated 26.11.2020 whereby the cognizance has been taken of the Charge-sheet No.99-A of 2020 dated 25.04.2020.

38. I am not interfering with the cognizance order dated 05.08.2020 whereby the cognizance of Charge-sheet No.100-A of 2020 dated 26.04.2020 has been taken. Pursuance to the cognizance order dated 05.08.2020, it shall be deemed that the learned court below has taken cognizance of the Charge-sheet No.33-A of 2020 dated 25.04.2020 and the Charge-sheet No.99-A of 2020 dated 25.04.2020, as both the charge-sheets have been filed one day prior to the Charge-sheet No.100-A of 2020 dated 26.04.2020.

39. The Charge-sheet No.33-A of 2020 dated 25.04.2020 and Charge-sheet No.99-A of 2020 dated 25.04.2020 shall be treated as part of Charge-sheet No.100-A of 2020 dated 26.04.2020.

40. The petitioner is directed to appear/ surrender before the learned court below pursuant to cognizance order dated 05.08.2020 within a period of three weeks from today and may file bail application and if such bail application is filed within the aforesaid stipulated time, the same may be decided expeditiously, preferably on the same day in the light of dictum of the Apex Court in re; ***Satender Kumar Antil Vs.***

Central Bureau of Investigation & Anr, Petition(s) for Special Leave to Appeal (Crl.) No(s).5191/2021.

41. In view of the aforesaid terms, all the three petitions are ***disposed of finally.***

(2022)01ILR A254
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 20.12.2021

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Application U/S 482/378/407 No. 5475 of 2021

Praveen Kumar Singh @ Praveen Singh & Ors. ...Applicants
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicants:
Agendra Sinha, S.D. Singh

Counsel for the Opposite Parties:
G.A.

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power - Indian Penal Code, 1860 - Sections 147, 148, 354, 452, 323, 504 & 506 , The Protection of Children From Sexual Offences Act, 2012 - Section 7/8 , The Scheduled Castes/Scheduled Tribes (Prevention from Atrocities) Act, 1989 - Sections 3 (i) (r), 3 (i) (s), 3 (ii) (v) - if any accused person has not been arrested during investigation and has cooperated with the investigation, there is no need to arrest him after filing charge sheet, particularly, if the nature of offences is not so serious - arrest is not mandatory in all cases and if the accused person is cooperating with investigation, there is no need to arrest . (Para - 10)

Quashing of Charge-sheet , summoning order, non-bailable warrant including the entire proceeding - applicants/ petitioners have not been arrested during investigation - status of accused described - police granted bail - fully co-operated with the investigation - criminal case being lodged against the petitioners as a counter blast being a cross case.(Para - 4)

HELD:-The courts have to be extremely careful before issuing non-bailable warrants. In the order where the bailable/ non-bailable warrant or proclamation under Section 82 Cr.P.C. is issued, the court must indicate that despite the service of summons or bailable warrant or non-bailable warrant the accused has not appeared. In the absence of such indication the coercive orders, would be treated as if they failed the test of statutory prescriptions prescribed under Sections 64 & 65 of the Cr.P.C. . (Para - 13)

Petition disposed of finally. (E-7)

List of Cases cited:-

1. Inder Mohan Goswami & anr. Vs St. of Uttaranchal & ors. , (2007) 12 SCC 1

2. Satender Kumar Antil Vs C.B.I. & Anr, Petition(s) for Special Leave to Appeal (Crl.) No(s).5191/2021

3. Aman Preet Singh Vs C.B.I. through Director, Criminal Appeal No.929 of 2021

4. Court on its own Motion Vs C.B.I., (2004) 72 DRJ 629

5. Siddharth Vs The St. of U.P.& anr., Criminal Appeal No.838 of 2021 (arising out of SLP (Crl.) No.5442/2021)

6. Joginder Kumar Vs St. of U.P. & ors, (1994) 4 SCC 260

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri S.D. Singh, learned counsel for the petitioners and Sri Ran

Vijay Singh, learned Additional Government Advocate for the State.

2. In view of the proposed order, the notice to opposite party No.3 is hereby dispensed with.

3. By means of this petitioner, the petitioners have prayed for quashing the Charge-sheet dated 30.11.2018, arising out of Case Crime No.333 of 2018, under Sections 147, 148, 354, 452, 323, 504 & 506 I.P.C., Section 7/8 of Protection of Children from Sexual Offences Act and Sections 3 (i) (r), 3 (i) (s), 3 (ii) (v) of SC/ST Act, Police Station-Gauriganj, District-Amethi, as well as the summoning order dated 22.07.2019 and non-bailable warrant dated 06.09.2021 issued by the learned Additional Session Judge/ Special Judge, POCSO Act, Court No.1, District-Sultanpur in Special Session Trial No.407 of 2019 (State vs. Praveen Singh & others) including the entire proceeding.

4. Learned counsel for the petitioners, at the very outset, has submitted that the present applicants/ petitioners have not been arrested and as per the charge-sheet where the status of accused has been described, it says that the police has granted bail. Therefore, for all practical purposes the petitioners have not been arrested during investigation. Further, they have fully co-operated with the investigation. This is a criminal case being lodged against the petitioners as a counter blast being a cross case.

5. Learned counsel for the petitioners has drawn attention of this Court towards Annexure No.3 of this petition, which is an order-sheet which indicates that the petitioners were absent on 02.07.2021 then bailable warrant of Rs.10,000/- was issued, again on the next date i.e. 06.09.2021 the non-bailable warrant has been issued against the petitioners. The aforesaid order issuing the non-bailable warrant dated 06.09.2021 is in violation of Section 65 Cr.P.C. inasmuch as the learned court concerned has not indicated the subjective satisfaction as to whether the bailable warrant has been served upon the petitioners or not. The law is clear that if despite the service of bailable warrant upon the accused person, he/ she does not appear, the non-bailable may be issued.

6. On that, the attention has been drawn towards the dictum of Hon'ble Apex Court rendered in re: ***Inder Mohan Goswami and another vs. State of Uttaranchal and others reported in (2007) 12 SCC 1*** referring paras-51 to 56, which read as under:-

"51. The issuance of non-bailable warrants involves interference with personal liberty. Arrest and imprisonment means deprivation of the most precious right of an individual. Therefore, the courts have to be extremely careful before issuing non-bailable warrants.

52. Just as liberty is precious for an individual so is the interest of the society in maintaining law and order. Both are extremely important for the survival of a civilized society. Sometimes in the larger interest of the Public and the State it becomes absolutely imperative to curtail freedom of an individual for a certain period, only then the non-bailable warrants should be issued.

When non-bailable warrants should be issued

53. Non-bailable warrant should be issued to bring a person to court when summons of bailable warrants would be unlikely to have the desired result. This could be when:

** it is reasonable to believe that the person will not voluntarily appear in court; or*

** the police authorities are unable to find the person to serve him with a summon; or*

** it is considered that the person could harm someone if not placed into custody immediately.*

54. As far as possible, if the court is of the opinion that a summon will suffice in getting the appearance of the accused in the court, the summon or the bailable warrants should be preferred. The warrants either bailable or non-bailable should never be issued without proper scrutiny of facts and complete application of mind, due to the extremely serious consequences and ramifications which ensue on issuance of warrants. The court must very carefully examine whether the Criminal Complaint or FIR has not been filed with an oblique motive.

55. In complaint cases, at the first instance, the court should direct serving of the summons along with the copy of the complaint. If the accused seem to be avoiding the summons, the court, in the second instance should issue bailable-warrant. In the third instance, when the court is fully satisfied that the accused is avoiding the courts proceeding intentionally, the process of issuance of the non-bailable warrant should be resorted to. Personal liberty is paramount, therefore, we caution courts at the first and second instance to refrain from issuing non-bailable warrants.

56. The power being discretionary must be exercised judiciously with extreme care and caution. The court should properly balance both personal liberty and societal interest before issuing warrants. There cannot be any straight-jacket formula for issuance of warrants but as a general rule, unless an accused is charged with the commission of an offence of a heinous crime and it is feared that he is likely to tamper or destroy the evidence or is likely to evade the process of law, issuance of non-bailable warrants should be avoided."

7. Learned counsel for the petitioners has further submitted that since the petitioners have never been arrested during investigation and have co-operated with the investigation, therefore, as per the settled proposition of law by Hon'ble Apex Court, they should not be taken into custody after filing of the charge-sheet

8. Per contra, Sri Ran Vijay Singh, learned Additional Government Advocate has opposed the aforesaid prayer of the petitioners, but could not dispute the aforesaid settled proposition of law.

9. Heard the learned counsel for the parties and perused the record.

10. In view of the facts and circumstances of the issue, let the petitioners be appeared before the learned court below within a period of four weeks from today and file appropriate application and if the petitioners appear before the learned court below within the aforesaid stipulated time in terms of this order and move appropriate application, the learned court below shall consider and decide the same expeditiously, if possible on the same day strictly in accordance with law and in the light of dictum of Hon'ble Apex Court rendered in

re: ***Satender Kumar Antil Vs. Central Bureau of Investigation & Anr, Petition(s) for Special Leave to Appeal (Crl.) No(s).5191/2021*** as well as in the light of the judgment dated 02.09.2021 in re; **Aman Preet Singh vs. C.B.I. through Director, Criminal Appeal No.929 of 2021** (arising out of SLP (Crl.) No.5234/2021), wherein the Apex Court has considered the decision of Delhi High Court in re; **Court on its own Motion vs. Central Bureau of Investigation (2004) 72 DRJ 629,** wherein the guideline was formulated that if any accused person has not been arrested during investigation and has cooperated with the investigation, there is no need to arrest him after filing charge sheet, particularly, if the nature of offences is not so serious. In the aforesaid judgment, the Apex Court has considered its own judgment in re; **Siddharth vs. The State of Uttar Pradesh & Anr., Criminal Appeal No.838 of 2021** (arising out of SLP (Crl.) No.5442/2021), whereby the Apex Court considering the observation of the well celebrated judgment in re; ***Joginder Kumar vs. State of U.P. & Ors, (1994) 4 SCC 260,*** has observed that the arrest is not mandatory in all cases and if the accused person is cooperating with investigation, there is no need to arrest.

11. Till the disposal of such application of the petitioners, the non-bailable warrant shall not be executed against them but if the petitioners do not file application within four weeks, as aforesaid, the benefit of this order may not be given to them and the learned court below would be at liberty to take appropriate coercive steps, as per law.

12. Before parting with the matter, I must observe that the learned court below must take care of relevant facts before issuing the bailable warrants, non-bailable warrants and proclamation under Section 82 Cr.P.C.

13. The Hon'ble Apex Court in re: ***Inder Mohan Goswami*** (supra) has clearly observed that issuance of non-bailable warrants involves interference with personal liberty. Arrest and imprisonment means deprivation of the most precious right of an individual. Therefore, the courts have to be extremely careful before issuing non-bailable warrants. Further, in the order where the bailable/ non-bailable warrant or proclamation under Section 82 Cr.P.C. is issued, the court must indicate that despite the service of summons or bailable warrant or non-bailable warrant the accused has not appeared. In the absence of such indication the coercive orders, as said above, would be treated as if they failed the test of statutory prescriptions prescribed under Sections 64 & 65 of the Cr.P.C.

14. Accordingly, the instant petition is ***disposed of finally*** in terms of the aforesaid order making it clear that I have not decided the validity of the charge-sheet. Therefore, the petitioners would be at liberty to avail appropriate remedy before appropriate court of law at various stages.

(2022)01ILR A257
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 23.12.2021

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Application U/S 482/378/407 No. 5691 of 2021

Hemant Tiwari & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Rajesh Kumar, Rohit Kumar Tripathi

Counsel for the Opposite Parties:
G.A.

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power - section 202 - Postponement of issue of process - Section 2(g) - Inquiry - no specific mode or manner of inquiry provided u/s 202 Cr.P.C. of the Code - Apex Court in the inquiry mandated u/s 202 Cr.P.C. - would mean examination of the complainant and examination of the witnesses. (Para - 11)

(B) Criminal Law - The Code of Criminal Procedure, 1973 - Section 202 - in case the summons are issued against the accused persons who are residing outside the territorial limits a prior inquiry by the concerned Magistrate or investigation by the police should be made before issuing summons.(Para -4 ,8)

Complaint filed by opposite party no. 2 - summoned all petitioners - residing outside the territory of the court from where the summoning order has been issued - contention - no inquiry was conducted by the Magistrate against the persons who were residing outside the territorial limits. (Para - 4,7)

HELD:-Summoning order (impugned) has been issued after examination of the complainant u/s 200 and examination of witnesses u/s 202 Cr.P.C. Therefore, there is no infirmity or illegality in the impugned order. Sections for which the petitioners have been summoned i.e. 500 and 501 IPC are triable by the sessions, therefore, the prior direction for investigation could have not been issued by the Magistrate in view of the first proviso of section 202(1) Cr.P.C. .(Para - 13)

Petition dismissed . (E-7)

List of Cases cited:-

1. N.B.O. Vs Barakara Abdul Aziz & anr. , (2013) 2 SCC 488

2. Vijay Dhanuka ors. Vs Najima Mamtaj & ors. , (2014) 14 SCC 638

3. Uday Shankar Awasthi Vs St. of U.P. , (2013) 2 SCC 435

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Rohit Kumar Tripathi and Sri Rajesh Kumar, learned counsel for the petitioners and learned AGA.

2. In view of the proposed order notice to opposite party no. 2 is dispensed with.

3. By means of this petition the petitioners have prayed for quashing the summoning order dated 31.5.2019 (Annexure no. 1) and N.B.W. order dated 1.11.2021 passed by the C.J.M., Lucknow summoning the petitioners in Complaint Case No. 5637/2018 u/s 500,501 IPC, P.S. Gautampalli, District Lucknow as well as entire criminal proceedings of the aforesaid criminal case.

4. The contention of learned counsel for the petitioner is that the petitioner nos. 2 and 3 are the resident of New Delhi and Bangalore respectively. On the complaint filed by opposite party no. 2 the learned C.J.M., Lucknow has summoned all the petitioners vide impugned order dated 31.5.2019. As per learned counsel for the petitioner while summoning the petitioners no. 2 and 3 who are residing outside the territory of the court from where the summoning order has been issued, the learned court-below has committed manifest error of law inasmuch as section 202 Cr.P.C. clearly mandates that in case any accused person is residing at a place beyond the area in which he exercises his jurisdiction, shall postpone the issue of process against the accused and either enquire into the case himself or direct the

investigation to be made by the police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceedings. For the convenience section 202 Cr.P.C. is being reproduced herein-below:

"202. Postponement of issue of process.

(1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him under section 192, may, if he thinks fit, [and shall,in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction] postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding: Provided that no such direction for investigation shall be made,--

(a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session; or

(b) where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath under section 200.

(2) In an inquiry under sub-section (1), the Magistrate may, if he thinks fit, take evidence of witnesses on oath:

Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.

(3) If an investigation under sub- section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Code on an officer- in- charge of a police station except the power to arrest without warrant."

5. Learned counsel for the petitioner has submitted that the aforesaid mandatory condition has been inserted in section 202 Cr.P.C. by Act no. 25 of 2002, w.e.f 23.6.2006. Therefore, before issuing summons, particularly to petitioner nos. 2 and 3 the Magistrate should have enquired into the case himself or should have directed for investigation to be made by the police officer. Since such mandatory exercise has been avoided by the Magistrate while issuing the summoning orders against the petitioner nos. 2 and 3, the impugned order dated 31.5.2019 vitiates and the same is liable to be quashed at the threshold.

6. In support of his aforesaid contention the learned counsel for the petitioner has drawn attention of this Court towards ***National Bank of Oman vs. Barakara Abdul Aziz and another (2013) 2 Supreme Court Cases 488 and Vijay Dhanuka and others vs. Najima Mamtaj and others (2014) 14 Supreme Court Cases 638.***

7. Learned counsel for the petitioner has submitted that in the case of National Bank of Oman (supra) the Apex Court instead of quashing the complaint remitted the matter back to the Magistrate concerned to pass fresh order under the mandatory condition of section 202 Cr.P.C. inasmuch as no inquiry was conducted by the

Magistrate against the persons who were residing outside the territorial limits.

8. Learned counsel for the petitioner has submitted that in re: Vijay Dhanuka (supra) Apex Court has considered one earlier judgment of Apex Court i.e. ***Uday Shankar Awasthi vs. State of U.P. (2013) 2 SCC 435*** whereby the Apex Court has interpreted section 202 Cr.P.C. and it has been clearly directed by the Apex Court that in case the summons are issued against the accused persons who are residing outside the territorial limits a prior inquiry by the concerned Magistrate or investigation by the police should be made before issuing summons. Since in the present case no such mandatory exercise has been followed, therefore, the impugned order dated 31.5.2019 vitiates and is liable to be set aside.

9. Per contra, Sri Anirudh Kumar Singh, learned AGA has submitted that since the learned Magistrate has issued summons against the petitioners including the petitioners no. 2 and 3 who resides outside the territorial limits after making compliance of section 200 and 202 Cr.P.C., therefore, there is no infirmity in the impugned order. He has further submitted that the first proviso of section 202 Cr.P.C. clearly mandates that where it appears to the Magistrate that the complaint is triable exclusively by the Court of sessions, no such direction for investigation shall be made by the Magistrate. As per Sri Singh in the present case the present petitioners have been summoned for section 500 and 501 IPC and section 500 IPC is triable by sessions court and section 501(a) IPC is also triable by the sessions, therefore, no such direction for investigation could have been issued by the Magistrate. Hence, in view of the above there is no infirmity or illegality in the order dated 31.5.2019.

10. Having heard learned counsel for the parties and having perused the material available on record, I find that the Apex Court in re: ***Vijay Dhanuka (supra)*** has set at rest the controversy in question vide para 13 to 16 thereof. For the convenience paras no. 13 to 16 are being reproduced herein below :

"13. In view of the decision of this Court in the case of Udai Shankar Awasthi v. State of Uttar Pradesh, (2013) 2 SCC 435, this point need not detain us any further as in the said case, this Court has clearly held that the provision aforesaid is mandatory. It is apt to reproduce the following passage from the said judgment:

"40. The Magistrate had issued summons without meeting the mandatory requirement of Section 202 CrPC, though the appellants were outside his territorial jurisdiction. The provisions of Section 202 CrPC were amended vide the Amendment Act, 2005, making it mandatory to postpone the issue of process where the accused resides in an area beyond the territorial jurisdiction of the Magistrate concerned. The same was found necessary in order to protect innocent persons from being harassed by unscrupulous persons and making it obligatory upon the Magistrate to enquire into the case himself, or to direct investigation to be made by a police officer, or by such other person as he thinks fit for the purpose of finding out whether or not, there was sufficient ground for proceeding against the accused before issuing summons in such cases."

14. In view of our answer to the aforesaid question, the next question which falls for our determination is whether the learned Magistrate before issuing summons has held the inquiry as mandated under Section 202 of the Code. The word "inquiry" has been defined under Section

2(g) of the Code, the same reads as follows:

"2.(g)"inquiry" means every inquiry, other than a trial, conducted under this Code by a

It is evident from the aforesaid provision, every inquiry other than a trial conducted by the Magistrate or Court is an inquiry. No specific mode or manner of inquiry is provided under Section 202 of the Code. In the inquiry envisaged under Section 202 of the Code, the witnesses are examined whereas under Section 202 of the Code, examination of the complainant only is necessary with the option of examining the witnesses present, if any.

This exercise by the Magistrate, for the purpose of deciding whether or not there is sufficient ground for proceeding against the accused, is nothing but an inquiry envisaged under Section 202 of the Code.

15. In the present case, as we have stated earlier, the Magistrate has examined the complainant on solemn affirmation and the two witnesses and only thereafter he had directed for issuance of process.

16. In view of what we have observed above, we do not find any error in the order impugned. In the result, we do not find any merit in the appeals and the same are dismissed accordingly."

11. In para 13 the Apex Court has considered the earlier dictum of Apex Court in re: ***Uday Shankar Awasthi (supra)*** wherein the amended section 202 Cr.P.C. has been interpreted, therefore, the Apex Court has taken cognizance of the amended portion of section 202 Cr.P.C. Vide para 14 the Apex Court has interpreted the term 'Inquiry' as defined u/s 2(g) of the Code, noticing the fact that no specific mode or manner of inquiry is provided u/s 202 Cr.P.C. of the Code, therefore, as per the Apex Court in the inquiry mandated u/s 202 Cr.P.C. would mean the examination of the complainant and examination of the witnesses. After the aforesaid examination, obviously the same would have been made on the solemn affirmation, that exercise would be sufficient to understand that, that is the inquiry as mandated u/s 202 Cr.P.C.

12. The Apex Court in para 15 and 16 of the aforesaid judgment has clearly observed that the Magistrate has examined the complaint on solemn affirmation of the two witnesses and only thereafter he had directed for issuance of process, therefore, there is no error in such order.

13. In the present case the impugned order dated 31.5.2019 clearly reveals that such order has been issued after examination of the complainant u/s 200 and examination of witnesses namely Nitin Srivastava, Sushil Awasthi, Rajat Kishor Mishra and Haseeb Siddiqui u/s 202 Cr.P.C. Therefore, there is no infirmity or illegality in the impugned order dated 31.5.2019. Besides, the sections for which the petitioners have been summoned i.e. 500 and 501 IPC are triable by the sessions, therefore, the prior direction for investigation could have not been issued by the Magistrate in view of the first proviso of section 202(1) Cr.P.C.

14. Accordingly, I ***dismiss*** the present petition being devoid of merits. However, it is provided that if the petitioner appears before the learned court below i.e. C.J.M., Lucknow in compliance of order dated 31.5.2019 by filing appropriate application, the same shall be heard and decided expeditiously as per law.

(2022)01ILR A262
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.12.2021

BEFORE

THE HON'BLE RAHUL CHATURVEDI, J.

Application U/S 482 No. 18671 of 2021

Dr. Abhai Ranjan ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Atharva Dixit, Sri Syed Imran Ibrahim, Sri Manish Tiwary (Sr. Advocate)

Counsel for the Opposite Parties:
G.A.

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power - The Prevention of Corruption Act, 1988 - Section 7/13(1)(d) r/w Section 13(2) - Section 19 - Previous sanction necessary for prosecution - difference between *absence of sanction* and *validity of sanction* - issue regarding *absence of sanction* can be raised at the inception by the aggrieved person - where the sanction order exists, the issue regarding its *validity* has to be raised only during course of trial - a mere error, omission or irregularity in sanction is not considered to be fatal unless it has resulted in the ''failure of justice' or has been occasioned thereby.(Para - 26,27)

(B) Criminal Law - The Prevention of Corruption Act, 1988 - Section 19(3) - specific embargo for granting any stay order on the ground of any error, omission or irregularity in the sanction granted by the authority, unless it has resulted into failure of justice - Section 4(4) - Act has given a time bound period to conclude the trial of the case within a period of two years (four years maximum).(Para -32,33)

Quashing of summoning order , impugned charge-sheet and entire proceeding - trap organized against applicant (Mining Inspector) - demanded a bribe - to issue challan to the complainant - enable him to complete his work - trap successful - F.I.R. lodged by Anti-Corruption - applicant caught red handed - Prevention of Corruption Act initiated against him - statements u/s 161 Cr.P.C. of various witnesses and collecting all the relevant material/ documents - charge-sheet - report u/s 173(2) Cr.P.C. filed without any requisite sanction and pending before the State Government - cognizance taken by magistrate .(Para - 1 to 4)

HELD:-Applicant failed to bring on record even a single instance regarding "failure of justice". Not a case of absence of sanction, but in this case sanction has been granted. Authenticity or validity of this sanction could be adjudged either by the Division Bench in writ petition or at the stage of the trial, but there could not be any good reason to stall the proceedings of the case or vitiate the cognizance order in absence of any material on record which may result into "failure of justice" to the applicant . Provisions of Section 4 (4) of the Prevention of Corruption Act has to be kept in mind and suitable endeavour has to be made by the trial court to conclude the trial within the time specified therein.(Para - 33,35)

Application u/s 482 Cr.P.C. dismissed. (E-7)

List of Cases cited:-

1. Nanjappa Vs St. of Karn., AIR 2015 SC 3060

2. Vijay Kumar Janjua Vs St. of Punj. & anr. , CWP No.10055 of 2010 decided on 24.01.2014

3. Dinesh Kumar Vs Chairman, Airport Authority of India & anr., (2011) 4 SCC 402

4. Prakash Singh Badal & anr. Vs St. of Punj. & ors., (2007) 1 SCC

5. C.B.I. Vs Ashok Kumar Aggarwal, (2015) 1 SCC (Cri) 344

6. Town Investments Ltd. Vs Deptt. of Environment, (1977) 1 All ER 813.

7. Girish Kumar Suneja Vs C.B.I. , Criminal Appeal No.1137 of 2017 decided on 13.7.2017

8. St. of Bihar Vs Rajmangal Ram, AIR 2014 SC 1674

9. St. of Mah. Vs Mahesh G. Jain, (2014) 1 SCC (Cri) 515

(Delivered by Hon'ble Rahul Chaturvedi, J.)

1. Heard Shri Manish Tiwary, learned Senior Advocate assisted by Mr. Syed Imran Ibrahim, learned counsel for the applicant and Shri Nishant Singh as well as Mr. Faraz Kazmi, learned counsels appeared for the State. Perused the record.

2. Since only legal point is involved in this case, as such the present application u/s 482 Cr.P.C. is being decided at the threshold stage itself without inviting any counter affidavit.

3. Raising an interesting law point, learned counsel for the applicant has tried to exploit the plenary powers of this Court u/s 482 Cr.P.C. with a prayer "to allow the instant 482 application quashing the summoning order dated 08.4.2021 as well as impugned charge-sheet dated 27.11.2014 and the entire proceeding of Special Case No.12 of 2014 (State vs Dr. Abhai Ranjan), arising out of Case Crime no.455 of 2014, u/s 7/13(1)(d) r/w Section 13(2) of the Prevention of Corruption Act, P.S.-Mundha Pandey, District Moradabad, pending before Special Judge (Prevention of Corruption Act), Court No.2, Bareilly" and pending final disposal of the instant 482 application stay further proceeding of the above mentioned case.

4. Before critically analyzing the legal controversy involve in the instant case, it is desirable to spell out the brief factual aspects of the matter touching the core issue :-

FACTS OF THE CASE

(A) On behalf of complainant, Muddasir Khan a trap was organized against the applicant, posted as Mining Inspector, who allegedly has demanded a bribe of Rs.25,000/- in order to issue challan to the complainant so as to enable him to complete his work. After the trap was successful, the F.I.R. was lodged by one Ms. Pragya Mishra, Dy. S.P. (Anti-Corruption), Moradabad on 30.9.2014 at 23.45 hours in the night, making a mention that the applicant was caught red handed with 10 x Rs.1000 notes and 30 x Rs.500 notes while taking illegal gratification, as such, proceedings under the Prevention of Corruption Act was initiated against him.

It is relevant to make a mention to the effect that the alleged complaint was made by Mr. Muddasir Khan on 26.9.2014, pursuant to that the aforesaid trap was laid after making a pre-trap enquiry by one Mr. S.N. Tyagi, who has given his report on the same day i.e. 26.9.2014 and the said report was transmitted to D.S.P. on the same date.

(B) After holding an in-depth probe into the matter, recording the statements u/s 161 Cr.P.C. of various witnesses and collecting all the relevant material/ documents and after thrashing it on the anvil of thorough investigation, the Investigating Officer of the case has submitted charge-sheet No.5 of 2014 u/s 7/13(1)(d) r/w Section 13(2) of Prevention of Corruption Act against the applicant on 27.11.2014.

(C) The applicant was languishing in jail in connection with above case and he was released on bail by Co-ordinate Bench of this Court on 31.3.2015

having Crl. Misc. Bail Application No.1572 of 2015.
(D) After the preparation of report u/s 173(2) Cr.P.C. the same was filed without any requisite sanction and the request for the same was pending before the State Government.

5. On these factual aspects of the issue, it was urged by learned counsel for the applicant that as per the provision of Government Order dated 24.12.1992 the proceedings against the Gazetted Officers under Group-B cannot be initiated by Anti Corruption Department. Since the applicant is a Mining Officer and not Mining Inspector, and as such, entire proceeding initiated against him goes hay-wire. Besides this, many other factual drawbacks were pointed out by the applicant in his petition while assailing the charge-sheet as well as cognizance order.

6. It is also submitted by learned counsel for the applicant that the applicant being an upright officer has taken number of administrative steps to curb the illegal mining in discharge of official duty, many dumpers and tractors were seized by him, which has caused cramps to various mining mafias including the complainant. In fact the applicant is now become victim of their nefarious design.

7. Reverting back to the earlier story, that the police after holding in-depth probe into the matter, has submitted charge-sheet on 27.11.2014 u/s 7/13(1)(d) r/w Section 13(2) of the Prevention of Corruption Act, 1988. The police authorities on 21.11.2014 and 02.12.2014 wrote letters to the Government of U.P. to accord permission/sanction so as to initiate a criminal prosecution against the applicant, but the same was refused by the Under Secretary, Govt. of U.P. vide letter dated 9.3.2015 (Annexure-21). The officer concerned has pointed out certain vital fallacies and pitfalls in the case-diary and documents collected during investigation, on which, according to the Under Secretary, the possibility of successful prosecution against the applicant is too bleak, and as such, sanction was declined at that juncture i.e. on 9.3.2015.

8. On 01.10.2015, the police official reviewed the entire material once again and thereafter sent yet another letter to accord sanction to prosecute the applicant under above mentioned allegations of corruption. This time too the sanction was turned down by the then Principal Secretary, Department of Mining, Government of U.P., relying upon the earlier order dated 9.3.2015, but this time there was simplicitor refusal without having any observation with regard to sufficiency or insufficiency of the material collected by the Investigating Officer during investigation vide its order dated 21.9.2016 (Annexure-23).

On this, it was urged by the learned counsel for the applicant that after turning down the sanction twice, makes it crystal clear that sanctioning authorities did not find anything incriminating against the applicant, upon which the sanction could be accorded and this by itself casts serious doubts over the prosecution story and the alleged material collected in support thereof.

9. It is further submitted by learned counsel for the applicant that the S.P., Anti-Corruption Organization, Lucknow for the third time sought sanction to prosecute the applicant by making a mention that the applicant was caught red handed while taking a bribe of Rs.25,000/- in front of

independent witnesses. The S.P. concerned requested the senior administrative authorities to accord sanction as there is sufficient and confidence generating material collected by the Investigating Officer to launch successful prosecution against the applicant.

10. On this, Shri Manish Tiwary, learned Senior Counsel urged that during this period, there was change in the government and consequently on 22.6.2017 (Annexure-25) the Additional Chief Secretary, Govt. of U.P., Lucknow has accorded permission to initiate the criminal case against the applicant without collecting any new material on record.

11. At the same juncture, it was pointed out by the learned A.G.A. that the applicant has already invoked the writ jurisdiction of this Court by filing Crl. Misc. Writ Petition No.5877 of 2021 in re : Abhai Ranjan vs State of U.P. The prayer sought in the above mentioned writ petition is as follows :

"issue, writ, order, direction in the nature of certiorari quashing the order dated 22.6.2017 (Annexure-25 to the writ petition), passed by Additional Chief Secretary bearing number 677/86-2017-172/2014 arising out of Case Crime No.455 of 2014 under Section 7/13(1)(d) r/w Section 13(2) of P.C. Act, P.S.-Mundha Pandey, Moradabad."

On this writ petition the Division Bench of this Court vide its order dated 20.9.2021 had sought counter affidavit from the Secretary, Government of U.P., Lucknow within ten days and rejoinder affidavit within a week thereafter, fixing 06.10.2021 as the next in the matter. The aforesaid writ petition is still pending, waiting for its final adjudication.

12. Thus, order dated 22.6.2017 whereby sanction was accorded on the third time, is the "focal issue' before this Court in the pending writ petition.

13. It is contended by the learned senior counsel Shri Manish Tiwary that after the submission of charge-sheet on 27.11.2014 and on the strength of sanction accorded on 22.6.2017, the learned Magistrate has taken cognizance on 08.4.2021 and thereafter the trial is galloping with speed whereby the discharge application (Application No.39 Kha) of the applicant was rejected on 8.4.2021 and the next date fixed for framing of the charge.

14. Per contra, Mr. Faraz Kazmi and Mr. Nishant Singh, learned counsels representing the State, have defended the cognizance order by making a mention that the learned Magistrate is fully justified in taking cognizance of the offence. Shri Kazmi states that while taking the cognizance, the only requirement is to look into the case-diary and the material collected during investigation and application of mind by the concerned Magistrate over the material collected during investigation, plus sanction letter accorded by the Governor. Magistrate cannot look into the legality and propriety of the sanctioning letter, and as such, the cognizance order dated 8.4.2021 does not suffer from any legal perversity or flaw.

15. Learned counsel for the applicant did not advance any argument regarding the rejection of discharge application dated 8.4.2021, thus, it would be deemed that he

has nothing to argue assailing the legality of the aforesaid order dated 8.4.2021.

16. After hearing the rival submissions made at the Bar, the Court has got an opportunity to formulate the legal issue, as follows :

17. Carrying the two rejections on the earlier occasions, as contemplated u/s 19 of the P.C. Act, which is sine qua non for any criminal proceedings against the propose offender, the sanction was accorded third time on 22.6.2017, after change in the establishment of the State of U.P. in the year 2017. Without having any new material on record against the applicant, the third sanctioning order is fallacious and untenable in the eyes of law. Thus the sanction order dated 22.6.2017 is now the pivotal issue of the controversy involved. It is urged that till such time i.e. sanctioning order dated 22.6.2017 its sanctity is not established by the legal pronouncement, entire subsequent proceeding is an exercise in futility, and as such, proceedings/prosecution against the applicant should be halted, till the writ petition is decided.

18. Shri Faraz Kazmi, learned counsel representing the State, reiterated his earlier submission that no doubt the legality and propriety of the third sanction letter dated 22.6.2017 is under challenge by means of Crl. Misc. Writ Petition 5877 of 2021, still it would not act as embargo in the present proceedings, because while taking cognizance of the offence the Magistrate is required to take cognizance of the offence relying upon the sufficiency or insufficiency of the material collected during investigation, coupled with the sanction letter issued by the Government of U.P. Magistrate is not supposed to give his legal verdict upon the legality and validity of the sanction letter nor he is required to evaluate the sanction and its propriety or its sufficiency or insufficiency.

19. It's true that the writ court is seized with the matter with regard to the legality and propriety of the third sanctioning letter dated 22.6.2017 and it's not proper on my part to express my views over that issue. The Court is required to evaluate (a) as to whether the cognizance order dated 8.4.2021 is legally sustainable and (b) can the Court halt the further proceedings of the present case until the writ is decided ?

LEGAL DISCUSSION

20. The Prevention of Corruption Act was initially enacted in 1947 and later on amended in 1964 based on recommendations of the Santhanam Committee. There are provisions of Chapter-IX of the I.P.C. to deal with public servants and those who abet them by way of criminal misconduct. There are also provisions in Criminal Law Amendment Ordinance, 1944 to enable attachment of ill-gotten wealth obtained through corrupt means including transfarees of such wealth. The present bill inter-alia envisages widening the scope of definition of "Public Servant' incorporation of the offences u/s 161 to 165A of the I.P.C., enhancement of penalties provided for these offences and incorporation of a provision that the order of the trial court upholding the "grant of sanction' for prosecution would be final, if it has already been challenged and the trial has commenced. In order to expedite the proceedings, the provisions for day to day trial of cases and prohibitory provisions with regard to the grant of the stay and exercise of powers of revision on

interlocutory orders have also been included. Thus the objective of present enactment is explicit and unambiguous, to the extent that the present enactment was promulgated for the expeditious disposal of trial, on day to day basis within a specific time frame.

21. Chapter-V of the "Act of 1988' provides sanction for the prosecution and other miscellaneous provisions, in which Section-19 puts an embargo on the prosecution that previous sanction is necessary for the alleged prosecution. Section 19(i) of the Act states that no court shall take cognizance of an offence punishable under Sections 7, 10, 11, 13 and 15 alleged to have been committed by a public servant, except with the previous sanction (save as otherwise provided in the Lokpal and Lokayuktas Act, 2013). It would be apt to recapitulate Section-19 of the Prevention of Corruption Act, herein below :

"19. Previous sanction necessary for prosecution.--

(1) No court shall take cognizance of an offence punishable under sections 7, 10, 11, 13 and 15 alleged to have been committed by a public servant, except with the previous sanction [save as otherwise provided in the Lokpal and Lokayuktas Act, 2013] ,--

(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 and is not removable from his office save by or with the sanction of the Central Government, of that 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 and is not removable from his office save by or with the sanction of the State Government, of that Government;

(c) in the case of any other person, of the authority competent to remove him from his office.

[Provided that no request can be made, by a person other than a police officer or an officer of an investigation agency or other law enforcement authority, to the appropriate Government or competent authority, as the case may be, for the previous sanction of such Government or authority for taking cognizance by the court of any of the offences specified in this sub-section,unless-

(i) such person has filed a complaint in a competent court about the alleged offences for which the public servant is sought to be prosecuted; and

(ii) the court has not dismissed the complaint under section 203 of the Code of Criminal Procedure, 1973 (2 of 1974) and directed the complainant to obtain the sanction for prosecution against the public servant for further proceeding:

Provided further that in the case of request from the person other than a police officer or an officer of an investigation agency or other law enforcement authority, the appropriate Government or competent authority shall not accord sanction to prosecute a public servant without providing an opportunity of being heard to the concerned public servant.

Provided also that the appropriate Government or any competent authority shall, after the receipt of the proposal requiring sanction for prosecution of a public servant under this sub-section, endeavour to convey the decision on such proposal within a period of three months from the date of its receipt.

Provided also that in case where, for the purpose of grant of sanction for prosecution, legal consultation is required, such period may, for the reasons to be recorded in writing, be extended by a further period of one month:

Provided also that the Central government may, for the purpose of sanction for prosecution fo a public servant, prescribe such guidelines as it considers necessary.

Explanation.- For the purpose of sub -section (1), the expression "public servant" includes such person--

(a) who has ceased to hold the office during which the offence is alleged to have been committed; or

(b) who has ceased to hold the office during which the offence is alleged to have been committed and is holding an office other than the office during which the offence is alleged to have been committed.]"

(2) Where for any reason whatsoever any doubt arises as to whether the previous sanction as required under sub-section (1) should be given by the Central Government or the State Government or any other authority, such sanction shall be given by that Government or authority which would have been competent to remove the public servant from his office at the time when the offence was alleged to have been committed.

(3) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),--

(a) no finding, sentence or order passed by a special Judge shall be reversed or altered by a court in appeal, confirmation or revision on the ground of the absence of, or any error, omission or irregularity in, the sanction required under sub-section (1), unless in the opinion of that court, a failure of justice has in fact been occasioned thereby;

(b) no court shall stay the proceedings under this Act on the ground of any error, omission or irregularity in the sanction granted by the authority, unless it is satisfied that such error, omission or irregularity has resulted in a failure of justice;

(c) no court shall stay the proceedings under this Act on any other ground and no court shall exercise the powers of revision in relation to any interlocutory order passed in any inquiry, trial, appeal or other proceedings.

(4) In determining under sub-section (3) whether the absence of, or any error, omission or irregularity in, such sanction has occasioned or resulted in a failure of justice the court shall have regard to the fact whether the objection could and should have been raised at any earlier stage in the proceedings.

Explanation.--For the purposes of this section,--

(a) error includes competency of the authority to grant sanction;

(b) a sanction required for prosecution includes reference to any requirement that the prosecution shall be at the instance of a specified authority or with the sanction of a specified person or any requirement of a similar nature."

22. The scope of sanction to prosecute is to ensure that a public servant may not be harassed or victimized. The sanction is an important attribute which was to be scroopllosly insisted

upon to ensure the fair prosecution. Grant of sanction is a sacrosanct act and is intended to provide a safeguard to a public servant against frivolous and vexatious litigations. Grant of sanction is only an administrative functioning and the sanctioning authority is required to prima facie reach the satisfaction that relevant facts would constitute the offence. The satisfaction of the sanctioning authority is essential to validate an order granting sanction. It is incumbent upon the prosecution to prove that a valid sanction has been granted by the sanctioning authority after being satisfied that a case of sanction has been made out. What is required by the learned Magistrate to just see the letter accorded by the sanctioning authority is on record or not? At the stage of cognizance it is beyond the domain and scope of the Magistrate to express or adjudicate the sanction letter. The sanction order may expressly show that the sanctioning authority has perused the material before it and, after consideration of circumstances, has granted sanction for prosecution. The prosecution may prove by adducing the evidence that the material was placed before the sanctioning authority and its satisfaction was arrived at upon perusal of the material placed before it. If the sanctioning authority has perused all the materials placed before it and some of them have not been proved, that would not vitiate the order of sanction.

23. The adequacy of material placed before the sanctioning authority cannot be gone into by the court, as it does not sit in appeal over the sanction order. An order of sanction should not be construed in a pedantic manner and there should not be a hypertechnical approach to test its validity. When there is an order of sanction by the competent authority indicating application of mind, the same should not be lightly dealt with. The flimsy technicalities cannot be allowed to become tools in the hands of an accused. [*State of Maharashtra v. Mahesh G. Jain, (2014) 1 SCC (Crl) 515*].

24. Learned counsel for the applicant relying upon the judgment of Hon'ble Apex Court in the case of ***Nanjappa v. State of Karnataka, AIR 2015 SC 3060,*** has drawn attention of the Court to its para 15, quoted herein below :

"15. The legal position regarding the importance of sanction under Section 19 of the Prevention of Corruption is thus much too clear to admit equivocation. The statute forbids taking of cognizance by the Court against a public servant except with the previous sanction of an authority competent to grant such sanction in terms of clauses (a), (b) and (c) to Section 19(1). The question regarding validity of such sanction can be raised at any stage of the proceedings. The competence of the court trying the accused so much depends upon the existence of a valid sanction. In case the sanction is found to be invalid the court can discharge the accused relegating the parties to a stage where the competent authority may grant a fresh sanction for prosecution in accordance with law. If the trial Court proceeds, despite the invalidity attached to the sanction order, the same shall be deemed to be non-est in the eyes of law and shall not forbid a second trial for the same offences, upon grant of a valid sanction for such prosecution."

25. On this, it was argued by learned counsel for the applicant that the learned Magistrate has committed serious legal fallacy in taking the cognizance of the offences and accepting the sanction dated 22.6.2017, which in fact sanction was granted by the Govt. of U.P. in its third attempt, and moreover, this precise focal issue is involved in the pending Crl. Misc. Writ Petition No.5877 of 2021, and

therefore, if the trial is allowed to proceed, the entire prosecution against the applicant should be construed as tainted one and deemed to be non-est in the eyes of law.

26. Mr. Faraz Kazmi, learned counsel representing the State, has drawn attention of the Court to Section 19(3) of the Act and produced a judgment decided by the High Court of Punjab and Haryana at Chandigarh in the case of ***Vijay Kumar Janjua vs. State of Punjab and another in CWP No.10055 of 2010 decided on 24.01.2014.*** In this judgment, reliance has been placed on a judgment of Hon'ble Apex Court in the case of ***Dinesh Kumar v. Chairman, Airport Authority of India and another, (2011) 4 SCC 402*** where after referring the judgment of ***Prakash Singh Badal and another v. State of Punjab and others, (2007) 1 SCC,*** it has been opined that there is difference between absence of sanction and validity of sanction. The issue regarding absence of sanction can be raised at the inception by the aggrieved person, however, where the sanction order exists, the issue regarding its validity has to be raised only during course of trial. Relevant paragraphs of Dinesh Kumar's case *(supra)* are being extracted herein below :

"10. The provisions contained in Section 19(1),(2),(3) and (4) of the P.C. Act came up for consideration before this Court in Parkash Singh Badal and another5. In paras 47 and 48 of the judgment, the Court held as follows:

"47: The sanctioning authority is not required to separately specify each of the offences against the accused public servant. This is required to be done at the stage of framing of charge. Law requires that before the sanctioning authority materials must be placed so that the sanctioning authority can apply his mind and take a decision. Whether there is an application of mind or not would depend on the facts and circumstances of each case and there cannot be any generalised guidelines in that regard.

48: The sanction in the instant case related to the offences relatable to the Act. There is a distinction between the absence of sanction and the alleged invalidity on account of non-application of mind. The former question can be agitated at the threshold but the latter is a question which has to be raised during trial."

11. While drawing a distinction between the absence of sanction and invalidity of the sanction, this Court in Parkash Singh Badal expressed in no uncertain terms that the absence of sanction could be raised at the inception and threshold by an aggrieved person. However, where sanction order exists, but its legality and validity is put in question, such issue has to be raised in the course of trial. Of course, in Parkash Singh Badal, this Court referred to invalidity of sanction on account of non- application of mind. In our view, invalidity of sanction where sanction order exists, can be raised on diverse grounds like non-availability of material before the sanctioning authority or bias of the sanctioning authority or the order of sanction having been passed by an authority not authorised or competent to grant such sanction. The above grounds are only illustrative and not exhaustive. All such grounds of invalidity or illegality of sanction would fall in the same category like the ground of invalidity of sanction on account of non-application of mind - a category carved out by this Court in Parkash Singh Badal, the challenge to which can always be raised in the course of trial."

27. In the case of ***C.B.I. v. Ashok Kumar Aggarwal, (2015) 1 SCC (Cri) 344,***

the Hon'ble Supreme Court further clarified that Section 19(3) of the 1988 Act puts a complete embargo on the court to grant stay of trial/proceedings. The court must examine as to whether the issue raised regarding tainted sanction has resulted into "failure of justice"? It is actually "failure of justice" in the true sense and import or whether it is only a camouflage argument. The expression "failure of justice" is an extremely pliable or facile an expression which can be made to fit into any case. The court must endeavour to find out the truth. There would be "failure of justice" not only by unjust conviction but also by acquittal of the guilty as a result of unjust or negligent failure to produce requisite evidence. Of course, the rights of the accused have to be kept in mind and safeguarded but they should not be over emphasised to the extent of forgetting that the victims also have certain rights. It has to be shown that the accused has suffered some disability or detriment in the protections available to him under Indian Criminal Jurisprudence. "Prejudice' is incapable of being interpreted in its generic sense and applied to criminal jurisprudence. The plea of prejudice has to be in relation to investigation or trial and not matters falling beyond their scope. Once the accused is able to show that there has been serious prejudice caused to him with respect to either of these aspects, and that the same has defeated the rights available to him under legal jurisprudence, the accused can seek relief from the Court. The "failure of justice' would be relatable to error, omission or irregularity in the grant of sanction. However, a mere error, omission or irregularity in sanction is not considered to be fatal unless it has resulted in the "failure of justice' or has been occasioned thereby. As mentioned above, the Court has dealt with the concept of "failure of justice' in an elaborate way in the light of the observations made in case of C.B.I. vs. Ashok Kumar Aggarwal *(supra)*. In continuation of the same the expression "failure of justice" would appear, sometimes, as an etymological chameleon (the simile is borrowed from Lord Diplock in ***Town Investments Ltd. v. Deptt. of Environment, (1977) 1 All ER 813.***

28. In a recent judgment the Hon'ble Apex Court in the case of ***Girish Kumar Suneja vs C.B.I.*** in Criminal Appeal No.1137 of 2017 decided on 13.7.2017, it has been held that :

"64. A reading of Section 19(3) of the PC Act indicates that it deals with three situations: (i) Sub-clause (a) deals a situation where a final judgment and sentence has been delivered by the Special Judge. We are not concerned with this situation. (ii) Sub-clause (b) deals with a stay of proceedings under the PC Act in the event of any error, omission or irregularity in the grant of sanction by the concerned authority to prosecute the accused person. It is made clear that no court shall grant a stay of proceedings on such a ground except if the court is satisfied that the error, omission or irregularity has resulted in a failure of justice - then and only then can the court grant a stay of proceedings under the PC Act. (iii) Sub-clause (c) provides for a blanket prohibition against a stay of proceedings under the PC Act even if there is a failure of justice [subject of course to sub-clause (b)]. It mandates that no court shall stay proceedings "on any other ground" that is to say any ground other than a ground relatable to the error, omission or irregularity in the sanction resulting in a failure of justice.

65. A conjoint reading of sub-clause (b) and sub-clause (c) of Section

19(3) of the PC Act makes it is clear that a stay of proceedings could be granted only and only if there is an error, omission or irregularity in the sanction granted for a prosecution and that error, omission or irregularity has resulted in a failure of justice. There is no other situation that is Crl. Appeal Nos._____/2017 etc. (@ SLP (Crl.) Nos. 9503/2016 etc.) contemplated for the grant of a stay of proceedings under the PC Act on any other ground whatsoever, even if there is a failure of justice. Clause (c) additionally mandates a prohibition on the exercise of revision jurisdiction in respect of any interlocutory order passed in any trial such as those that we have already referred to. In our opinion, the provisions of clauses (b) and (c) of Section 19(3) of the PC Act read together are quite clear and do not admit of any ambiguity or the need for any further interpretation.

66. Sub-section (4) of Section 19 of the PC Act is also important in this context inasmuch as the time lapse in challenging an error, omission or irregularity in the sanction resulting in a failure of justice is of considerable significance. Unless the challenge is made at the initial stages of a trial and within a reasonable period of time, the court would not be obliged to consider the absence of, or any error, omission or irregularity in the sanction for prosecution. Therefore, it is not as if the accused can, after an unreasonable delay, raise an issue about the sanction; but if that accused does so, the court may not decide that issue both at the appellate stage as well as for the purposes of stay of the proceedings."

29. In yet another judgment in the case of ***State of Bihar vs. Rajmangal Ram, AIR 2014 SC 1674***, the Hon'ble Apex Court has observed that in a situation where any error, omission or irregularity in the sanction, which would also include the competence of the authority to grant sanction, does not vitiate the eventual conclusion in the trial including the conviction and sentence, unless of course a "failure of justice' has occurred, it is difficult to see how at the intermediary stage a criminal prosecution can be nullified or interdicted on account of any such error, omission or irregularity in the sanction order without arriving at the satisfaction that a "failure of justice' has also been occasioned.

30. In the entire submission Shri Tiwari, learned Senior Advocate has hammered his submission that since the subject matter of the third sanction dated 22.6.2017 is on target of Crl. Misc. Writ Petition No.5877 of 2021, and yet to see its final day and on the other hand if the trial is permitted to proceed, a serious prejudice would be caused to the applicant. Not a single word was whispered by him as to what would amount the "failure of justice' to the applicant, if the trial is permitted to proceed. In the recent judgment in the case of ***State of Maharashtra vs Mahesh G. Jain (2014) 1 SCC (Cri) 515***, the Division Bench of this Hon'ble Apex Court while dealing with such issues, has opined :

"In these kind of matters there has to be reflection of promptitude, abhorrence for procrastination, real understanding of the law and to further remain alive to differentiate between hyper-technical contentions and the acceptable legal proponements. While sanctity attached to an order of sanction should never be forgotten but simultaneously the rampant competition in the society has to be kept in view. The Court is concious of the fact that how frequent adjournments

are sought in a maladroit manner to linger the trial and how at every stage ingenious efforts are made to assail every interim order. It is the duty of the Court that the matters are appropriately delt with on the proper understanding of the law. Minor irregularities or technicalities are not to be given Everestine Status. It should be borne in mind that historically corruption is a disquiet disease for healthy governance. It has potentiality to stifle the progress of a civilized society. It ushers in an atmosphere of distrust. Corruption fundamentally is perversion and infectious and an individual perversity can become a social evil."

31. The Court has occasion to peruse Section 4(4) of the Prevention of Corruption Act, 1988 which reads thus :

"(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, the trial of an offence shall be held, as far as practicable, on day-to-day basis and an endeavour shall be made to ensure that the said trial is concluded within a period of two years:

Provided that where the trial is not concluded within the said period, the special Judge shall record the reasons for not having done so:

Provided further that the said period may be extended by such further period, for reasons to be recorded in writing but not exceeding six months at a time; so, however, that the said period together with such extended period shall not exceed ordinarily four years in aggregate."

32. Coupled with the provisions of Section 19(3) of the Act where there is specific embargo for granting any stay order on the ground of any error, omission or irregularity in the sanction granted by the authority, unless it has resulted into failure of justice.

33. Learned counsel for the applicant has miserably failed to bring on record even a single instance regarding "failure of justice" having been occasioned to the appellant. It is not a case of absence of sanction, but in this case sanction has been granted vide order dated 22.6.2017 and same is subject matter of challenge in writ jurisdiction. The authenticity or validity of this sanction could be adjudged either by the Division Bench in writ petition or at the stage of the trial, but there could not be any good reason to stall the proceedings of the case or vitiate the cognizance order in absence of any material on record which may result into "failure of justice" to the applicant. More particularly, when the legislature in its wisdom by its Section 4(4) of the Act has given a time bound period to conclude the trial of the case within a period of two years (four years maximum), stay of the proceedings would amount a luxury in favour of applicant.

34. Admittedly, this F.I.R. is of 2014 and the charge sheet was submitted on 27.11.2014, meaning thereby, about seven years have already been elapsed and only charges have been framed as yet. Under the circumstances, I am not inclined to exercise my inherent powers u/s 482 of Cr.P.C. to quash the summoning order or charge-sheet or the entire proceeding of Special Case No.12 of 2014 (State vs Dr. Abhai Ranjan), arising out of Case Crime No.455 of 2014, u/s 7/13(1)(d) r/w Section 13(2) of the Prevention of Corruption Act, P.S.-Mundha Pandey, District Moradabad, pending

before Special Judge (Prevention of Corruption Act), Court No.2, Bareilly.

35. It is expected from the court concerned that the provisions of Section 4 (4) of the Prevention of Corruption Act has to be kept in mind and suitable endeavour has to be made by the trial court to conclude the trial within the time specified therein.

36. The application stands DISMISSED being devoid of merit.

37. The Registrar (Compliance) is directed to transmit the copy of this order to the trial court concerned within a week positively.

(2022)01ILR A274
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.12.2021

BEFORE

THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Writ C No. 2582 of 2014

Manager L.I.C. of India, Basti ...Petitioner
Versus
Permanent Lok Adalat, Basti & Anr. ...Respondents

Counsel for the Petitioner:
Sri Manish Goyal, Ms. Anjali Goklani

Counsel for the Respondents:
Sri Uma Nath Pandey, Sri S.R. Dubey, Sri Manan Kumar Chaubey

क. विधिक सेवा प्राधिकरण अधिनियम, 1987 – धारा 22ग, उपधारा (3) व (4) – स्थायी लोक अदालत का क्षेत्राधिकार – बिना सौहार्द्रपूर्ण समझौते का प्रयास किए निर्णय लिया गया – पंचाट में समझौता के प्रयास के संबंध में कोई उल्लेख नहीं – पंचाट/विनि चय की वैधानिकता को चुनौती दी गई – अभिनिर्धारित किया गया, स्थायी लोक अदालत को सर्वप्रथम पक्षकारों को सौहार्द्रपूर्ण समझौते पर पहुंचाने के लिए अपनी बुद्धिमत्ता, ज्ञान व अनुभव का उपयोग करके प्रयास करना चाहिए, जो उसका सर्वप्रथम कर्तव्य है। इस प्रयास में असफल होने के उपरान्त ही विवाद का विनि चय करना चाहिए – हाईकोर्ट ने आक्षेपित पंचाट को अवैध एवं दूशित घोशित करते हुए निरस्त किया। {पैरा 6 (ज), 6(झ) एवं 7}

ख. विधिक सेवा प्राधिकरण अधिनियम, 1987 – धारा 20 व 22ग – लोक अदालत व स्थायी लोक अदालत की निर्णय प्रक्रिया में बुनियादी अन्तर – स्थायी लोक अदालत का क्षेत्राधिकार – अभिनिर्धारित किया गया, जहां लोक अदालत पक्षकारों के बीच समझौता या परिनिर्धारण करने का प्रयास करेगा और यदि ऐसा न हो पाये तो वाद विधि के अनुसार निपटाने के लिए लौटा दिया जाएगा, परन्तु अधिनियम की धारा 22ग के अनुसार स्थायी लोक अदालत मामलों का संज्ञान लेने के उपरान्त सर्वप्रथम पक्षकारों के बीच सुलह कार्यवाही करेगी और स्वतंत्र और निश्पक्ष रीति से सौहार्दपूर्ण समझौते पर पहुंचने के लिए, पक्षकारों के प्रयास में सहायता करेगी। यदि पक्षकार किसी करार पर पहुंचने में असफल रहते हैं और यदि विवाद किसी अपराध से संबंधित नहीं है, उस द ा में ही स्थायी लोक अदालत विवाद का विनि चय कर सकती है। {पैरा 6 (ख)}

रिट याचिका आंकि रूप से स्वीकृत. (E-1)

<u>उल्लेखित पूर्व निर्णयों की सूची:–</u>

1. उत्तर प्रदे ा राज्य बनाम श्रीमती कामिनी देवी व अन्य; 2017 (9) ए.डी.जे. 44

2. रिट सी नं0 – 34170 वर्श 2012; ने ानल इं योरेन्स कं0 लि0 बनाम स्थाई लोक अदालत निर्णय तिथि 02.05.2014

3. लाइफ इं योरेन्स कॉरपोरे ान ऑफ इंडिया बनाम सैयद जैइघम व अन्य ; 2015 (8) ए.डी.जे. 668

(Delivered by Hon'ble Saurabh Shyam Shamshery, J.)

1. **<u>विचारार्थ विधिक प्रश्न</u>**

वर्तमान प्रकरण के तथ्य व परिस्थितियों के संदर्भ में एक महत्वपूर्ण विधिक प्रश्न, इस न्यायालय के समक्ष विचार के लिए उत्पन्न होता है कि-

विधिक सेवा प्राधिकरण अधिनियम 1987 के अध्याय 6क (मुकदमा पूर्व सुलह और समझौता) की धारा 22 ग व उपधारा (1) से (7) के अंतर्गत 'स्थायी लोक अदालत' द्वारा 'पूर्वोक्त सुलह कार्यवाहियों' की सहायता से 'सौहार्द्र पूर्ण समझौते' पर पहुँचने के लिये युक्तियुक्त प्रयास करना क्या आवश्यक है तथा उक्त प्रयास असफल होने की स्थिति में 'विवाद का विनिश्चय' (उपधारा (8)) करने के पूर्व उक्त कार्यवाही का संक्षेप में उल्लेख करना भी क्या आवश्यक है, तथा ऐसा न होने के कारणमात्र से क्या उद्घोषित 'पंचाट' अवैधानिक हो जायेगा?

2. **<u>प्रकरण का तथ्यात्मक प्रारुप</u>**

(क) विपक्षी संख्या 2 ने 'हेल्थ प्लस योजना' के अंतर्गत स्वास्थ सुरक्षा हेतु, याची (भारतीय जीवन बीमा निगम) से 25.3.2018 (बीमा पॉलिसी संख्या 294568688) को कराया था। जिसके अंतर्गत, विपक्षी संख्या 2, उसकी पत्नी प्रमिला त्रिपाठी और एक बच्चे का स्वास्थ्य संबंधित बीमा हुआ था।

(ख) विपक्षी सं0 2 ने अपनी पत्नी को अपोलो अस्पताल, दिल्ली में उपचार हेतु भर्ती कराया, जिसका 6.9.2011 को शल्योपचार हुआ तथा वो 11.9.2011 को अस्पताल से उन्मोचित हुई। विपक्षी सं0 2, ने याची से अपनी पत्नी की अस्पताल में हुए खर्चों (तीन लाख चौसठ हजार अठहत्तर रुपये) का दावा किया, परन्तु बीमा निगम ने वो दावा, दिनांक 9.3.2012 के पत्रक द्वारा अस्वीकार कर दिया, कि वो दावा बीमा नीति (पॉलिसी) के अंतर्गत नहीं था, क्योंकि नीति (पॉलिसी) के शुरु होने के बहुत साल पहले से ही विपक्षी सं0 2 की पत्नी उक्त बीमारी (मोटापे) से पूर्व ग्रसित थी।

(ग) विपक्षी सं0 2, ने स्थायी लोक अदालत, के समक्ष एक आवेदन दिनांक 14.6.2013 को प्रस्तुत किया तथा उपरोक्त तथ्यों का वर्णन करते हुए रु0 364678/- तथा ब्याज की मांग की तथा कथन किया कि उसका दावा असंगत आधारों पर निरस्त किया गया था तथा नीति (पालिसी) की शर्तों का खुला उल्लंघन भी किया गया था।

(घ) उपरोक्त आवेदन का विरोध करते हुए याची, द्वारा लिखित उत्तर दिनांक 27.7.2013 को दिया गया कि, विपक्षी सं0 2 ने अपनी पत्नी के 12 वर्षों से वजन बढ़ने की बात व उसके लिए दवा लेने व उपचार कराने की बात नीति (पॉलिसी) लेते समय छिपायी, अतः बीमा धारक की बीमारी (वजन बढ़ने की) नीति (पॉलिसी) लेने के पूर्व की होने के कारण, दावा देय नहीं हो सकता था। 29.8.2011 को उनका वजन 115 किलो ग्राम था, जैसा डाक्टर कृपलानी से अपने पर्चे पर लिखा था, परन्तु बीमा लेते हुए उसका वजन मात्र 58 कि0ग्रा0 दिखाया गया, जो पूर्णतः गलत था।

(ङ) स्थायी लोक अदालत ने आक्षेपित पंचाट दिनांक 22.10.2013 द्वारा विपक्षी सं0 2 की याचिका स्वीकार की व निम्न आदेश पारित किया-

"याचिका स्वीकार की जाती है। याची के पक्ष में और विपक्षी के विरुद्ध रु0 3,64,678.04/- (तीन लाख चौसठ हजार छः सौ अठहत्तर रुपये चार पैसे मात्र) तथा उस पर याचिका प्रस्तुत करने की तिथि से 10 प्रतिशत प्रतिवर्ष की दर से ब्याज की भी वसूली आज्ञप्त की जाती है अलावा इसके वाद व्यय और वकील फीस के मद में रु0 5,000-00 (पांच हजार मात्र)

भी याची, विपक्षी से पाने का अधिकारी है। आज्ञप्त धनराशि इस आदेश के दो माह के अन्दर अदा न होने पर पूरी आज्ञप्त धनराशि पर वसूली की तिथि तक याची को उक्त दर से ब्याज भी देय होगा।"

(च) स्थाई लोक अदालत ने यह भी निर्धारित किया कि-

"बीमित व्यक्ति सुश्री प्रमिला त्रिपाठी की अपोलो अस्पताल में जो जांच और इलाज हुआ उससे सम्बन्धित डिस्चार्ज समरी (Discharge Summary) (उन्मोचन संक्षेपण) 19ग/18 के अवलोकन से यह स्पष्ट होता है कि निदान (Diagnosis) में वजन आदि का साक्ष्य, प्रारम्भिक लक्षण Morbid Obestity अवश्य अंकित है किन्तु (Endoscopy) के उपरान्त यह स्पष्ट हुआ था कि सुश्री प्रमिला त्रिपाठी का जिस बीमारी हेतु आपरेशन किया गया था वह या (Antral gastritis) तथा (erosive duodenitis) यानी गैस सम्बन्धी बीमारी और छोटी आंत में क्षरण और इसी कारण आपरेशन हुआ था और यह बीमारी बीमा लेने के समय अस्तित्व में होने की साक्ष्य तो है ही नहीं, कथन तक नहीं है।

इस प्रकार विपक्षी बीमा कम्पनी के बचाव प्रकरण का एक मात्र आधार कि बीमित व्यक्ति सुश्री प्रमिला त्रिपाठी लेने के समय अस्वस्थ मोटापा जैसी बीमारी से ग्रसित थी जिसे उसने छिपाया। अतः उपरि उल्लिखित बीमा शर्तों के अनुसार उसका दावा सकारण और वैध रुप से खण्डित किया गया, पूरी तरह धराशयी हो जाता है। परिणाम में अदालत की राय में याचिका स्वीकार एवं आज्ञप्त किए जाने योग्य है।"

3. **<u>याचीकर्ता का पक्ष</u>**

(क) याची (भारतीय जीवन बीमा निगम) का पक्ष उसकी विद्वान अधिवक्ता, सुश्री अंजली गोकलानी, ने प्रबल पूर्वक इस न्यायालय के समक्ष रखा। उन्होनें तर्क प्रस्तुत किया कि 'स्थायी लोक अदालत' ने विधिक सेवा प्राधिकरण अधिनियम 1987 की धारा 22 ग, की उपधारा 4, 5, 6, व 7 के विभिन्न प्रावधानों का साक्षर परिपालन किये बिना ही विवाद का विनिश्चय, गुण-दोष पर करके, आक्षेपित पंचाट पारित कर दिया, जिसके कारण आक्षेपित पंचाट न केवल न्याय विरुद्ध है, परन्तु विधिक सेवा प्राधिकरण अधिनियम 1987 के उद्देश्य व इस विधि के निर्माण के कारणों के विरुद्ध भी है।

(ख) विद्वान अधिवक्ता ने आगे कथन किया कि, आक्षेपित पंचाट में किसी भी स्तर पर यह उल्लेखित नहीं किया गया है कि, स्थायी लोक अदालत ने पक्षकारों के बीच सुलह कार्यवाही की कोई रीति ही अपनाई हो या पक्षकारों के विवाद को सौहार्द्रपूर्ण समझौते पर पहुँचाने के लिये कोई प्रयास ही किया हो। पंचाट में किसी भी स्थान पर यह भी उल्लेखित नहीं है कि, पक्षकार किसी करार पर पहुँचने में असफल रहने के कारण, स्थाई लोक अदालत ने विवाद का विनिश्चय गुण-दोष पर करके पंचाट की घोषणा की। अतः आक्षेपित न्याय संगत न होने के कारण निरस्त किये जाने योग्य है।

4. **<u>विपक्षी संख्या 2 का पक्ष</u>**

(क) विपक्षी सं0 2 (वादी) का पक्ष उसके विद्वान अधिवक्ता श्री मनन कुमार चौबे ने रखा। उन्होंने उपरोक्त तर्क व कथन का विरोध किया और कहा कि स्थाई लोक अदालत ने पक्षकारों के मध्य समझौते कराने के प्रयास किये थे तथा इस नाते 26.8.2013 को तिथि निर्धारित भी की थी, जैसा पंचाट में उल्लेखित भी है, परन्तु याचिकाकर्ता (बीमा निगम) ने इस प्रक्रिया के प्रति कोई दिलचस्पी नहीं दिखाई व कोई प्रयास करने की कोशिश भी नहीं की। अतः यह कथन करना कि स्थाई लोक अदालत ने पक्षकारों के मध्य विवाद की सुलह कराने का कोई प्रयास नहीं किया, पूर्ण गलत है। विद्वान अधिवक्ता ने अपने कथन के समर्थन में प्रतिउत्तर के प्रस्तर

20 पर इस न्यायालय का ध्यान आकर्षित करवाया।

(ख) प्रतिवादी के विद्वान अधिवक्ता ने यह भी कथन किया कि एक तरफ बीमा निगम ने समझौते के लिए कोई प्रयास नहीं किया और दूसरी तरफ पंचाट की कार्यवाही में इस विरोध को पंचो के समक्ष उठाया भी नहीं, अतः वो अब यह तर्क नहीं ले सकते हैं। बीमा निगम के अधिवक्ता ने बहस के दौरान भी यह मुद्दा पंचो के समक्ष नहीं रखा था। विधिक सेवा प्राधिकरण अधिनियम की धारा 22 ग व उसकी उपधारा 2 लगात 7 में यह कहीं भी उल्लेखित नहीं है कि अगर पक्षकार किसी करार में पहुँचने में असफल होते है तो उस तथ्य का उल्लेख स्पष्ट रुप से पंचाट में होना आवश्यक है। अगर पक्षकारों द्वारा पंचाट की कार्यवाही के दौरान ऐसा विरोध न किया गया हो, तो यह मानना चाहिये कि स्थाई लोक अदालत ने आपसी सुलह के प्रयास अवश्य किये होंगे। याचिका कर्ता के पास गुण-दोष पर पंचाट का विरोध करने का कोई युक्ति युक्त कारण न होने के कारण वो, पंचाट का तकनीकी विरोध इस आधार पर कर रहें। जो विधि विरुद्ध हैं।

5. पक्षों के विद्वान अधिवक्ताओं को सुना व पत्रावली के समस्त दस्तावेजों का सम्यक पूर्वक परिशीलन किया।

6. **<u>विश्लेषण</u>**

(क) वर्तमान प्रकरण में उत्पन्न विधिक प्रश्न, जिसका उल्लेख इस निर्णय के प्रस्तर 1 में किया गया है, उस पर दोनों पक्षों की बहस के मद्देनजर, निर्णय लेने के लिये, सर्वप्रथम विधिक सेवा प्राधिकरण अधिनियम1983, के अधिनियमित करने के उद्देश्य का उल्लेख करना अति आवश्यक है, जो निम्नलिखित है-

"समाज के दुर्बल वर्गों को निःशुल्क और सक्षम विधिक सेवा यह सुनिश्चित करने हेतु उपलब्ध कराने के लिए कि आर्थिक या अन्य निर्योग्यताओं के कारण कोई भी नागिरक न्याय पाने के अवसर से वंचित न रह जाए, विधिक सेवा प्राधिकरणों का गठन करने के लिए और यह सुनिश्चित करने हेतु कि विधिक पद्धति के प्रवर्तन से समान अवसर के आधार पर न्याय का संवधर्न हो, लोक अदालतें संगिठत करने के लिए अधिनियम"

(ख) उपरोक्त उद्देश्य की प्राप्ति के हेतू 'लोक अदालतों के आयोजन' का प्रावधान उक्त अधिनियम के अध्याय 6 में किया गया है। अध्याय 6क, के धारा 22 (ख) की उपधारा (1) में 'स्थायी लोक अदालत' की स्थापना का प्रावधान है। 'लोक अदालत' व 'स्थायी लोक अदालत' में एक महत्वपूर्ण बुनियादी अंतर है। जहाँ लोक अदालत पक्षकारों के बीच समझौता या परिनिर्धारण करने का प्रयास करेगा और यदि ऐसा न हो पाये तो वाद विधि के अनुसार निपटाने के लिये लौटा दिया जायेगा। (देखे उक्त अधिनियम की धारा 20 व उसकी उपधारा) परन्तु उक्त अधिनियम की धारा 22 ग के अनुसार 'स्थायी लोक अदालत' मामलों का संज्ञान लेने के उपरान्त सर्वप्रथम पक्षकारों के बीच सुलह कार्यवाही करेगी और स्वतंत्र और निष्पक्ष रीति से सौहार्द्रपूर्ण समझौते पर पहुँचने के लिए, पक्षकारों के प्रयास में सहायता करेगी। परन्तु यदि पक्षकार किसी करार पर पहुंचने में असफल रहते हैं और यदि विवाद किसी अपराध से संबंधित नहीं है, उस दशा में ही स्थाई लोक अदालत विवाद का विनिश्चय कर सकती है (देखे उक्त अधिनियम की धारा-22 (ख) व उसकी उपधारा)

(ग) सुलभता के लिए विधिक सेवा प्राधिकरण अधिनियम 1983 की धारा 22 ग व उसकी सभी उपधारा निम्न उल्लेखित की जा रही है।

"22 ग. स्थायी लोक अदालत द्वारा मामलों का संज्ञान-

(1) किसी विवाद का कोई पक्षकार, विवाद को किसी न्यायालय के समक्ष लाने से पूर्व, विवाद के निपटारे के लिए स्थायी लोक अदालत को आवेदन कर सकेगा परन्तु स्थायी लोक अदालत को ऐसे अपराध से, जो किसी विधि के अधीन शमनीय नहीं है, संबंधित किसी विषय के संबंध में कोई अधिकारिता नहीं होगी परन्तु यह और कि स्थायी लोक अदालत को ऐसे मामले में भी अधिकारिता नहीं होगी जिसमें वादग्रस्त संपत्ति का मूल्य दस लाख रुपए से अधिक है परन्तु यह भी कि केन्द्रीय सरकार राजपत्र में अधिसूचना द्वारा, केन्द्रीय प्राधिकरण से परामर्श करके दूसरे परंतुक में विनिर्दिष्ट दस लाख रुपए की सीमा को बढ़ा सकेगी।

(2) स्थायी लोक अदालत को उपधारा (1) के अधीन आवेदन किए जाने के पश्चात्, उस आवेदन का कोई पक्षकार उसी विवाद के लिए किसी न्यायालय की अधिकारिता का अवलंब नहीं लेगा।

(3) जहां किसी स्थायी लोक अदालत को उपधारा (1) के अधीन कोई आवेदन किया जाता है वहां वह,-

(क) आवेदन के प्रत्येक पक्षकार को उसके समक्ष लिखित कथन फाइल करने का निर्देश देगी जिसमें आवेदन के अधीन विवाद के तथ्यों और प्रकृति, ऐसे विवाद के मुद्दों या विवाद्यकों और, यथास्थिति, ऐसे मुद्दों या विवाद्यकों के समर्थन में या उसके विरोध में अवलंबित आधारों का कथन होगा और ऐसा पक्षकार ऐसे कथन की अनुपूर्ति में ऐसा कोई दस्तावेज या अन्य साक्ष्य दे सकेगा जिसे ऐसा पक्षकार ऐसे तथ्यों और आधारों के सबूत में समुचित समझता है और ऐसे कथन की एक प्रति ऐसे दस्तावेज या अन्य साक्ष्य, यदि कोई हो, के साथ आवेदन के प्रत्येक पक्षकार को भेजेगी;

(ख) आवेदन के किसी पक्षकार से सुलह कार्यवाहियों के किसी प्रक्रम पर उसके समक्ष अतिरिक्त कथन फाइल करने की अपेक्षा कर सकेगी;

(ग) आवेदन के किसी पक्षकार से, उसे प्राप्त किसी दस्तावेज या कथन को, अन्य पक्षकार को, उसका उत्तर देने के लिए समर्थ बनाने हेतु संसूचित करेगी ।

(4) जब कोई कथन, अतिरिक्त कथन और उत्तर, यदि कोई हो, उपधारा (3) के अधीन स्थायी लोक अदालत के समाधानप्रद रूप में फाइल किया गया है तब वह आवेदन के पक्षकारों के बीच सुलह कार्यवाहियां ऐसी रीति से करेगी जिसे वह विवाद की परिस्थितियों को ध्यान में रखते हुए उचित समझे।

(5) स्थायी लोक अदालत उपधारा (4) के अधीन सुलह कार्यवाहियां करने के दौरान पक्षकारों को विवाद के स्वतंत्र और निष्पक्ष रीति में सौहार्द्रपूर्ण समझौते पर पहुंचने के लिए, उनके प्रयास में सहायता करेगी।

(6) आवेदन के प्रत्येक पक्षकार का यह कर्तव्य होगा कि वह आवेदन से संबंधित विवाद की सुलह कराने में स्थायी लोक अदालत के साथ सद्भावनापूर्वक सहयोग करे और स्थायी लोक अदालत के, उसके समक्ष साक्ष्य और अन्य संबंधित दस्तावेज प्रस्तुत करने के निर्देश का अनुपालन करे।

(7) जब स्थायी लोक अदालत की पूर्वोक्त सुलह कार्यवाहियों में यह राय है कि ऐसी कार्यवाहियों में समझौते के ऐसे तत्व विद्यमान हैं जो पक्षकारों को स्वीकार्य हो सकेंगे, तब वह विवाद के संभाव्य समझौते के निबंधन विरचित कर सकेगी और संबंधित पक्षकार को उनके संप्रेक्षण के लिए देगी और यदि पक्षकार विवाद के समझौते के लिए सहमत हो जाते हैं तो वे समझौता करार पर हस्ताक्षर करेंगे तथा स्थायी लोक अदालत उसके निबंधनानुसार अधिनिर्णय पारित करेगी और उसकी एक-एक प्रति प्रत्येक संबंधित पक्षकार को देगी।

(8) जहां पक्षकार उपधारा (7) के अधीन किसी करार पर पहुंचने में असफल रहते

हैं, वहां यदि विवाद किसी अपराध से संबंधित नहीं है तो स्थायी लोक अदालत, विवाद का विनिश्चय कर देगी।"

(घ) इस उच्च न्यायालय की एक समवर्ती न्यायपीठ ने उत्तर प्रदेश राज्य प्रति श्रीमती कामिनी देवी व अन्य; 2017 (9) ए.डी.जे. 44, के निर्णय में अन्य उच्च न्यायालयों के कई निर्णयों को आधार मानते हुए यह निर्धारित किया कि स्थाई लोक अदालत का यह एक पवित्र कर्तव्य है कि, वो अपनी बुद्धिमत्ता, ज्ञान व अनुभव का सद्प्रयोग करते हुए पक्षकारों के मध्य समझौता करने का भरसक प्रयास करेंगे और ऐसे प्रयासों में असफल होने की दशा में ही विवाद का विनिश्चिय गुण-दोष पर कर सकेंगे। समझौते की प्रक्रिया को किये बिना स्थाई लोक अदालत सीधे गुण-दोष पर निर्णय नहीं दे सकते हैं।

(ङ) इस न्यायालय की एक और समवर्ती न्यायपीठ ने नेशनल इंश्योरेन्स कं0 लि0 प्रति स्थाई लोक अदालत (रिट सी नं0 34170/2012 निर्णय तिथि 02.05.2014) में प्रतिपादित किया है कि-

"वो सभी मामले जो इस न्यायालय के समक्ष आते हैं, निरअपवाद रुप से न्यायालय यह पाया जाता है कि भले ही अधिनियम की धारा-22 ग की उप-धारा (5) और उप-धारा (6), स्थायी लोक अदालत, पर सुलह की कार्यवाही के दौरान समझौता कराने का दायित्व होता है और फिर उप-धारा (7) के संदर्भ में एक राय बनाना होता हैं, कि ऐसी कार्यवाही में समझौते के तत्व मौजूद हैं, जो पक्षकार को स्वीकार्य हो सकते हैं, तो संभावित समझौते के निबन्धन विचरित कर सकते हैं और पक्षकारों से टिप्पणियां आमंत्रित की जा सकती है। लेकिन ऐसा प्रतीत होता है कि स्थायी लोक अदालतें, उक्त वैधानिक प्रावधानों के पुर्णत्य विपरीत में गुण-दोष के आधार पर इस मुद्दे पर निर्णय लेने से पहले केवल "समाधान का प्रयास किया परन्तु विफल रहा" का पाठ कर रही है। इस बारे में कोई सामग्री नहीं है कि यह सुलह कब की गयी, किस तरीके से और किस तरह से समझौते की शर्ते तैयार की गई ताकि संबंधित पक्षों की टिप्पणियां आमंत्रित की जा सकें। यह न तो प्रावधान की भावना है और न ही इसे सार्वजनिक उपयोगिता सेवा प्रदाता में शामिल करने के लिए एक छल के रुप में इस्तेमाल किया जा सकता है। यह कोई औपचारिकता नहीं है, जिसे यंत्रवत् रुप से निर्वहन किया जाना है। पत्रावली से यह प्रतिबिंबित होना चाहिए कि एक संभावित समझौते तक पहुँचने के लिये, एक प्रस्तावित समझौता बनाने के लिए वास्तविक और ईमानदार प्रयास किये गये थे और केवल जब प्रस्तावित समझौते को वांछित प्रतिक्रिया नहीं मिलती है, तब ही स्थायी लोक अदालत को गुण-दोष के आधार पर निर्णय लेने के लिये आगे बढ़ना चाहिए।" (अनुवाद न्यायालय द्वारा किया गया है)

(च) इसके अतिरिक्त एक और समवर्ती न्यायपीठ द्वारा लाइफ इंश्योरेन्स कॉरपोरेशन ऑफ इंडिया प्रति सैयद जैइघम व अन्य; 2015 (8) एडीजे 668, के मामले में इस संदर्भ में स्थाई लोक अदालतों को कुछ दिशा निर्देश भी दिये गये थे, परन्तु ऐसा प्रतीत होता है कि वो दिशा निर्देश स्थाई लोक अदालतों द्वारा पूर्ण रुप से अपनाये नहीं जा रहे हैं। प्रमुख निर्देश हैं कि

"स्थाई लोक अदालत का मुख्य कार्य परिनिधारण कराना है परन्तु पक्षकार जब किसी करार तक नहीं पहुँच पाते हैं तब स्थाई लोक अदालत न्याय निर्णायक निकाय में रुपान्तरित हो जाता है" तथा "स्थाई लोक अदालत को विवाद के पक्षकारों को यह धारणा नहीं बनाने देना चाहिये कि, आरम्भ से ही उसका कार्य न्याय निर्णायक का है" (अनुवाद न्यायालय द्वारा किया गया है)

(छ) जैसा कि उक्त अधिनियम की धारा 22 ग की उपधारा 3 व 4 में वर्णित है, कि पक्षकारों

के लिखित कथन व विवाद के मुद्दों के विवाधकों को ध्यान में रखते हुए, पक्षकारों की बीच स्थाई लोक अदालत, सुलह कार्यवाहियां द्वारा पक्षकारों को विवाद के स्वंतत्र और निष्पक्ष रीति में सौहार्द्रपूर्ण समझौते पर पहुँचने के लिए उनके प्रयास में सहायता करेगी। अतः यह आवश्यक है कि स्थाई लोक अदालत, उक्त प्रयासों का संक्षेप में अपने आदेश में उल्लेख करे क्योंकि उपधारा (8) के अनुसार यदि पक्षकार किसी करार पर पहुँचने से असफल रहते हैं, उस दशा में ही, स्थायी लोक अदालत विवाद का विनिश्चय कर सकती हैं (यदि विवाद किसी अपराध से संबंधित नहीं है)। उपधारा (8) तक की स्थिति तक पहुँचने से पहले उपधारा (3), (4), (5) व (6) में किये गये प्रयास व उपधारा (7) में समझौते पर न पहुँचने की स्थिति के उपरान्त ही, स्थाई लोक अदालत, उपधारा (8) के अन्तर्गत गुण-दोष पर निर्णय ले सकती है। अतः उक्त कार्यवाही का उल्लेख, संक्षिप्त में ही सही, परन्तु अवश्य होना चाहिये।

(ज) उपरोक्त विश्लेषण से यह पूर्णतः विदित होता है कि, स्थाई लोक अदालत, को सर्वप्रथम पक्षकारों को सौहार्द्रपूर्ण समझौते पर पहुँचाने के लिये अपनी बुद्धिमत्ता, ज्ञान व अनुभव का उपयोग करके प्रयास करना चाहिए। जो उसका सर्वप्रथम कर्तव्य है। इस प्रयास में असफल होने के उपरान्त ही विवाद का विनिश्चय करना चाहिये। परन्तु उपरोक्त कार्यवाहियों का उल्लेख (संक्षेप में) पंचाट में अवश्य होना चाहिए, जिसमें उसके द्वारा विवाद का विनिश्चय करने का कारण पता चल सके। ऐसा उल्लेखित न होने से यह प्रतीत होगा कि स्थाई लोक अदालत, द्वारा पक्षकारों के बीच समझौता कराने का कोई प्रयास नहीं किया गया, जो उक्त अधिनियम के प्रावधानों का हनन करने के समकक्ष होगा। अतः ऐसी दशा में 'पंचाट' विधिक रुप से मान्य नहीं माना जायेगा। प्रकरण में उत्पन्न विधिक प्रश्न का निर्धारण उपरोक्त वर्णन द्वारा किया जाता है।

(झ) वर्तमान प्रकरण में पंचाट में समझौते के प्रयास के संबंध में कोई उल्लेख नहीं किया गया है, केवल एक स्थान पर समझौते के लिए तारीख निर्धारित की गयी, ऐसा उल्लेखित है, परन्तु उक्त तारीख पर क्या प्रयास किये गये व क्यों पक्षकार समझौता नहीं कर पाये, ऐसा कुछ भी नहीं लिखा गया है। अतः यह प्रतीत होता है 'स्थाई लोक अदालत' ने सौहार्द्रपूर्ण समझौते के लिए कोई भी प्रयास नहीं किया होगा या युक्ति युक्त प्रयास की कमी रही होगी तथा वो सीधे विवाद में विनिश्चय की स्थिति पर पहुँच गये जो, उपरोक्त विश्लेषण के पूर्णतः विपरीत है। अतः आक्षेपित पंचाट इसी कारणवश, अविधिक व दूषित हो जाता है। क्यों कि यह न्यायालय इस निष्कर्ष पर पहुँचता है कि स्थाई लोक अदालत द्वारा समझौते की प्रक्रिया का प्रयास किये बिना विवाद पर गुण-दोष पर निर्णय देना अवैधानिक है, अतः इस स्तर पर पंचाट की गुण-दोष पर जाँच करने की आवश्यकता नहीं है।

7. **<u>निष्कर्ष</u>**

उपरोक्त विश्लेषण के फलस्वरुप, आक्षेपित 'पंचाट' निरस्त किया जाता है तथा वाद 'स्थाई लोक अदालत' को प्रतिप्रेषित किया जाता है और निर्देशित किया जाता है कि वो समझौता कराने की प्रक्रिया को अपना कर पक्षकारों के मध्य सुलह कराने का युक्तियुक्त प्रयास करेगी व उसके असफल होने के उपरांत ही वाद का गुण-दोष पर विनिश्चय करेगी तथा समझौते के प्रयास असफल होने का संक्षेप में उल्लेख पंचाट में भी करेगी। उपरोक्त निर्देश के साथ यह याचिका आंशिक रुप से स्वीकार की जाती है।

(2022)01ILR A280
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.12.2021

BEFORE

THE HON'BLE JAYANT BANERJI, J.

Writ C No. 7012 of 2016

Sone Lal Kushwaha ...Petitioner
Versus
Presiding Officer Labour Court-III, U.P. Kanpur & Anr. ...Respondents

Counsel for the Petitioner:
Sri Mukesh Kumar Kushwaha, Sri Bhupendra Nath Singh, Mahima Maurya Kushwaha, Sri Nar Singh Narayan Verma, Sri Pramendra Pratap Singh, Sri Devendra Pratap Singh, Sri A.P. Singh, Sri Abhishek Pandey

Counsel for the Respondents:
C.S.C., Sri Anoop Trivedi, Sri Shashi Shekhar Mishra

A. Labour law – U.P. Industrial Disputes Act, 1947 – Section 4-K & 6-H (1) – Adjudication – Ex-parte Award in favour of workman was passed and published – An application u/s 6-H (1) was also allowed and recovery certification was issued – Satisfaction with regard to adequacy of service was recorded in the award – Subsequently, Labour Court allowed the application of the employer to recall the recovery certificate – Validity challenged – No application to set aside the ex-parte award – Effect – Held, the award is not a nullity inasmuch as the employer was afforded an opportunity to represent its case before the Labour Court by due service of notice – It was, however, open to the employer to press for setting aside the exparte award where it could have demonstrated that sufficient cause preventing it from appearing during the course of the adjudication. (Para 12)

B. Labour law – Adjudication – Ex-parte Award – Absence of defendant – Sufficient cause – Principle laid down – Held, the test that has to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called on for hearing and did his best to do so – The sufficient cause is a cause for which defendant could not be blamed for his absence – The sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straitjacket formula of universal application – Parimal's case is followed. (Para 14)

Writ petition allowed. (E-1)

List of Cases cited :-

1. M/s Haryana Suraj Malting Ltd. Vs Phool Chand; (2018) 16 SCC 567

2. IA No. 6993 of 2004 in Cs(OS) 87 of 1995; Jai Gopal Goyal & anr.Vs Bishen Dayal Goyal decided on 30.4.2007

3. Civil Application No. 19 of 2018 in Second Appeal ST No. 22803 of 2017; Kanta alias Shanti Vs Manjulabai @ Kholki decided on 18.6.2019

4. Grindlays Bank Ltd. Vs Central Government Industrial Tribunal & ors.; 1980 (Supp) SCC 420

5. Parimal Vs Veena @ Bharti; 2011 (3) SCC 545

(Delivered by Hon'ble Jayant Benerji, J.)

1. Heard Sri Devendra Pratap Singh and Pramendra Singh, learned counsel for the petitioner and Sri Shashi Shekhar Mishra, learned counsel appearing for respondent no.2, Kanpur Development Authority, Kanpur.

2. By means of this writ petition, quashing of order dated 29.1.2016, passed by respondent no. 1, Presiding Officer, Labour-III, U.P. Kanpur passed on paper No. 16/D and 19/D in Adjudication Case No. 35 of 2013 has been sought.

3. Facts as stated in the petition are that the petitioner raised an industrial dispute against his termination before the State Government and that was referred for adjudication to the Labour Court, Kanpur by means of a reference under Section 4K of the U.P. Industrial Disputes Act, 19471. After registration of the case as Adjudication Case No. 35 of 2013, notices

were issued to the parties. A written statement was filed by the petitioner on 25.5.2013 but, despite notice, neither was any appearance put by the Kanpur Development Authority before the Labour Court nor was any written statement filed. Accordingly, proceedings took place exparte that culminated in an Award dated 29.5.2014 which was subsequently published on 16.7.2014 on the Notice Board of the Labour Court, Kanpur.

4. When the Kanpur Development Authority did not comply with the award despite passing of a sufficient time from the date of publication of the award, an application under Section 6H(1) of the U.P. Act was filed by the petitioner before the Assistant Labour Commissioner, Kanpur. A show cause notice of the Assistant Labour Commissioner dated 31.10.2014 met with no response from the respondent no.2. Whereafter a recovery certificate dated 20.11.2014 was issued. The amount of recovery certificate is stated to have been paid by means of bank draft dated 30.12.2014. On 19.10.2015, the respondent no.2 filed an application to recall the exparte award. A writ petition was also filed by the respondent no.2 which was dismissed as withdrawn. On 8.12.2015, the petitioner filed a reply to the recall application filed by the respondent no.2. By the order passed on 29.1.2016, the Labour Court allowed the recall application of respondent no.2, which order is under challenge in the present writ petition.

5. The contention of the learned counsel for the petitioner is that to sustain the application for recall of the exparte award, which was filed by the respondent no.2 citing negligence of the counsel/authorised representative, the respondent no.2 was required to demonstrate the factum of engagement/authorization of the counsel/representative, and, on which all dates the respondent no.2 attempted to contact its counsel after his engagement. It is contended that there is no evidence on record to demonstrate the same.

6. Learned counsel for the petitioner has relied upon a judgement of the Supreme Court, in the matter of **M/s Haryana Suraj Malting Ltd. Vs. Phool Chand2,** to contend that for setting aside an exparte award, those very principles that are applicable while consideration an application under Order 9 Rule 13 C.P.C, would apply while considering an application under Rule 16(2) of the U.P. Industrial Disputes Rules. It is contended that no attempt was made by the respondent no. 2 to cogently demonstrate whether sufficient cause actually existed to merit the application for recall being allowed. Further, learned counsel has relied upon a judgement of Delhi High Court passed in a case between **Jai Gopal Goyal and another Vs. Bishen Dayal Goyal3** to contend that responsibility of respondent no. 2 did not end by merely engaging a counsel. The respondent no.2 was required to show due diligence on its part and that it had acted bona fide, and only then the fault of the counsel may not be labelled as penalty against the litigant. Learned counsel has also referred to the judgement of the Bombay High Court (Nagpur Bench) passed in the matter of **Kanta alias Shanti Vs. Manjulabai alias Kholki4** to contend that a litigant who approaches to the Court must be diligent and it must take all steps to pursue its litigation.

7. On the other hand, the learned counsel for the respondent has referred to his application for recall that has been filed

as Annexure No. 5 to the writ petition, to contend that after engagement of the counsel, the counsel did not inform any development of the case, that is to say, whether a written statement was required to be filed and what was the date fixed and whether any documents were required to be filed and whether any date for cross examination of the workman had been fixed. It is contended that the respondent no.2 has been deprived of its right to produce evidence and make statement before the Labour Court to demonstrate its case. It is further contended that since the matter involves public money, proper adjudication is required to be done by the Labour Court in the matter, and, in the interest of justice, the writ petition may be dismissed and the parties be relegated to the jurisdiction of the Labour Court so that the case may be considered on its merits.

8. As is evident from the record, the dispute was referred for adjudication by the Deputy Labour Commissioner by means of an order dated 14.5.2013. The award was passed on 29.5.2014. Satisfaction regarding service was recorded in the award and it was mentioned that nobody appeared on behalf of the respondent no. 2 and, therefore, exparte proceeding was ordered. It was held in the award that dismissal of workman/petitioner with effect from 1.1.2002 was wrong and illegal and reinstatement with 50% back wages and Rs. 1000/ towards cost was awarded. It is not in dispute that the award was published on 16.7.2014. As stated in the petition itself, in paragraph no. 12, that the respondent no.2 paid the entire amount of recovery certificate issued by the Assistant Labour Commissioner pursuant to an application filed under Section 6-H(1) of the U.P. Act, to recover the amount due under the aforesaid award, by means of a cheque/draft dated 30.12.2014. In paragraph no.11 of the counter affidavit filed on behalf of the respondent no.2, the fact that the cheque/draft dated 30.12.2014 was given to the petitioner pursuant to the aforesaid recovery, has not been denied. Thereafter, on 19.10.2015, the aforesaid recall application was filed by the respondent no.2, purportedly under Rule 16(2) of the U.P. Industrial Disputes Rules. In paragraph 3 of this recall application dated 19.10.2015, it is stated that only a few days ago, the respondent no.2 came to know of the exparte award dated 29.5.2014. In paragraph no. 5 of the application, it is stated that authorised representative Sri Mahesh Mani Pandey never appeared before the Labour Court on any date and neither did he file the authorisation letter given by respondent no.2 before the Court/Tribunal. In paragraph no. 6 of the recall application, it is stated that due to negligence and want of care by its counsel, respondent no.2 has been deprived of its right to contest the case at various stages. It has further been stated that for the fault of its counsel, the respondent no.2 should not be held liable and, therefore, it was prayed that the exparte award be set aside and be decided on its merit.

9. In the reply filed by the petitioner to the aforesaid application of respondent no.2, the application was opposed and it was pointed out that the employer/respondent no.2 was required to demonstrate that there was negligence of its counsel and, further, it

was required to file a copy of the authorisation letter given to the counsel, which was not done.

10. A perusal of the impugned order dated 29.1.2016 reveals that the Labour Court had noticed the divergent views in the decision of the Supreme Court regarding the stage at which the Labour Court/Industrial Tribunal would be rendered *functus officio* and whether an application for recall of an exparte award may be entertained by the Labour Court after 30 days from the date of making/publishing the award. It was noticed by the Labour Court that a bench of the Supreme Court in **M/s Haryana Suraj Malting Ltd(supra)** had referred the matter to a larger Bench in view of the divergence of opinion. However, the Labour Court chose to opt for the opinion of the Supreme Court which held that an application for recall of an exparte award may be entertained after 30 days from the date of pronouncement/publication of the award on the ground that it was a later judgement. The Prescribed Officer also relied upon a decision of the Jammu and Kashmir High Court that a party ought not to suffer due to negligence of its counsel and, therefore, the exparte award ought to be set aside. The award dated 29.5.2014 was, accordingly, set aside by the impugned order.

11. Learned counsel for the petitioner has submitted a judgement of a three Judge Bench of the Supreme Court dated 18.5.2018 in the matter of **M/s Haryana Suraj Malting Ltd(supra)**. A perusal of the judgement reveals that the previous judgement of the Supreme Court in **Grindlays Bank Ltd. Vs. Central Government Industrial Tribunal and others5** was referred, in which it was held that setting aside an exparte award is a matter of procedural review exercised ex debito justitiae to prevent abuse of its process and such powers are inherent in every Court or Tribunal. Where the Tribunal proceeds to make an award without notice to a party, the award is nothing but a nullity. In such circumstances, the Tribunal has not only the power but also the duty to set aside the ex parte award and direct the matter to be heard afresh. That power cannot be circumscribed by limitation. It was further observed that power and duty of the Tribunal exercising its ancillary and incidental powers to set aside an award which is a nullity is in its power. In that process, the Tribunal is governed by the principles of Order 9, Rule 13 C.P.C. While noticing various decisions, the Supreme Court in **M/s Haryana Suraj Malting Ltd.** held as follows:-

"34. In case a party is in a position to show sufficient cause for its absence before the Labour Court/Tribunal when it was set ex parte, the Labour Court/Tribunal, in exercise of its ancillary or incidental powers, is competent to entertain such an application. That power cannot be circumscribed by limitation. What is the sufficient cause and whether its jurisdiction is invoked within a reasonable time should be left to the judicious discretion of the Labour Court/Tribunal.

35. It is a matter of natural justice that any party to the judicial proceedings should get an opportunity of being heard, and if such an opportunity has been denied for want of sufficient reason, the Labour Court/Tribunal which denied such an opportunity, being satisfied of the sufficient cause and within a reasonable time, should be in a position to set right its own procedure. Otherwise, as held in Grindlays

[Grindlays Bank Ltd. v. Central Govt. Industrial Tribunal, 1980 Supp SCC 420 : 1981 SCC (L&S) 309] , an award which may be a nullity will have to be technically enforced. It is difficult to comprehend such a situation under law.

. . . . . .

37. Merely because an award has become enforceable, does not necessarily mean that it has become binding. For an award to become binding, it should be passed in compliance with the principles of natural justice. An award passed denying an opportunity of hearing when there was a sufficient cause for non-appearance can be challenged on the ground of it being nullity. An award which is a nullity cannot be and shall not be a binding award. In case a party is able to show sufficient cause within a reasonable time for its non-appearance in the Labour Court/Tribunal when it was set ex parte, the Labour Court/Tribunal is bound to consider such an application and the application cannot be rejected on the ground that it was filed after the award had become enforceable. The Labour Court/Tribunal is not functus officio after the award has become enforceable as far as setting aside an ex parte award is concerned. It is within its powers to entertain an application as per the scheme of the Act and in terms of the rules of natural justice. It needs to be restated that the Industrial Disputes Act, 1947 is a welfare legislation intended to maintain industrial peace. In that view of the matter, certain powers to do justice have to be conceded to the Labour Court/Tribunal, whether we call it ancillary, incidental or inherent."

12. In the present case, it is admitted by the respondent no.2 that it had notice of the proceedings before the Labour Court. Therefore, in view of the aforesaid judgement of the Supreme Court, the award is not a nullity inasmuch as the respondent no.2 was afforded an opportunity to represent its case before the Labour Court by due service of notice. It was, however, open to the respondent no.2 to press for setting aside the exparte award where it could have demonstrated that sufficient cause preventing it from appearing during the course of the adjudication.

13. The Supreme Court in the case of **Parimal Vs. Veena alias Bharti; 2011 (3) SCC 545** while interpreting order 9 Rule 13 C.P.C has observed as follows:-

"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.

13. "Sufficient cause" is an expression which has been used in a large

number of statutes. The meaning of the word "sufficient" is " adequate" or "enough", inasmuch as may be necessary to answer the purpose intended. Therefore, word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the viewpoint of a reasonable standard of a cautious man. In this context, "sufficient cause" means that the party had not acted in a negligent manner or there was a want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or" remaining inactive". However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously.....

14. In *Arjun Singh v. Mohindra Kumar* this court observed that every good cause is sufficient cause and must offer an explanation for non-appearance. The only difference between a "good cause" and "sufficient cause" is that the requirement of a good cause is complied with on a lesser degree of proof than that of a "sufficient cause".....

15. While deciding whether there is sufficient cause or not, the court must bear in mind the object of doing substantial justice to all the parties concerned and that the technicalities of the law should not prevent the court from doing substantial justice and doing away the illegality perpetuated on the basis of the judgment impugned before it. .....

16. In order to determine the application under Order 9 Rule 13 CPC, the test that has to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called on for hearing and did his best to do so. Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Therefore, the applicant must approach the court with a reasonable defence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straitjacket formula of universal application."

14. Thus, the Supreme Court categorically observed that the test that has to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called on for hearing and did his best to do so. The sufficient cause is a cause for which defendant could not be blamed for his absence. The Supreme Court further held that the sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straitjacket formula of universal application.

15. As noticed above, the Prescribed Officer had recorded its satisfaction with regard to adequacy of notice on the respondent no.2 in the award dated 29.5.2014. The award was published on 16.7.2014. It is also admitted that pursuant to issuance of recovery certificate in proceedings under Section 6H(1) of the U.P. Act, the cheque/draft dated 30.12.2014 was issued by the respondent no.2 to the petitioner. The recall application was filed on 19.10.2015 stating that only few days back, they had came to know of the exparte award being passed. A perusal of the recall application filed by the

petitioner that has been enclosed as Annexure no. 5 to the writ petition reveals that it does not specify the date on which the authorisation letter was given to its counsel. The contention on behalf of the petitioner in its reply to the aforesaid recall application, that the respondent no.2 had failed to file the authority letter by which the counsel was appointed, was not even considered by the Presiding Officer of the Labour Court while setting aside the exparte award. It has been stated by the learned counsel for the respondent no.2 that the counsel who was previously engaged has been removed from panel of the advocates of the Kanpur Development Authority. However, neither is there averment to that effect in the recall application filed nor the date of removal of the advocate has been mentioned in the counter affidavit of the respondent no.2.

16. In the case of **Jai Gopal Goyal (supra)**, the Delhi High Court has held as under:

"12. Learned Counsel for the plaintiffs referred to the judgment of a learned single judge (as he then was) of this Court in ***Indian Sewing Machines Co. Pvt Ltd. v. Sansar Machine Ltd. and Anr., 1994(31) DRJ 382*** , where the plea the negligent absence by the counsel was taken by the applicant seeking to set aside the ex parte decree. The applicant failed to prove his diligence in pursuing the case or his counsel and gave no explanation about steps taken to prepare or file the written statement. It was held that no sufficient cause was made out for setting aside the ex parte decree. The court observed that there is no dispute on the principle of law that a litigant should not be made to suffer for the fault of his counsel. However, the question to be examined is whether the responsibility of the defendants ends merely by engaging a counsel and should not a litigant show diligence on his part. It can be understood if a litigant has been diligent enough and acting bona fide then the fault of the counsel may not be labelled as a penalty against the litigant.? In ***National Small Industries Corporation Ltd. v. Thermosetting Industrial Projects 2001 II AD (Delhi) 857*** it was observed that engaging a lawyer does not mean that the party is absolved of his/her duty to diligently pursue the case. Recently a tendency has developed amongst litigants to blame his/her lawyers for adverse orders passed without realising that a lawyer cannot conduct the case without proper instructions from the party. The lawyer is not expected to write to his client after every date of hearing about the developments in the case unless there is a specific contract about the same.

13. On consideration of the submissions advanced by learned Counsel for the parties and the case law cited at the Bar, I am of the considered view that there is no dispute about the legal principle that an innocent litigant must not be allowed to suffer due to the fault of his counsel. Simultaneously, it is also a settled legal principle that a litigant must show due diligence in pursuing or defending the case and mere entrustment of a case to the counsel does not absolve the litigant of all responsibilities. The observations made in Indian Sewing Machines Co.Pvt. Ltd's Case (supra) thus lucidly set forth this aspect.

14. In National Small Industries Corporation Ltd.'s case (supra), it has been observed that a recent trend has developed that litigants who fail to take steps or

defend a matter attempt to blame their counsels for the adverse orders.

15. I am of the considered view that this is one more case of that category. The facts and order sheets referred to above in the present case show the negligent manner in which the defendant has been proceedings not only in the present suit but also in other legal proceedings between the parties. No doubt as a legal principle, a party has to explain the absence on a particular date in a particular matter, but the court can certainly take cognizance of a continued trend to evade legal proceedings. In the criminal proceedings filed by the defendant, he failed to appear resulting in dismissal of the same. In the criminal proceedings filed against the defendant, the defendant has been declared a proclaimed offender. These criminal proceedings arise out of the same dispute. Not only that the suit filed by the defendant for possession in respect of the present dispute was also simultaneously dismissed when the ex parte proceedings were initiated in the present suit and no steps have been taken for the last about six years for restoration of the suit. It is only when the defendant faced the consequences of the decree passed in the present suit that the present application has been filed."

17. Further in the case of **Kanta alias Shanti (supra)**, the Bombay High Court has observed as under:-

"4. This submission, at the first blush, appears very attractive and tends the Court to interfere with the matter. However, after hearing the learned counsel for the applicant, especially when a query was put to the learned counsel in respect of the conduct on the part of the applicant as to whether at any point of time, she on her own, contacted her advocate, the reply was in negative. A litigant who approaches to the Court must be diligent. He or she must take all steps to pursue his or her litigation. It is expected from the litigant that he or she is in contact with the lawyer who is representing his or her cause in the Court of law. A litigant cannot take a spacious plea that once the case is entrusted with an advocate his or her work is over and the advocate will take care of the matter. An Advocate always discharges his duties on the instructions given to him by his client.

.....

7. It is very easy for a litigant to make allegations against an advocate behind his back. If the applicant wishes to make allegations against the advocate, the applicant should have a courage to join the advocate as a party and in his presence should make allegation against him. Here, the applicant wants to condemn the advocate behind his back. In my view, it is impermissible and unacceptable. Further, no steps are also being taken by the applicant against any advocate under the provision of the Advocates Act."

18. In view of the aforesaid two judgements, I am of the opinion that the respondent no.2 has failed to exercise due diligence and has failed to pursue the case in a manner warranted by ordinary prudence. Not only the counsel who was allegedly issued the letter of authorisation, but the respondent no.2 itself was grossly negligent in pursuing the case, inasmuch as despite admittedly making payment under the recovery certificate issued against it, the respondent no.2 had failed to promptly file a application for recall. As a matter of fact, it waited around 11 months after making payment under the recovery certificate before filing the application for recall. Such a conduct may not be condoned. It is pertinent to mention here that in the recall

application, in paragraph no.10 thereof the submission is that, in case the exparte award is not recalled and the respondent is not given adequate opportunity to present its case, then the loss being suffered by the respondent cannot be saved and in future also loss would be caused, and it will be deprived of bringing the full and correct facts before the court because there was no relationship of master and servant between the respondent and the petitioner. Therefore, apart from this vague submission, which merely gives a hint of the case on merit, and which is wholly unsubstantiated, there is no other averment in that application nor was there any evidence before the Presiding Officer of the Labour Court to have proceeded to recall the exparte award. Therefore, under the circumstances, allowing the recall application cannot be said to be a judicious exercise of discretion by the Labour Court.

19. In view of the aforesaid, the impugned order dated 29.1.2016, passed by the Prescribed Authority setting aside the exparte award is hereby quashed and the writ petition is, accordingly, **allowed.**

(2022)01ILR A289
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.01.2022

BEFORE

THE HON'BLE RAJESH BINDAL, C.J.
THE HON'BLE PIYUSH AGRAWAL, J.

Writ C No. 18526 of 2021

Smt. Prabha Shukla ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Udayan Nandan, Sri Shashi Nandan (Senior Adv.)

Counsel for the Respondents:
C.S.C., Mr. Pranjal Mehrotra

A. Acquisition law – Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 – Section 11 – Acquisition for the purpose of construction of a Railway over-bridge, a public purpose – Principle, required to be kept in mind, while exercising the discretionary power by the Court, laid down – Held, once a project of public importance, which is good in larger public interest, is being executed and has been completed about 45%, setting aside of acquisition in a petition filed by one of the land owners owning a small portion of the land, will not be in larger public interest – Projects of public importance should not be halted as the same would be against the larger public interest and the constitutional courts should weigh public interest vis-à-vis private interest, while exercising its discretion. (Para 8 and 10)

Writ petition dismissed. (E-1)

List of Cases cited :-

1. Kamal Trading Pvt.Ltd.Vs St. of W.B. & ors.; (2012) 2 SCC 25

2. Usha Stud & Agricultural Farms Pvt. Ltd. & ors. Vs St. of Har.& ors.; (2013) 4 SCC 210

3. Nareshbhai Bhagubhai & ors. Vs U.O.I. & ors.; (2019) 15 SCC 1

4. Ramniklal N. Bhutta & anr.Vs St. of Mah. & ors.; AIR 1997 SC 1236

5. Pratibha Nema & ors. Vs St. of M.P. & ors.; AIR 2003 SC 3140

6. Jaipur Metro Rail Corporation Ltd.Vs Alok Kotahwala & ors.; AIR 2013 CC 754.

(Delivered by Hon'ble Rajesh Bindal, C.J.)

1. The petitioner has filed the present writ petition praying for quashing of notification dated April 06, 2021 issued under Section 11 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (hereinafter referred to as "2013 Act"), as published in newspaper on April 24, 2021 and notification dated July 16, 2021 issued under Section 19 of the 2013 Act.

2. The learned counsel for the petitioner submitted that the petitioner is owner and in possession of plot no. 293 measuring 0.0688 hectare. The same is being utilized for agricultural purposes. However, off late, she intended to construct a house for residential purposes, for which pillars have been raised as foundation. For the purpose of acquisition of aforesaid land, notification under Section 11 of 2013 Act was issued on April 06, 2021. The land was sought to be acquired for the purpose of construction of a Railway over-bridge. The total area sought to be acquired was 0.5344 hectare. The petitioner filed objections to the aforesaid acquisition on May 26, 2021. However, without affording opportunity of hearing to the petitioner and also violating the mandate of Section 19(2) of the 2013 Act, notification under Section 19 was issued. Section 15 of the 2013 Act clearly provides that in case any objection is filed to the proposed acquisition of land, the aggrieved parties have to be afforded opportunity of personal hearing. Section 19(2) of the 2013 Act provides that rehabilitation scheme has to be published for the persons, who may be displaced.

3. The learned counsel for the petitioner referred to notification issued under Section 19 of 2013 Act, which mentions that as per the survey carried out, none of the land owner is required to be rehabilitated, whereas the case set up by the petitioner was that number of families will be displaced, hence, rehabilitation scheme was required. The petitioner has family of five persons. Unless the rehabilitation scheme is published, final notification under Section 19 of the 2013 Act for acquisition of the land could not be issued.

4. Further argument raised is that the Collector is not final authority to dispose of the objection. He has to merely send his report to the appropriate Government to take a final decision thereon. However, in the present case, the objections have been decided by Collector himself with no application of mind by appropriate Government. Right of hearing under *pari materia provision*, i.e., Section 5-A of the Land Acquisition Act, 1894 (hereinafter referred to as "1894 Act") has been held to be fundamental right, hence, for violation thereof, the acquisition proceedings deserves to be quashed. In support of his argument, reliance is placed on **Kamal Trading Private Limited Vs. State of West Bengal and others (2012) 2 SCC 25, Usha Stud and Agricultural Farms Private Limited and others Vs. State of Haryana and others (2013) 4 SCC 210 and Nareshbhai Bhagubhai and others Vs. Union of India and others (2019) 15 SCC 1.**

5. On the other hand, learned counsel appearing for the State submitted that the acquisition is for a total area of 0.5344 hectare of land. As per survey carried out, minimum possible land was acquired for construction of railway over-bridge, which is required to take care of traffic problem on the spot. It is to facilitate the people of the area and is in larger public interest. As should be the normal attitude, the

development activities are not opposed by the inhabitants of the area when they are appropriately compensated. This happened in the present case also as none of the other owners objected to the acquisition. It is only the petitioner, who raised objection and the same was considered and with the opinion of the Collector, the entire record was sent to the Government, which finally issued the notification. It shows that there was proper application of mind by the appropriate Government before issuance of the notification under Section 19 of the 2013 Act.

6. He further submitted that it is admitted case of the petitioner herself that the plot in question, which is a small portion of the total land acquired, was merely being used for agricultural purposes. It is proposed to be used for residential purposes. However, there was no house existing thereon. Thus, it is not a case where petitioner or her family members are required to be rehabilitated as they already have a residence. Merely on account of some small discrepancy, if any, in the process of acquisition, where the same is not opposed to by 90% of the land owners, the acquisition proceedings should not be quashed as the entire project, which is being executed in large public interest, will be put to a halt. He further submitted that award of entire land was announced by the Collector on September 13, 2021 except the land of the petitioner, as there was interim stay granted by this Court. The total cost of the project is about ₹ 38 crore. The project is expected to be completed in March, 2022. About 45% work has already been executed. Any interference by this Court at this stage in the writ petition filed by the petitioner will put the project on hold as a result whereof the entire amount spent on the project will go waste and it will be delayed unnecessarily. It is not the stage where even the alignment can be changed as the land on the site, except small portion for which petitioner has raised dispute, already stands acquired. The over-bridge is connected on both sides with road. Land of the petitioner was also lying vacant except that she claims that certain pillars of foundation had been raised for construction of a house. But the fact is that no one was residing there. The prayer is for dismissal of the writ petition.

7. Learned counsel appearing for respondents no. 2 and 4 submitted that the construction of over-bridge has already started. The pillars on the Karchhana side have already been erected upto the required height till the railway line. However, the side on which the land of the petitioner is located, pillars are yet to be raised.

8. Hon'ble the Supreme Court has time and again opined that projects of public importance should not be halted as the same would be against the larger public interest and the constitutional courts should weigh public interest vis-à-vis private interest, while exercising its discretion. The view could very well be gathered from the judgments of Hon'ble the Supreme Court in **Ramniklal N. Bhutta and another Vs. State of Maharashtra and others**, reported as AIR 1997 SC 1236, **Pratibha Nema and others Vs. State of M.P. and others,** reported as AIR 2003 SC 3140. The same view has been expressed by Rajasthan High Court's in **Jaipur Metro Rail Corporation Limited Vs. Alok Kotahwala and others**, reported as AIR 2013 CC 754. Relevant extracts from the aforesaid judgments are reproduced hereunder:

i) **Ramniklal N. Bhutta's case:**

"10. Before parting with this case, we think it necessary to make a few observations relevant to land acquisition proceedings. Our country is now launched upon an ambitious programme of all round economic advancement to make our economy competitive in the world market. We are anxious to attract foreign direct investment to the maximum extent. We propose to compete with China economically. We wish to attain the pace of progress achieved by some of the Asian countries, referred to as "Asian tigers", e.g., South Korea, Taiwan and Singapore. It is, however, recognised on all hands that the infrastructure necessary for sustaining such a pace of progress is woefully lacking in our country. The means of transportation, power and communications are in dire need of substantial improvement, expansion and modernisation. These things very often call for acquisition of land and that too without any delay. It is, however, natural that in most of these cases, the persons affected challenge the acquisition proceedings in Courts. These challenges are generally in the shape of writ petitions filed in High Courts. Invariably, stay of acquisition is asked for and in some cases, orders by way of stay or injunction are also made. Whatever may have been the practices in the past, a time has come where the Courts should keep the larger public interest in mind while exercising their power of granting stay/injunction. The power under Article 226 is discretionary. It will be exercised only in furtherance of interests of justice and not merely on the making out of a legal point. And in the matter of land acquisition for public purposes, the interests of justice and the public interest coalesce. They are very often one and the same. Even in a Civil Suit, granting of injunction or other similar orders, more particularly of an interlocutory nature, is equally discretionary. The courts have to weigh the public interest vis-a-vis the private interest while exercising the power under Article 226 - indeed any of their discretionary powers. It may even be open to the High Court to direct, in case it finds finally that the acquisition was vitiated on account of non-compliance with some legal requirement that the persons interested shall also be entitled to a particular amount of damages to be awarded as a lump sum or calculated at a certain percentage of compensation payable. There are many ways of affording appropriate relief and redressing a wrong; quashing the acquisition proceeding is not the only mode of redress. To wit, it is ultimately a matter of balancing the competing interests. Beyond this, it is neither possible nor advisable to say. We hope and trust that these considerations will be duly borne in mind by the Courts while dealing with challenges to acquisition proceedings." *(sic) (emphasis supplied)*

ii) **Pratibha Nema's case:**

"38. When no prejudice has been demonstrated nor could be reasonably inferred, it would be unjust and inappropriate to strike down the Notification under Section 4(1) on the basis of a nebulous plea, in exercise of writ jurisdiction under Article 226. Even assuming that there is some ambiguity in particularizing the public purpose and the possibility of doubt cannot be ruled out, the constitutional Courts in exercise of jurisdiction under Article 226 or 136 should not, as a matter of course, deal a lethal blow to the entire proceedings based on the theoretical or hypothetical grievance of the petitioner. It would be sound exercise of discretion to intervene when a real and substantial grievance is made out, the non-redressal of which would cause prejudice and injustice to the aggrieved

party. Vagueness of the public purpose, especially, in a matter like this where it is possible to take two views, is not something which affects the jurisdiction and it would, therefore, be proper to bear in mind the considerations of prejudice and injustice."

iii) **Jaipur Metro Rail Corporation Limited's case:**

"31. With respect to ecological balance, there has to be sustainable development and such projects of immense public importance cannot he halted. It is not the case that requisite permissions from the Central Government and the State Government have not been obtained, thus, objections were flimsy. In other petitions also pertaining to the same Project, this Court has held that such project of immense public importance should not be put to halt. Thus, flimsy and untenable objections were raised, which have been rightly rejected after due application of mind.

x x x x

48. On merits, we find the order of interim stay passed by the single Bench to be untenable, thus, we have no hesitation in setting aside the same. Suffice it to observe that in such cases of public importance of Metro Rail Project, there should not be any interim stay, rather an effort should be made to decide the matter finally at an early date. Staying the land acquisition proceedings is not appropriate and would be against the larger public interest involved in such projects. Thus, relying upon the decision in the case of Ramniklal N. Bhutta (supra), we hold that in the matter of immense public importance like the present one, the power to grant interim stay under Article 226 of the Constitution should not be exercised in the normal course."

9. In the case in hand, respondents' stand is that 45 per cent work of railway over-bridge is already complete. On one side pillars have been erected whereas on the other side, where the land of the petitioner is situated, the same are yet to be erected. She otherwise owns small portion, i.e., about 10 % of the total acquired land, which at present, is lying vacant, though it is claimed that the petitioner sought to construct a house thereon for residential purposes. From the photographs placed on record it is evident that there exist certain pillars, that too only upto ground level.

10. Once a project of public importance, which is good in larger public interest, is being executed and has been completed about 45%, setting aside of acquisition in a petition filed by one of the land owners owning a small portion of the land, will not be in larger public interest. It is not the stage where alignment of over-bridge can be changed which otherwise could not have been possible as the railway over-bridge will be connecting the existing roads on both the sides. Private interest has to give way to the larger public interest. Even if there are some small discrepancies in the process of acquisition, in our opinion in the facts of the present case, the acquisition does not deserve to be set aside as otherwise the project will be delayed which will cause loss to the State besides suffering to the residents of the area, who may be deprived of using the railway over-bridge on account of delayed completion of the project. In any case, the petitioner will be duly compensated for the land owned by her.

11. For the reasons mentioned above, we do not find any merit in the present

petition. The same is, accordingly, dismissed.

(2022)01ILR A294
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.12.2021

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE VIKRAM D CHAUHAN, J.

Writ C No. 26608 of 2021

Bipraji Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Pramod Kumar Singh Paliwal

Counsel for the Respondents:
C.S.C.

A. Civil Law – The Maintenance and Welfare of Parents and Senior Citizens Act, 2007 – Sections 21, 22 & 23 – UP Maintenance and Welfare of Parents and Senior Citizens Rules, 2014 – Rule 21 – Protection of property of Senior Citizens, its extent – Title dispute – Jurisdiction of Maintenance Tribunal – Held, the proceedings before the District Magistrate are summary in nature and only limited inquiry can be made by the District Magistrate for the purpose of carrying out the object of Rule 21 – The "protection" of property must therefore be understood to mean where a senior citizen retains a property in his name or possession for his welfare and well being – In the Act of 2007, no power have been prescribed of any adjudicatory mechanism being conferred on the District Magistrate for deciding the disputed question of title, right and interest in the property. (Para 25 and 26)

B. Pleading – Significance – Vague pleading, it's effect – Missing in the factual foundation for the cause of action, how far effect the relief sought – Held, the pleadings are the foundation of litigation. In pleadings, the necessary and relevant particulars and material must be included and unnecessary and irrelevant material must be excluded – Pleadings in a particular case are the factual foundation on which the case of the litigant is based on. The pleadings should be specific in the petition and should disclose the complete cause of action for approaching the court. If the factual foundation for the cause of action in approaching the court is missing or is vague then it is always open for the court to deny the relief to the petitioner/litigant in the facts and circumstances of the particular case. (Para 33)

Writ petition dismissed. (E-1)

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

1. The present writ petition has been filed by the petitioner seeking direction to the District Magistrate, Azamgarh to demolish the illegal encroachment made over the petitioner's adjoining land and hand over the possession in favour of the petitioner.

2. The petitioner claims to be a widow lady having no source of protection of life and liberty and, as such, has moved an application under the Uttar Pradesh Maintenance and Welfare of Parents and Senior Citizens Rules, 2014, to the District Magistrate, Azamgarh, to take action in respect of the land of the petitioner and to evict the private respondent no.5 from the land in question. The application filed by the petitioner before the District Magistrate, Azamgarh is filed by the petitioner as Annexure 1 to the writ petition. A bare perusal of the above-mentioned application of the petitioner before the District Magistrate would

demonstrate that it is the case of the petitioner that she is residing at Mumbai along with her family and is permanent resident of the village in which the land in question is situated. It is also stated by the petitioner that during the absence of the petitioner from the village, the neighbour of the petitioner being respondent no 5 has illegally taken possession of the land of the petitioner adjoining the residence of the petitioner in the village and post- karia gopalpur, Police Station-Devgaon, District-Azamgarh, Uttar Pradesh.

3. Heard learned counsel for the petitioner and learned standing counsel for the respondent-State.

4. It is submitted by learned counsel for the petitioner that the petitioner has moved an application before the District Magistrate, seeking eviction of private respondent no.5 from the land adjoining the residence of petitioner. It is also submitted that the petitioner is living with her family at Mumbai and during her absence, neighbour has taken possession over the land adjoining the residence of petitioner. It is submitted on behalf of learned counsel for the petitioner that The Maintenance and Welfare of Parents and Senior Citizens Act, 2007 (hereinafter referred to "Act of 2007") has been enacted by the legislature providing for welfare & protection to the senior citizens and parents. It is also submitted by learned counsel for the petitioner that under the aforesaid Act of 2007, the Uttar Pradesh Maintenance and Welfare of Parents and Senior Citizens Rules, 2014 (hereinafter referred to "Rules of 2014") has been framed and under Rule 21 of the Rules of 2014, the District Magistrate is enjoined with the duty to ensure that the life and property of senior citizens of the district is protected and they are able to live with security and dignity. It is further submitted by learned counsel for the petitioner that under Rule 22 of the Rules of 2014, an action plan for the protection of life and property of senior citizen has been envisaged and on the aforesaid basis, petitioner seeks direction for ejection of the private respondent from the land in question.

5. Before considering the claim of the petitioner arising out of the present writ petition, it is necessary that the scheme of the Act of 2007 be examined.

6. The Act of 2007 is enacted with the object to provide more effective provisions for the maintenance and welfare of parents and senior citizens guaranteed and recognised under the Constitution and for matters connected therewith or incidental thereto. The statement, objects and reasons of the aforesaid Bill is as under :-

"Traditional norms and values of the Indian society laid stress on providing care for the elderly. However due to withering of the joint family system, a large number of elderly are not being looked after by their family. Consequently, many older persons, particularly widowed women are now forced to spend their twilight years all alone and are exposed to emotional neglect and to lack of physical and financial support. This clearly reveals that ageing has become a major social challenge and there is a need to give more attention to the care and protection for the older persons. Though the parents can claim maintenance under the Code of Criminal Procedure, 1973 (Act No.2 of 1974), the

procedure is both time-consuming as well as expensive. Hence, there is need to have simple, inexpensive and speedy provisions to claim maintenance for parents.

2. The Bill proposes to cast an obligation on the persons who inherit the property of their aged relatives to maintain such aged relatives and also proposes to make provisions for setting up old age homes for providing maintenance to the indigent older persons.

The Bill further proposes to provide better medical facilities to the senior citizens and provisions for protection of their life and property.

3. The Bill, therefore, proposes to provide for :

(i) appropriate mechanism to be set up to provide need-based maintenance to the parents and senior citizens;

(ii) providing better medical facilities to senior citizens;

(iii) for institutionalisation of a suitable mechanism for protection of life and property of older persons; and

(iv) setting up of old age homes in every district.

4. The Bill seeks to achieve the above objectives."

7. The aforesaid Act is primarily divided into seven chapters providing for maintenance and welfare of parents and senior citizens.

8. Chapter I of the aforesaid Act provides the definition of "maintenance" and "property". The definition as envisaged under the aforesaid Act is as under :-

"2 (b) "maintenance" includes provision for food, clothing, residence and medical attendance and treatment;

(f) "property" means property of any kind, whether movable or immovable, ancestral or self acquired, tangible or intangible and includes rights or interests in such property;"

Maintenance' is defined in an inclusive manner to incorporate, among other things, provisions for food, clothing, residence, medical assistance and treatment. In defining the expression 'property', the legislation uses broad terminology encompassing "property of any kind" and to include "rights or interests in such property" . Further, overriding effect is given to the provisions of the enactment by virtue of Section 3.

9. Chapter II of the aforesaid Act provides for maintenance of parents and senior citizens. Under the aforesaid Chapter, the Maintenance Tribunal has been constituted providing for reddressal of grievance. The Maintenance Tribunal is constituted under Section 7 of the aforesaid Act. Further, Section 4 recognises a corresponding obligation on the part of the children or relative to maintain a senior citizen, extending to such needs as would enable them to lead a normal life. In the case of a relative, the obligation is if they are in possession of the property of the senior citizen or would inherit property from them whereas in the case of the children of a senior citizen, the obligation to maintain a parent is not conditional on being in possession of property of the senior citizen or upon a right of future inheritance.

10. Further, Section 8 of the aforesaid Act provides that the procedure before the Tribunal would be a summary procedure and the Tribunal would 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 materials objects and for such other purposes as may be prescribed and the 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.

11. Section 9 of the aforesaid Act, provides the tribunal with the power to order for maintenance if the children and relatives has neglected or refused to maintain a senior citizen being unable to maintain himself.

12. Further, Section 15 of the aforesaid Act provides Appellate Tribunal to be constituted against any order passed by the Maintenance Tribunal and any senior citizens or parents aggrieved by the order of the Tribunal can prefer an appeal before the Appellate Tribunal.

13. Chapter III of the aforesaid Act further directs the establishment of old age homes for senior citizens in furtherance of welfare of senior citizens.

14. Chapter IV of the aforesaid Act provides medical care of senior citizens and in this respect various directions have been issued under Section 20 of the Act of 2007, to the State Government for ensuring the medical treatment of senior citizens.

15. Under Chapter V of the aforesaid Act, protection of life and property of senior citizens is envisaged. In this respect following provisions are required to be noticed. Sections 21, 22 and 23 are quoted hereinbelow:-

"21. Measures for publicity, awareness, etc., for welfare of senior citizens. - The State Government shall, take all measures to ensure that -

(i) the provisions of this Act are given wide publicity through public media including the television, radio and the print, at regular intervals;

(ii) the Central Government and State Government Officers, including the police officers and the members of the judicial service, are given periodic sensitization and awareness training on the issues relating to this Act;

(iii) effective co-ordination between the services provided by the concerned Ministries or Departments dealing with law, home affairs, health and welfare, to address the issues relating to the welfare of the senior citizens and periodical review of the same is conducted.

22. Authorities who may be specified for implementing the provisions of this Act. - (1) The State Government may, confer such powers and impose such duties on a District Magistrate as may be necessary, to ensure that the provisions of this Act are properly carried out and the District Magistrate may specify the officer, subordinate to him, who shall exercise all or any of the powers, and perform all or any of the duties, so conferred or imposed and the local limits within which such powers or duties shall be carried out by the officer as may be prescribed.

(2) The State Government shall prescribe a comprehensive action plan for providing protection of life and property of senior citizens.

23. Transfer of property to be void in certain circumstances. - (1) Where any senior citizen who, after the commencement of this Act, has transferred by way of gift or otherwise, his property, subject to the condition that the transferee

shall provide the basis amenities and basic physical needs to the transferor and such transferee refuses or fails to provide such amenities and physical needs, the said transfer of property shall be deemed to have been made by fraud or coercion or under undue influence and shall at the option of the transferor be declared void by the Tribunal.

(2) Where any senior citizen has a right to receive maintenance out of an estate and such estate or part thereof is transferred, the right to receive maintenance may be enforced against the transferee if the transferee has notice of the right, or if the transfer of gratuitous; but not against the transferee for consideration and without notice of right.

(3) If, any senior citizen is incapable of enforcing the rights under sub-sections (1) and (2), action may be taken on his behalf by any of the organization referred to in Explanation to sub-section (1) of Section 5."

16. Sub-section (1) of Section 23 covers a situation where property has been transferred after the enactment of the legislation by a senior citizen (by gift or otherwise) subject to the condition that the transferee must provide the basic amenities and physical needs to the transferor. In other words, Sub-section (1) deals with a situation where the transfer of the property is accompanied by a specific condition to provide for the maintenance and needs of a senior citizen. In such an event, if the transferee fails to provide the maintenance and physical needs, the transfer of the property is deemed to have been vitiated by fraud, coercion or under undue influence. Section 23(1), in other words, creates a deeming fiction of the law where the transfer of the property is subject to a condition and the condition of providing for maintenance and the basic needs of a senior citizen is not fulfilled by the person upon whom the obligation is imposed. Then, at the option of the transferor, the transfer can be declared as void by the Tribunal. On the other hand, Sub-section (2) of Section 23 envisages a situation where a senior citizen has a right to receive maintenance out of an estate. Where such a right exists, the right of maintenance can be enforced where the estate or a portion of it, is transferred against a transferor who has notice of the right; or if the transfer is gratuitous. The right however cannot be enforced against a transferee for consideration and without notice of the right.

17. The Sub-section (1) of Section 23 envisages a situation where the transfer of property is by the senior citizen. This is evident from the language of sub-Section (1) namely "where any senior citizen who, after the commencement of this Act, has transferred by way of gift or otherwise, his property...". On the other hand, sub-Section (2) of Section 23 does not confine itself to a transfer by a senior citizen, unlike sub-Section (1). Sub- Section (2) uses the expression "such estate or part thereof is transferred". Where a senior citizen has a right to receive maintenance out of the estate and any part of it is transferred, sub-section 2 permits the enforcement of the right to receive maintenance out of the estate against a transferee with notice or against a gratuitous transferee. Sub-Section (2), in other words, may cover a situation where the transfer of the estate (in which a senior citizen has a right to maintenance) is by a third party, in which event, the provision provides the right to enforce the claim of maintenance against such transferee (other than those transferees for consideration or without notice of the

preexisting right). Arguably, the language of subsection (2) is broad enough to also cover a situation where the transfer is by the senior citizen, in which event the transferee with notice of the right; or a gratuitous transferee, can be made subject to the enforcement of the right against the transferred estate. Further, under sub-Section (1), where a transfer has been made by a senior citizen subject to the condition that the transferee will provided for basic amenities or physical needs of the transferor and if there is a failure of the transferee to fulfil the condition, two consequences follow: (i) the transfer of property shall be deemed to have been made by fraud or coercion or under undue influence; and (ii) the transfer shall, at the option of the transferor, be declared to be void by the Tribunal. The deeming consequence which is provided for in sub-Section (1) is not incorporated in sub-Section (2). Sub-Section (2), in contradistinction, stipulates that the right to receive maintenance can be enforced against a gratuitous transferee or a transferee with notice of the pre-existing right of a citizen to receive maintenance out of an estate notwithstanding who is the transferee of the estate. In keeping with the salutary public purpose underlying the enactment of the legislation, the expression 'transfer" would include not only the absolute transfer of property but also transfer of a right or interest in the property. This would also be in consonance with the provisions of Section 2(f) which defines the expression property to include "rights or interests in such property". The expression 'transfer' not having been defined specifically by the legislation, it must receive an interpretation which would advance the beneficent object and purpose of its provisions. Sub-section (2) of section 23 speaks of the enforcement of the "right to receive maintenance" which is more comprehensive in its nature, than merely enforcing an order for maintenance passed under Section 9 of the Act.

18. Chapter VI of the aforesaid Act provides for offences and procedure for trial of the aforesaid offence against senior citizens and parents.

19. Under Section 32 of the aforesaid Act, the State Government has been empowered to make rules for carrying out the purposes of the Act. Sub-section (2) (f) of Section 32 enables the State Government to make Rules for a comprehensive action plan for providing protection of life and property of senior citizens.

20. Under Sub-section (2) of Section 22 of the Act it is directed that State Government shall provide a comprehensive action plan for providing protection of life and property of senior citizens. The State Government in exercise of power under Section 32 of the Act of 2007 has framed the Rules of 2014.

21. Rule 21 of the aforesaid Rules of 2014 provide duties and powers of the District Magistrate. Under the Rule 21 sub-Rule 2(i) it is directed that it is the duty of the District Magistrate to ensure that life and property of senior citizens of the districts are protected and they are able to live with security and dignity. For convenience Rule 21 of the aforesaid Rules of 2014 is quoted hereinbelow:-

"21. Duties and Powers of the District Magistrate. - (1) The District Magistrate shall perform the duties and

exercise the powers mentioned in sub-rules (2) and (3) so as to ensure that the provisions of the Act are properly carried out in his district.

(2) It shall be the duty of the District Magistrate to :

(i) ensure that life and property of senior citizens of the district are protected and they are able to live with security and dignity;

(ii) oversee and monitor the work of Maintenance Tribunals and Maintenance Officers of the district with a view to ensuring timely and fair disposal of applications for maintenance, and execution of Tribunals' orders;

(iii) oversee and monitor the working of old homes in the district so as to ensure that they conform to the standards laid down in these rules and any other guidelines and orders of the Government;

(iv) ensure regular and wide publicity of the provisions of the Act, and Central and State Governments, programmes for the welfare of senior citizens;

(v) encourage and co-ordinate with panchayats, municipalities, Nehru Yuva Kendras, educational institutions and especially their National Service Scheme Units, Organisations, specialists, experts, activists, etc. working in the district so that their resources and efforts are effectively pooled for the welfare of senior citizens of the district;

(vi) ensure provision of timely assistance and relief to senior citizens in the event of natural calamities and other emergencies;

(vii) ensure periodic sensitisation of officers of various Departments and Local Bodies concerned with welfare of senior citizens, towards the needs of such citizens, and the duty of the officers towards the latter;

(viii) review the progress of investigation and trial of cases relating to senior citizens in the district, except in cities having a Divisional Inspector General of Police;

(ix) ensure that adequate number of prescribed application forms for maintenance are available in offices of common contact for citizens like Panchayats, Block Development Offices, Tahsildar Offices, District Social Welfare Offices, Collectorate, Police Station etc.;

(x) promote establishment of dedicated helplines for senior citizens at district headquarters, to begin with; and

(xi) perform such other functions as the Government, may by order, assign to the District magistrate in this behalf, from time to time.

(3) With a view to performing the duties mentioned in sub-rule (2), the District Magistrate shall be competent to issue such directions, not inconsistent with the Act; these rules, and general guidelines of the Government, as may be necessary, to any concerned Government or statutory agency or body working in the district, and especially to the following:

(a) Officers of the State Government in the Police, Health and Publicity Departments, and the Department dealing with welfare of senior citizens;

(b) Maintenance Tribunals and Conciliation Officers;

(c) Panchayats and Municipalities; and

(d) Educational Institution."

22. Under Rule 22 of the Rules, 2014 an action plan for the protection of life and property of senior citizens is provided. For convenience Rule 22 of the aforesaid Rules is quoted hereinbelow:-

"22. Action Plan for the protection of life and property of senior citizens.- (1) The District Superintendent of Police and in the case of cities having Divisional Inspector General of Police, such Divisional Inspector General of Police shall take all necessary steps, subject to such guidelines as the Government may issue from time to time for the protection of life any property of senior citizens.

(2) Without prejudice to the generality of sub-rule (1) :

(i) each police station shall maintain an up-to-date list of senior citizens living within its jurisdiction, especially those who are living by themselves (i.e. without there being member in their household who is not a senior citizen);

(ii) a representative of the police station together as far as possible, with a social worker or volunteer, shall visit such senior citizens at regular intervals of at least once a month, and shall, in addition, visit them as quickly as possible on receipt of a request of assistance from them;

(iii) complaints/problems of senior citizens shall be promptly attended to, by the local police;

(iv) one or more Volunteer Committee(s) shall be formed for each Police Station which shall ensure regular contact between the senior citizens, especially those living by themselves, on the one hand, and the police and the district administration on the other;

(v) the District Superintendent of Police or, the Divisional Inspector General of Police as the case may be, shall cause to be publicised widely in the media and through the Police Station, at regular intervals, the steps being taken for the protection of life and property of senior citizens;

(vi) each Police Station shall maintain a separate register containing all important particulars relating to offences committed against Senior Citizens as in Annexure IV:

(vii) the register referred to in clause (vi) shall be kept available for public inspection, and every officer inspecting a Police Station shall invariably review the status as entered in the register;

(viii) the Police Station shall send a monthly report of such crimes to the District Superintendent of Police by the 10th of every month;

(ix) list of Do's and Don'ts to be followed by senior citizens, in the interest of their safety, will be widely publicised;

(x) antecedents of domestic servants and others working for senior citizens shall be promptly verified, on the request of such citizens;

(xi) community policing for the security of senior citizens will be undertaken in conjunction with citizens living in the neighborhood, Residents' Welfare Association, Youth Volunteers, Non-Government Organizations, etc;

(xii) the District Superintendent of Police shall submit to the Director General of Police and to the District Magistrate, a monthly report by the 20th of every monthly, about the status of crimes against senior citizens during the previous month, including progress of investigation and prosecution of registered offences, and preventive steps taken during the month, as in Annexure V;

(xiii) the District Magistrate shall cause the report to be placed before the District Level Committee constituted under Rule 24;

(xiv) the Director General of Police shall cause the reports submitted under clause (xii) to be complied, once a quarter, and shall submit them to the Government every quarter as well as every year for, inter alia, being placed before the State Council of Senior Citizens constituted under Rule 23."

23. It is to be seen that under Rule 21 Sub-Rule (2)(i) of the Rules of 2014, the District Magistrate has been conferred with the duty to ensure the life and property of senior citizens of the district are protected and they are able to live with security & dignity and further under Rule 22 a comprehensive action plan has been envisaged for the welfare of senior citizens. The power conferred on the District Magistrate by Rule 21 of the Rules of 2014 are for the purpose of providing protection to the life and property of the senior citizens.

24. The scheme of the Act would go to show that in respect of maintenance of the senior citizens under Chapter II of the Act of 2007, adjudicatory mechanism has been placed under the Act of 2007. For the purpose of maintenance of senior citizens, a Maintenance Tribunal has been constituted under Section 7 to adjudicate upon the issue with regard to maintenance of senior citizens and parents and the aforesaid Tribunal has been conferred with the power of civil court under Section 8 of the Act for the purpose of determination of the issues before the Maintenance Tribunal. It is further to be seen that adjudicatory mechanism has been provided under Chapter II of the Act of 2007, for which the Tribunal is the authority to adjudicate the dispute.

25. In so far as the power conferred under Rule 21 to the District Magistrate is concerned, the said power is limited to the protection of the life and property of the senior citizens. No such power has been conferred on the District Magistrate to be part of adjudicatory mechanism under the act and the power of the District Magistrate are executive in nature and he is only required to protect the property of the senior citizens, where from the records or otherwise, it can be found that the title of the property or rights to the property is vested in the senior citizen. The proceedings before the District Magistrate are summary in nature and only limited inquiry can be made by the District Magistrate for the purpose of carrying out the object of Rule 21, to find out whether the property belongs to senior citizens or not or the senior citizen has any right in the property in question. Rule does not in any manner permit the District Magistrate to consider the disputed claim of the parties in respect of title or rights to the property. The "protection" of property must therefore be understood to mean where a senior citizen retains a property in his name or possession for his welfare and well being.

26. The adjudicatory mechanism under the present constitutional frame work is provided to the ordinary courts of law and executive is not conferred with powers to determine the rights of the parties in respect of property. Where ever the power has been conferred on the executive to adjudicate the rights of the parties under any law, the power has been well defined and the jurisdiction of executive authority under the relevant law is also prescribed. In the Act of 2007, no power have been prescribed of any adjudicatory mechanism being conferred on the District Magistrate

for deciding the disputed question of title, right and interest in the property.

27. It is also to be seen that the dispute in respect title or right to property would require leading of evidence and recording of finding on the basis of evidence led with regard to the right and ownership of the property. The said powers under the constitutional framework is to be exercised by the ordinary courts of law and such a mechanism without there being any provisions in the Act of 2007, cannot be permitted to be conferred on the District Magistrate in the garb of Rule 21 which is limited to protection of property of the senior citizens.

28. Under section 23, the transfer of property in certain circumstances have been declared to be void and the senior citizen is permitted to approach the tribunal for declaration of the transfer is void or for maintenance as the case may be. In respect of the protection of the property and rights of the senior citizen arising out of the property under section 23, the adjudicatory mechanism has been conferred on the maintenance Tribunal constituted under chapter 2 of the Act of 2007.

29. Under the scheme of the above-mentioned act, wherever the adjudication of the right of a senior citizen is required, the power has been conferred under the aforesaid act on the tribunal. The tribunal has also been conferred with the powers of the civil court under Section 8 of the Act of 2007. The orders passed by the tribunal under the act is subjected to an appeal under Section 16 of the Act of 2007. It is to be seen that the adjudicatory mechanism in place under the aforesaid act for the purpose of maintenance of senior citizen and for protection of the rights conferred under Section 23 of the Act of 2007, indicate that the power of the District Magistrate under the aforesaid act for protection of the property & life of the senior citizen is san of any adjudication at the behest of the District Magistrate in respect of any disputed claim to the property or the rights of the senior citizen.

30. The District Magistrate under Rule 21 of Rules of 2014 is not an adjudicatory forum in respect of serious dispute of title between the senior citizen and the third party. The provisions contained in the Act of 2007 and the rules framed thereunder merely provide for protection of the rights of the senior citizen over the property with the object of maintenance of such property. The act does not intend to create any new forum for adjudication or determination of the property dispute or rights in the property between individuals. The powers of the District Magistrate under the Rules of 2014 would require the District Magistrate to ascertain that the applicant before the aforesaid authority is a senior citizen and further the property in respect of which the protection is being sought is in the ownership of the senior citizen or the senior citizen has any right, interest or title in the property in dispute. The right or title or interest in the property as claimed by the senior citizen should be an existing right which is without any cloud on the title, interest or right of the senior citizen in the aforesaid property. Where there are serious dispute with regard to the title, interest or right of the senior citizen to the property in question and the aforesaid dispute can only be resolved by leading evidence and further by recording a finding in respect of title of the property, the district magistrate in such circumstances would not have the authority to consider upon the rival claims of the parties specifically in the case where the dispute with regard to the property is with the third party who is neither the relative nor the children of the senior citizen.

31. It is further to be seen that under the Act of 2007, no adjudicatory powers have been conferred on the District Magistrate and under section 22 of the Act of 2007 a direction was issued to the state government to prescribe a comprehensive action plan for providing protection to life and property of the senior citizen. The State government while exercising the powers under section 32 of the Act of 2007 has framed the Rules of 2014 where under the District Magistrate has been conferred with the powers to protect the property & life of the senior citizen. It is for the legislature to confer adjudicatory powers on any authority and we have already observed that such power of adjudication, in respect of disputed claim to property is neither intended to be conferred upon the District Magistrate nor has actually been conferred upon the District Magistrate. We are therefore inclined to read down Rule 21 in light of the statutory scheme and clarify that the power vested in the District Magistrate vide Rule 21 does not extend to potential claims in respect of property where title, interest or possession needs determination/adjudication. For the aforesaid purpose the District Magistrate can make a summary enquiry as regard to the title, interest of the senior citizen in the property in question however the intrinsic question of title or right which requires evidence and adjudication could not be gone into by the District Magistrate under the aforesaid Rule of 2014.

32. In the present case, the pleadings in the writ petition are of significance as in the writ petition, the petitioner has not disclosed that she is a senior citizen. It is also to be seen that in the application filed before the District Magistrate which is annexed as Annexure No.1 to the writ petition, it is not stated that the petitioner is a senior citizen. The pleadings in this respect are wholly vague in nature in the writ petition as well as the application filed by the petitioner before the District Magistrate.

33. The Pleadings are the foundation of litigation. In pleadings, the necessary and relevant particulars and material must be included and unnecessary and irrelevant material must be excluded. Pleadings in a particular case are the factual foundation on which the case of the litigant is based on. The pleadings should be specific in the petition and should disclose the complete cause of action for approaching the court. If the factual foundation for the cause of action in approaching the court is missing or is vague then it is always open for the court to deny the relief to the petitioner/litigant in the facts and circumstances of the particular case.

34. It is also to be seen that in an application filed before the District Magistrate annexed as Annexure No.1 to the writ petition, petitioner has only stated that the land adjacent to the residence of the petitioner has been occupied by the private respondent and boundary wall has been made on the aforesaid land. It is further to be seen that the pleadings in the writ petition does not demonstrate as to how the ownership of the aforesaid land is vested with the petitioner and what right the petitioner has on the aforesaid land in question. The pleadings in writ petition are apparently silent on the aforesaid aspect and unless the petitioner comes up with a specific pleadings showing her established title or rights to the property, the direction in the writ petition cannot be issued.

35. It is further to be seen that in the present writ petition it has not been

stated/disclosed as to the date when the land in question was encroached upon by the private respondent and when the wall was constructed. It is only stated in the application that the petitioner is living at Mumbai and in her absence, the neighbour/ private respondent has occupied the land in question. The details & identification of the land in question has neither been given in the writ petition nor in the application filed before the District Magistrate and the application as well as the writ petition is lacking the factual foundation for initiation of proceedings under the Act of 2007.

36. It is further to be noted that third party has already created a boundary on the land in question and, as such, there prima facie exists a dispute, which is required to be considered and decided by the court of competent jurisdiction and the District Magistrate in exercise of Rule 21, would not have the power to decide the dispute between petitioner and the private respondent, who is third party in respect of title and ownership of the land in question and the aforesaid would require the evidence to be led by the parties before the court of competent jurisdiction.

37. The petitioner in the present writ petition has prayed for direction to the District Magistrate to demolish the illegal encroachment over the petitioners adjoining land and handover the possession in favour of the petitioner. While considering the aforesaid prayer, it was imperative on the part of the petitioner to have laid the factual foundation with regard to right, title or interest of the petitioner in the property in question, in the writ petition. The direction as prayed by the petitioner can only be issued where the petitioner shows that he has any right, title or interest in the property in question. In the writ petition neither any document has been produced to indicate the right, title or interest nor the pleadings in this respect has been provided in the writ petition.

38. In view of the aforesaid, the present writ petition lacks merit and is dismissed.

(2022)01ILR A305
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.12.2021

BEFORE

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

Writ C No. 30240 of 2021

C/M Sri Ishwar Maharaj Uchchatar Madhyamik Vidyalaya Inter College, Agra & Anr. ...Petitioners

Versus

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

Counsel for the Petitioners:
Sri Saurabh Singh, Sri Amit Saxena (Sr. Advocate), Sri Rohit Upadhyay

Counsel for the Respondents:
C.S.C.

A. Committee of Management – Election dispute – Rival claim – Order for single operation was passed by D.I.O.S. – No reason recorded – Effect – Held, it is settled proposition of law that even in administrative matters, the reasons should be recorded as it is incumbent upon the authorities to pass a speaking and reasoned order. (Para 16)

B. Constitution of India – Article 14 & 21 – Principle of natural justice – No opportunity of hearing was given – Effect – Held, the D.I.O.S. has passed the impugned order behind the back of the petitioners without affording any opportunity of hearing to the petitioners, which is clearly in violation of principle of natural justice, which is the requirement of Articles 14 and 21 of the Constitution of India. (Para 23)

Writ petition allowed. (E-1)

List of Cases cited :-

1. Committee of Management, Raja Tej Singh Vidyalaya Aurandh, Mainpuri Vs District Inspector of Schools, Mainpuri; 2000 0 Supreme (All) 32

2. Committee of Management of Rajendra Prasad Intermediate College, Bareilly Vs DIOS, Bareilly & anr.; 1990(1) UPLBEC 189

3. Committee of Management Ramroop Singh Dhanraj Singh Intermediate College, Fatehpur Vs DIOS Fatehpur & ors.; 2000 (2) UPLBEC, (Summary) 54

4. Committee of Management Gandhi Smarak Inter College, Jainganj, Agra Vs DIOS Agra; 2001(1) UPLBEC 1347

5. Babu Triloki Singh Inter College Vs St. of U.P. & ors.; 2020(9) ADJ 192

6. Kumari Shrilekha Vidyarthi & Ors. Vs St. of U.P. & ors.; AIR 1991 SC 537

7. Life Insurance Corporation of India Vs Consumer Education & Research Centre; (1995) 2 SCC 480

8. Mahesh Chandra Vs Regional Manager, U.P. Financial Corporation & ors.; AIR 1993 SC 935

9. U.O.I. Vs. M.L. Capoor; AIR 1974 SC 87

10. St. of W.B. Vs Atul Krishna Shaw & anr., 1991 (Suppl.) 1 SCC 414

11. S.N. Mukherjee Vs U.O.I.; AIR 1990 SC 1984

12. Krishna Swami Vs U.O.I. & ors.; AIR 1993 SC 1407

13. Institute of Chartered Accountants of India Vs L.K. Ratna & ors.; (1986) 4 SCC 537

14. Board of Trustees of the Port of Bombay Vs Dilipkumar Raghavendranath Nadkarni & Ors.; AIR 1983 SC 109

15. Rameshwari Devi Vs St. of Raj. & ors.; AIR 1999 Raj. 47

16. Vasant D. Bhavsar Vs Bar Council of India & ors.; (1999) 1 SCC 45

17. M/s. Indian Charge Chrome Ltd. & Anr. Vs U.O.I. & ors, 2003 AIR SCW 440

18. Secretary, Ministry of Chemicals & Fertilizers, Government of India Vs CIPLA Ltd. & ors.; (2003) 7 SCC 1

19. U.O.I. & anr. Vs International Trading Co. & anr.; (2003) 5 SCC 437

20. Raj Kishore Jha Vs St. of Bihar & ors..; (2003) 11 SCC 519

21. St. of Uttranchal Vs Sunil Kumar Negi; 2008 (4) ALJ 226,

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

1. Heard Sri Amit Saxena, Senior Advocate assisted by Sri Saurabh Singh, learned counsel for the petitioners, Sri Shailendra Singh, learned Standing Counsel for the State-respondents.

2. The present writ petition has been filed by the petitioner for quashing the impugned order dated 31.07.2021 passed by the District Inspector of Schools, Agra (D.I.O.S.) under Section 5 (1) of the payment of Salaries Act, 1971 (hereinafter referred to as "Act 1971), for single operation of the Account of the College. He has also prayed for a mandamus directing the respondents not to interfere in the peaceful functioning of the petitioner's institution in accordance with law.

3. Brief facts of the case is that Sri Ishwar Maharaj Inter College, Nagla Teja, Agra is a recognized and aided intermediate institution, which is governed by the provisions of the Intermediate Education Act, 1921 and the regulations framed thereunder. There is an approved scheme of administration of the institution wherein the term of the Committee of Management is four years. The Committee of Management has constantly being recognized as the validly constituted committee and the last undisputed elections were held on 15.04.2012 and the term of the committee of management was to expire on 15.05.2016.

4. Before expiry of the aforesaid term, a rival claim was setup by one Mr. M.D. Dwivedi and after several litigations, the elections of both the rival groups were discarded by the respondent no.2, i.e. Regional Education Committee, Agra Region, Agra, vide order dated 29.12.2016, wherein a direction was given to hold a fresh elections. However, after reconsideration of the matter, the respondent no.2 vide its order dated 28.11.2018 upheld the validity of the elections of the petitioner's committee of the management, which were held on 17.04.2016. After several litigations, it was ultimately the elections of petitioners' committee of management, which was taken to be valid elections and, therefore, the petitioners' committee of management was managing the affairs of the institution.

5. Since the term of petitioners' committee of management, which was recognized on 17.04.2016, was to expire on 17.04.2020, hence the proceedings were initiated for holding of elections on the date fixed, i.e. 19.04.2020, which was later postponed to 05.07.2020 due to Covid-19. The elections were held on 05.07.2020 and the results were declared on the same date, wherein the petitioner no.2 was again elected as Manager of Committee of management and entire papers pertaining to the elections were submitted in the office of respondent no.3 on 10.07.2020. Surprisingly, the order dated 02.07.2020 was received by the petitioner, which records that the elections of petitioners' committee of management held in the year 2012 and 2016 was found to be valid and the petitioners' committee was in effective control of the institution. By the said order, a direction has been issued to the D.I.O.S. to hold fresh elections within a period of three months as the term of the committee of management has expired on 16.04.2020. The aforesaid order has been passed in compliance of the order dated 28.02.2019 passed in Writ -C No. 3551 of 2019, wherein several directions were issued. However, the Court had declined to interfere with the order dated 28.02.2019 vide which the respondent no.2 had upheld the validity of elections of the petitioners' committee of management, which were held on 17.04.2016. Thereafter, the aforesaid order dated 02.07.2020 was challenged by the petitioners by means of Writ C No.15879 of 2020, wherein vide order dated 12.10.2020, the Court had passed the following order:-

"Heard Shri Amit Saxena, learned Senior Advocate for the petitioner.

Challenge in the writ petition is to an order dated 22.07.2020 passed by the respondent No. 2, Regional Committee, Agra, Region Agra, which was seized of the matter pursuant to order of remand passed

by the High Court on 28.02.2019, requiring two issues, pertaining to the election of the petitioners Committee of Management held in the year 2016 which issues had not been dealt with while upholding the elections.

The operative portion of the impugned order directs a fresh election to be held while upholding petitioners election of 2016.

It is contended that the election of the 2016 were held on 17.04.2016. The term of Committee of Management was 4 years. Therefore fresh election was notified for 19.04.2020 but could not have been held on account of the lockdown.

It is contended that an advertisement was actually published that the elections were to be held on 05.07.2020 but while passing the impugned order, this aspect has not been adverted to. In any case, the elections have been duly held and the papers have been forwarded for necessary action. Under the circumstances, the direction for holding fresh elections is unjustified.

It has also been stated that the no election scheduled has been notified till date.

Matter requires consideration.

Learned Standing Counsel may file a counter affidavit within three weeks.

Counsel for the petitioner will have one week thereafter to file a rejoinder affidavit.

List this petition for admission/ final hearing immediately after 4 weeks.

Until further orders, directions contained in the impugned order for holding fresh elections to the Committee of Management, shall remain stayed."

6. Pursuant to the aforesaid order dated 12.10.2020, since holding of fresh elections in the institution were stayed, the petitioners' committee of management as validly elected on 17.04.2016, is still managing the affairs of the institution.

7. Surprisingly, the respondent no.3, i.e. the D.I.O.S., Agra has passed the impugned order dated 31.07.2021, whereby he has directed the single operation of accounts of the petitioners' institution.

8. Mr. Amit Saxena, Senior Advocate assisted by Mr. Saurabh Singh, learned counsel for the petitioners submits that the order passed by the District Inspector of School, Agra dated 31.07.2021 directing single operation of bank accounts of the petitioners' institution is in violation of principal of natural justice, as there is no whisper as on which date the petitioner has been afforded opportunity of hearing to the petitioner. In support of the aforesaid submission, the learned counsel for the petitioners has placed reliance upon a judgment of this Court in the case of ***Committee of Management, Raja Tej Singh Vidyalaya Aurandh, Mainpuri-Appellant Vs. District Inspector of Schools, Mainpuri-Respondents*** reported in ***2000 0 Supreme (All) 32,*** wherein it has been held as follows:

"29.....no order for single operation of accounts can be passed without reasonable opportunity to the Committee of Management....."

9. Learned counsel for the petitioners further submits that the impugned order dated 31.07.2021 is without jurisdiction and not sustainable in the eye of law as Section 5 of the Act, 1971, provides that the D.I.O.S. is empowered to pass an order for single operation, if there is any difficulty in disbursement of the salary to the teaching and non-teaching staff of the institution. Neither any such complaint is

there before the D.I.O.S. in this regard nor any reason has been indicated in the impugned order, showing any difficulty in disbursement of salary of staff of the institution.

10. Learned counsel for the petitioner has placed reliance upon the judgments of this Court reported in ***1990(1) UPLBEC, page 189; Committee of Management of Rajendra Prasad Intermediate College, Bareilly Vs. DIOS, Bareilly and another, 2000 (2) UPLBEC, (Summary) 54; Committee of Management Ramroop Singh Dhanraj Singh Intermediate College, Fatehpur Vs. DIOS Fatehpur and others, 2001(1) UPLBEC, Page 1347; Committee of Management Gandhi Smarak Inter College, Jainganj, Agra Vs. DIOS Agra and 2020(9) ADJ 192; Babu Triloki Singh Inter College vs. State of U.P. and Ors.,*** wherein it has been held that an order of single operation of accounts could be passed by the D.I.O.S. under Section 5(1) of the Act, 1971, where the difficulty has arisen in disbursement of salary of the staff of the institution due to any default of the Management. The order for single operation of accounts could not be passed without providing opportunity of hearing to the Committee of Management.

11. Mr. Shailendra Singh, learned Standing Counsel does not dispute the fact that the impugned order dated 31.07.2021 has been passed without affording opportunity of hearing to the petitioners.

12. Counsel for the parties agree that the writ petition may be disposed of finally at this stage without calling for a counter affidavit specifically in view of the order proposed to be passed today.

13. In order to appreciate the contentions advanced by learned counsel for the parties, it would be appropriate to refer to the relevant provisions of Section 5(1) of the Payment of Salaries Act, 1971, which is reproduced below: -

"5. Procedure for payment of salary in the case of certain institutions. -

(1) The management of every institution shall, for the purpose of disbursement of salaries to its teachers and employees, open [in a Scheduled Bank or a Cooperative Bank] a separate account to be opened jointly by a representative of the management and by the Inspector or such other officer as may be authorised in that behalf :

Provided that after the account is opened, the Inspector may, if he is, subject to any rules made under this Act, satisfied that it is expedient in the public interest so to do, instruct the bank that the account shall be operated by the representative as the management alone, and may at any time revoke such instruction :

Provided further that in the case referred to in the provision to subsection (2), or where a difficulty arises in the disbursement of salaries due to any default of the management, the Inspector may instruct the Bank that the account shall be operated only by himself or by such other officer as may be authorised by him in that behalf and may at any time revoke such instruction."

14. As per the requirement of the above Section 5(1) of the Act 1971, an

order of single operation of the accounts could be passed by the D.I.O.S. where the difficulty has arisen in disbursement of salary of the staff of the institution due to any default of the management.

15. From bare reading of the impugned order dated 31.07.2021, it is apparently clear that the petitioners have not been afforded any opportunity of hearing before passing the impugned order, as there is no whisper in order, as to on which date the petitioners have been called upon to set up his case with regard to any complaint made against him. Perusal of the impugned order dated 31.07.2021 goes to show that the D.I.O.S. has not mentioned that the petitioners' committee of management has defaulted in making payment to the staff (teaching or non-teaching) and there is no complaint to that effect also.

16. So far as the second submission made by the learned counsel for the petitioners is concerned, this Court may record that it is settled proposition of law that even in administrative matters, the reasons should be recorded as it is incumbent upon the authorities to pass a speaking and reasoned order. In ***Kumari Shrilekha Vidyarthi & Ors. Vs. State of U.P. & Ors., reported in AIR 1991 SC 537,*** the Apex Court has observed as under:-

"Every such action may be informed by reason and if follows that an act un-informed by reason is arbitrary, the rule of law contemplates governance by law and not by humour, whim or caprice of the men to whom the governance is entrusted for the time being. It is the trite law that "be you ever so high, the laws are above you." This is what a man in power must remember always."

17. In ***Life Insurance Corporation of India Vs. Consumer Education and Research Centre, reported in (1995) 2 SCC 480,*** the Apex Court observed that the State or its instrumentality must not take any irrelevant or irrational factor into consideration or appear arbitrary in its decision. *"Duty to act fairly"* is part of fair procedure envisaged under Articles 14 and 21. Every activity of the public authority or those under public duty must be received and guided by the public interest. Same view has been reiterated by the Apex Court in ***Mahesh Chandra Vs. Regional Manager, U.P. Financial Corporation & Ors.,*** reported in AIR 1993 SC 935; and ***Union of India Versus M.L. Capoor, reported in AIR 1974 SC 87.***

18. In ***State of West Bengal Vs. Atul Krishna Shaw & Anr., 1991 reported in (Suppl.) 1 SCC 414,*** the Apex Court observed that *"giving of reasons is an essential element of administration of justice. A right to reason is, therefore, an indispensable part of sound system of judicial review."*

19. In ***S.N. Mukherjee Vs. Union of India, reported in AIR 1990 SC 1984,*** it has been held that the object underlying the rules of natural justice is to prevent mis-carriage of justice and secure fair play in action. The expanding horizon of the principles of natural justice provides for requirement to record reasons as it is now regarded as one of the principles of natural justice, and it was held in the above case that except in cases where the requirement to record reasons is expressly or by necessary implication dispensed with, the authority must record reasons for its decision.

20. In ***Krishna Swami Vs. Union of India & Ors., reported in AIR 1993 SC 1407,*** the Apex Court observed that the rule of law requires that any action or decision of a statutory or public authority must be founded on the reason stated in the order or borne-out from the record. The Court further observed that *"reasons are the links between the material, the foundation for these erection and the actual conclusions. They would also administer how the mind of the maker was activated and actuated and there rational nexus and syntheses with the facts considered and the conclusion reached. Lest it may not be arbitrary, unfair and unjust, violate Article 14 or unfair procedure offending Article 21."*

21. Similar view has been taken by the Apex Court in ***Institute of Chartered Accountants of India Vs. L.K. Ratna & Ors., (1986) 4 SCC 537; Board of Trustees of the Port of Bombay Vs. Dilipkumar Raghavendranath Nadkarni & Ors., AIR 1983 SC 109. In Rameshwari Devi Vs. State of Rajasthan & Ors., AIR 1999 Raj. 47. In Vasant D. Bhavsar Vs. Bar Council of India & Ors., (1999) 1 SCC 45,*** the Apex Court held that an authority must pass a speaking and reasoned order indicating the material on which its conclusions are based. Similar view has been reiterated in ***M/s. Indian Charge Chrome Ltd. & Anr. Vs. Union of India & Ors, 2003 AIR SCW 440; Secretary, Ministry of Chemicals & Fertilizers, Government of India Vs. CIPLA Ltd. & Ors., (2003) 7 SCC 1; and Union of India & Anr. Vs. International Trading Co. & Anr., (2003) 5 SCC 437.***

22. The Apex Court in the case of in ***Raj Kishore Jha vs. State of Bihar and Ors. Reported in (2003) 11 SCC 519*** and in the case of ***State of Uttranchal Vs. Sunil Kumar Negi reported in 2008 (4) ALJ. 226,*** has held that reason is the heartbeat of every conclusion and without the same, it becomes lifeless.

23. So far as the first submission made by the learned counsel for the petitioners is concerned, this Court may record that the D.I.O.S. has passed the impugned order behind the back of the petitioners without affording any opportunity of hearing to the petitioners, which is clearly in violation of principle of natural justice, which is the requirement of Articles 14 and 21 of the Constitution of India.

24. The D.I.O.S. has failed to consider that the petitioners' committee of management is still functioning and managing the affairs of the institution in the light of orders of this Court.

25. In view of the above, the order dated 31.07.2021 passed by the District Inspector of Schools, Agra being contrary to the provision of Section 5 (1) of the Act 1971 and without providing any opportunity of hearing to the petitioners, is arbitrary, illegal and is liable to be set aside.

26. Accordingly, the present writ petition is allowed. The impugned order dated 31.07.2021 passed by the D.I.O.S., Agra is hereby quashed.

27. No order as to cost.

(2022)01ILR A312
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.12.2021 & 23.12.2021

BEFORE

THE HON'BLE PRITINKER DIWAKER, J.
THE HON'BLE ASHUTOSH SRIVASTAVA, J.

Writ C No. 61005 of 2017

Dhan Pal Singh & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Manoj Kumar Pandey

Counsel for the Respondents:
C.S.C., Sri Vivek Saran

A. UP Avas Evam Vikas Parishad Plots and Housing Regulations and Allotment Rules, 1979 – Allotment of shop/plot to the displaced person – Rates chargeable on it, whether it should be the rate which was given to the farmers at the time of the acquisition or the current market rate – Held, the contention that the demand of the Parishad for current rates is unjustified cannot be sustained. The petitioners are liable to pay the current rates as applicable towards the allotment of the plots in their favour – Raghuvir Singh's case is followed. (Para 3 and 9)

Writ petition dismissed. (E-1)

List of Cases cited:-

1. Special Leave to Appeal (C) No. 487 of 2018; U.P. Avas Evam Vikas Parishad & ors. Vs Raghuvir Singh (D) through L.R.s & ors. decided on 11.01.2018

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

1. Heard Sri Manoj Kumar Pandey, learned counsel for the petitioners, Sri Vivek Saran, learned counsel, who has put in appearance on behalf of contesting Respondents No.2, 3 & 4 and learned Standing Counsel for Respondent No.1.

2. The pleadings between the contesting parties have been exchanged and with the consent of the parties, we proceed to decide the writ petition on merits at the admission stage itself.

3. The writ petitioners claim that they are "Displaced Persons" within the meaning of displaced persons under the U.P. Avas Evam Vikas Parishad Plots and Housing Regulations and Allotment Rules, 1979. Their entire land was acquired by the Parishad for their Vasundhara Scheme. The award in respect of the acquisition was made on 27.02.1989. It is submitted that the Parishad under the 1979 Regulations has decided to allot plots as well as shops to the displaced persons provided such displaced persons apply and get themselves registered by depositing a sum of Rs.5000/- in between 01.09.1999 and 30.09.1999. There is no dispute about the petitioners getting themselves registered by depositing the requisite amounts. The Parishad proceeded to allot the shops to the petitioners which were not acceptable to the petitioners. The Parishad consequent to a meeting held on 08.10.2012 resolved to allot commercial plot measuring 25 sq. meter to 50 sq. meter to the displaced persons. The grievance of the petitioners, as is borne out from the averments made in the writ petition, is with regard to the rate of the land/plot being charged by the Parishad. According to the petitioners, the rate should be the rate which was given to the farmers at the time of the acquisition, while the Parishad is insisting on current

market rate. The other grievance of the petitioners is that till date the plots have not been allotted to the petitioners.

4. Sri Vivek Saran, learned counsel appearing for the contesting respondents, has filed counter affidavit stating therein that the Parishad on account of the unwillingness of the erstwhile landowners/villagers, whose entire land was acquired and such persons were placed in the category of "Displaced Persons", in principal agreed to allot "Small Commercial Plots" at the current/ prevailing market rate at the time of the allotment through the process of auction. He submits that the Hon'ble Supreme Court has approved the charging of the current land rate by the Parishad in its order dated 11.01.2018 passed in ***Special Leave to Appeal (C) No.487 of 2018 (U.P. Avas Evam Vikas Parishad & others Vs. Raghuvir Singh (D) through L.R.s & others)***, which SLP arose from the judgment rendered by this Court in Writ Petition (C) No.64373 of 2008. The order of the Hon'ble Supreme Court has been brought on record as CA-2.

5. Sri Vivek Saran further submits that in similar set of facts this Court was pleased to dispose of Writ Petition (C) No.16355 of 2018 by order dated 10.05.2018 (Annexure CA-3) directing the Parishad to allot "Small Commercial Plots" through auction amongst the Displaced Person Category. He further submits that the prevailing land rate in Vasundhara Scheme, Ghaziabad is between Rs.48,800/- to Rs.44,200/- sq. meter and the circle rate would be around Rs.60,000/- to Rs.56,500/- per sq. meter and in such view of the matter, the rate of land demanded by the petitioners is unimaginable and cannot be accepted.

6. In the rejoinder affidavit filed by the petitioners, in response to the counter affidavit of the Parishad, the petitioners have demonstrated that the Parishad is not following uniform policy in applying the rate of the land rather is adopting a pick and choose policy, inasmuch as for certain schemes i.e. Siddharth Vihar Mandola of Ghaziabad, Vrindadban Scheme of Lucknow, the Parishad has allotted plots to displaced persons on the basis of rate of compensation or 20% of first allotment, while the displaced persons of Vasundhara Scheme, Ghaziabad (i.e. the petitioners) the Parishad is demanding the current market rate.

7. Sri Vivek Saran, learned counsel for the contesting respondents has apprised the Court that the Parishad generally allots the commercial plots by conducting public auctions. However, since the present allotment process relates to allotting the commercial plots of 25 to 50 sq. meter to a special class i.e. displaced persons, a proposal dated 06.10.2021 has been made not to hold any auction and allot the plots to the displaced persons, such as the petitioners. The proposal dated 06.10.2021 is in the process of approval in the Board Meeting of the Parishad and soon after the approval, the allotment of the plots shall be made to the petitioners and other similarly circumstanced displaced persons.

8. We have considered the submissions raised. We find that Writ Petition (C) No.64373 of 2008 (Raghvir Singh and another Vs. State of U.P through Secretary, Urban Development and others)

raising similar issues, as raised in the present petition was, allowed and the demand of current rates made by the respondents was held to be unsustainable. However, the Hon'ble Apex Court in ***Special Leave to Appeal (C) No.487 of 2018 (U.P. Avas Evam Vikas Parishad & others Vs. Raghuvir Singh (D) through L.R.s & others)*** preferred by the Parishad against the decision dated 06.10.2017 passed in Writ Petition (C) No.64373 of 2008, vide its order dated 11.01.2018, modified the order of the High Court to the effect that the rate at which the plot may be allotted, will be the current rate.

9. In such view of the matter, the contention of the petitioners that the demand of the Parishad for current rates is unjustified cannot be sustained. The petitioners are liable to pay the current rates as applicable towards the allotment of the plots in their favour. As regards the allotment of the "Small Commercial Plots" of 25-50 sq. meter area to the petitioners, it is expected from the Respondent Avas Evam Vikas Parishad that the allotment process may be finalized at the earliest considering the delay that has already occurred.

10. With the aforesaid observations, the writ petition is **dismissed.**

Order on Correction Application.

The application is allowed.

The word 'Pritinder' in the signature clause of the judgement dated 3.12.2021 stands substituted by the word '**Pritinker'.**

This order shall be treated as part of the judgement dated 3.12.2021 and certified copy of this order shall be issued along with copy of judgement dated 3.12.2021.

(2022)01ILR A314
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 24.12.2021
BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Application U/S 482 Cr.P.C. No.2955 of 2007

Rakesh Kumar Shukla ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Ashok Kumar Dwivedi

Counsel for the Opposite Parties:
A.G.A.,Sri U.B. Singh, Sri V.B. Rao

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power - Indian Penal Code, 1860 - Sections 307, 504 , 506 - Section 155(4) Cr.P.C - 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 - 16)

Informant/respondent no.2 filed an application under Section 156 (3) Cr.P.C. against the accused-applicant - applicant had fired at him with the intention to kill him - charge sheet forwarded to the court for trial of the applicant. - applicant charged with offences under Sections 504 and 506 IPC - one of which, i.e. the offence under Section 506 is a cognizable offence.(Para - 2,3,15)

HELD:-Since the accused had been charged under Sections 504 and 506 IPC, he has to be tried for both the offences in the manner prescribed for trial of cognizable offences.(Para - 17)

Application u/s 482 Cr.P.C. rejected. (E-7)

List of Cases cited:-

1. Dr. Rakesh Kumar Sharma Vs St. of U.P. & anr. , 2007 (9) ADJ 478

2. Meta Sewak Upadhyay Vs St. of U.P., 1995 CJ (All) 1158

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

1. Heard Sri. Ashok Kumar Dwivedi, learned Counsel for the Applicant and learned AGA for the State-respondents.

2. By means of the present application under Section 482 of the Criminal Procedure Code the applicant has prayed for quashing of the charge sheet dated 18.01.2007 in Criminal Case No. 305 of 2007 (State vs. Rakesh Kumar Shukla) under Sections 504 and 506 IPC, Police Station Kotwali Nagar, District Banda, pending in the Court of Chief Judicial Magistrate, Banda, which has been instituted by an application under Section 156 (3) Cr.P.C., filed on 25-11-2006 by the opposite party number 2.

3. The accused-applicant and the informant-opposite party no.2 are neighbors. The applicant lives in House No. B-81 whereas the informant lives in House No. B-82, Awas Vikas Colony, P.S. Kotwali, District-Banda. The informant/respondent no.2 had filed an application under Section 156 (3) Cr.P.C. against the applicant alleging that the applicant had fired at him with the intention to kill him and when several persons from the locality gathered there, he went away threatening to kill the informant. In furtherance of the aforesaid application, a First Information Report was lodged. The applicant had filed Criminal Misc. Application No. 15344 of 2006 and on 27.11.2006, this Court passed the following order:

"Heard Sri R.R.Singh, counsel for the applicant and A.G.A.

Having heard the submissions and perusing the materials on record, this application is finally disposed of with the direction that pursuant to the impugned order dated 19.10.2006 passed by C.J.M., Banda on the application of opposite party no.2 under Section 156 (3) Cr.P.C., if any case has been registered against the applicant at P.S. registered against the applicant at P.S. Kotwali, district-Banda, then investigation in the matter may go on, but the applicant shall not be arrested till submission of the report under Section 173(2), Cr.P.C. provided he cooperates with the investigation."

4. An investigation was carried out pursuant to the aforesaid FIR and statements of six witnesses were recorded. After completion of investigation, the police has submitted the charge sheet no. 11/2007 on 18.11.2007 stating that upon investigation, from the statements of the witnesses and inspection of the site of occurrence, commission of the offence under Section 307 IPC was not found and merely offences under Sections 504 and 506 IPC was found to have been committed. The charge sheet has been forwarded to the court for trial of the applicant.

5. Sri Ashok Kumar Dwivedi, learned counsel for the applicant has argued that although originally the first information report was lodged under Sections 307, 504, 506 IPC but during investigation, the allegation of commission of offence under

Section 307 IPC was found to be false and only a case under Sections 504 and 506 IPC was found to be made out against the applicant, both of which are non-cognizable offences and, therefore, the case against the applicant can only proceed as a complaint. In support of his submission, he has invited attention of the Court to the Explanation appended to Section 2 (d) of Cr.P.C. In order to appreciate his submission, the relevant provision of Cr.P.C. is being reproduced below: -

"(d) "complaint" means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report.

Explanation.--A report made by a police officer in a case which discloses, after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be the complainant"

6. Ashok Kumar Dwivedi has placed reliance on a judgment of this Court in **Dr. Rakesh Kumar Sharma vs. State of U.P. and another** reported in **2007 (9) ADJ 478**, in which case originally the FIR was lodged under Section 307. However, after investigation the Investigating Officer came to the conclusion that no offence under Section 307 IPC was made out and only a case under Section 504 IPC was made out against the accused and so a charge sheet under Section 504 IPC was submitted against the applicant. In this backdrop a coordinate Bench of this Court held that the Magistrate shall not proceed with the case as a state case but he shall proceed with it as a complaint case as provided in the explanation to Section 2(d) Cr.P.C.

7. However, in the present case, apart from an offence under Section 504, an offence under Section 506 IPC has also been found to have been committed. Although in the first schedule appended to the code of criminal procedure, 1973 Section 506 is mentioned to be a non-cognizable offence, the Uttar Pradesh Government has issued a Notification No. 777/VIII-9 4(2)-87, dated July 31,1989, published in U.P. Gazette, Extra Part-4, Section (Kha), dated 2nd August, 1989 by which the Section 506 IPC was made cognizable and non bailable.

8. The aforesaid Notification No. 777/VIII 9-4 (2)-87 dated July 31, 1989, published in the U.P. Gazette, Extra, Part-4, Section (kha) dated 2nd August, 1989 states as follows:

"In exercise of the powers conferred by Section 10 of the Criminal Law Amendment Act, 1932 (Act No. XXIII of 1932) read with Section 21 of the General Clauses Act, 1897 (Act No.10 of 1897) and in super session of the notifications issued in this behalf, the Governor is pleased to declare that any offence punishable under Section 506 of the Indian Penal Code when committed in any district of Uttar Pradesh, shall notwithstanding anything contained in the Code of Criminal Procedure, 1973 (Act No.2 of 1974) be cognizable and non-bailable."

9. The aforesaid notification has been issued under Section 10 of the Criminal Law Amendment Act, 1932 (Act No. 23 of 1932), which provides as follows: "10. Power of State Government to make certain offences cognizable and non-bailable.--

(1) The State Government may, by notification4 in the Official Gazette, declare that any offence punishable under section 186, 188, 189, 190, 228, 295A, 298, 505, 506 or 507 of the Indian Penal Code (45 of 1860), when committed. in any area specified in the notification shall, notwithstanding anything contained in the Code of Criminal Procedure, 1898 (5 of 1898), be cognizable, and thereupon the Code of Criminal Procedure, 1898, shall, while such notification remains in force, be deemed to be amended accordingly.

(2) The State Government may, in like manner and subject to the like conditions and with the like effect, declare4 that an offence punishable under section 188 or section 506 of the Indian Penal Code (45 of 1860), shall be non-bailable."

10. The validity of the aforesaid Notification dated 31-07-1989 was examined by a Division Bench of this Court in Virendra Singh versus State of U.P., 2002 Indian Law reports Allahabad Series 653 2002 (2) UC 453 and in that case, this Court held as follows: -

"6. Section 10 of the Criminal Law Amendment Act, 1932 does not give power to the State Government to amend by a notification any part of the Code of Criminal Procedure, 1973. Since the Code of Criminal Procedure of 1898 has been repealed by Section 484 of the Code of Criminal Procedure. Act, 1973 we are of the opinion that Section 10 of the Criminal Law Amendment Act, 1932 has become redundant and otiose. Hence in our opinion no notification can now be made under Section 10 of the Criminal Law Amendment Act, 1932. Any such notification is illegal for the reason given above. Hence we declare notification No. 777/VIII-94(2)-87, dated July 31, 1989, published the U.P. Gazette, Extra Part-4, Section (kha), dated 2nd August, 1989 by which Section 506 I.P.C. was made cognizable and non-bailable to be illegal. Section 506 I.P.C. has to be treated as bailable and non-cognizable offence."

11. However, in the case of **Meta Sewak Upadhyay versus State of U.P., 1995 CJ (All) 1158,** a Full Bench of this Court examined the validity of the aforesaid Notification. It may be relevant to note that although the Full Bench has at some places mentioned the date of the Notification as August 2, 1989, which is actually the date of publication of the Notification in the Official Gazette and at some places the date of the Notification is mentioned as July 31, 1989 but the contents of the Notification are the same as those which have been reproduced above. The Full Bench held as follows: -

"61.There are two notifications of December 29, 1932 and August 2, 1989 which came to be issued in exercise of the powers conferred by Section 10 of the Act of 1932. Whereas, the first notification was made applicable only to a few districts, mentioned therein, the second notification of August 2, 1989 which was issued in super session of the notifications earlier issued in this behalf, states that the Governor is pleased to declare that any offence punishable under Section 506 of the Indian Penal Code (IPC) when committed in any district of Uttar Pradesh, shall notwithstanding anything contained in the Criminal Procedure Code, 1973, be cognizable and non-bailable. From the second notification it is, therefore, clear that that was issued in super session of the

notification of December 29, 1932 and the effect of this notification is that the offence punishable under Section 506, IPC when committed at any place through, out the Uttar Pradesh, shall notwithstanding anything contained in the Criminal Procedure Code, be cognizable and non-bailable. In the first Schedule to the Criminal Procedure Code, 1973, the offence under Section 506 IPC is described as non-cognizable and bailable, but by virtue of Sec. 10 of the Act of 1932, the same has been declared for the entire Uttar Pradesh as cognizable and non-bailable by the notification of August 2, 1989. Sec. 10 of the Act of 1932 confers powers of the State Government to declare by notification in the official Gazette that an offence punishable under Section 506 IPC inter alia when committed in any area specified in the notification, shall notwithstanding anything contained in the Code of Criminal Procedure, 1898, be cognizable and non-bailable and thereupon the Code of Criminal Procedure, 1898 shall while such notification remain in force, be deemed to be amended accordingly. The submission is that by the Act of 1932, an amendment was made in the Code of Criminal Procedure, 1898, which stood repealed by virtue of Section 484 of Code of Criminal Procedure, 1973, which was assented by the President of April 1, 1974. The Act of 1932 having been passed simply to amend the Cr. P.C. of 1889, the argument of Sri Misra is that the former could not survive beyond the life of the Cr. P.C. of 1898, which came to an end after being repealed in April, 1974. In short, he submits that the life of the Amending Act cannot be more that the principal act and that the amending act is co-extensive and co-terminus with the Principal Act and that Cr. P.C. of 1898 which was amended by the Act of 1932, having been repealed in April, 1974, the Act of 1932 could not have survived thereafter. Sri Tulsi argues that it is a misnomer to say that the Act of 1932 is simply an Amending Act. He submits that the Act of 1932 is named as "The Criminal Law Amendment Act, 1932." because that has made some amendment in the general body of criminal law and, in fact, the Act of 1932 is not only an Amending Act but a unique blend of substantive law as well as of the provisions making an amendment in the Cr. P.C., 1898 and that it having contained substantive provisions as well, cannot be said to be co-terminus with the Cr. P.C. of 1898 in which certain amendments were made, says Sri Tulsi. From perusal of the Act of 1932, the submission of Sri Tulsi appears to be correct that the said enactment is not merely an Amending Act but that is a blend of substantive provisions as well as the ***provisions amending Cr. P.C. of 1898. So the Act of 1932*** *is still on the statute book, notwithstanding the repeal of Cr. P.C. 1898.*

62. Therefore, the contention of Sri Misra that impugned notification of August 2, 1989, having been issued under a dead enactment is invalid, has to be rejected.

Then Sri Trivedi whose assistance was sought by Sri R. R. Dwivedi submits that Section 10 of the Act of 1932 is violative of ***Article 14 of the Constitution,*** inasmuch as it is bereft of any guideline in respect of an area to be specified in the notification. He submits that the State Government is given free hand with unguided, unchannelised and arbitrary power to issue notification for any area and, therefore, Section 10 suffers from the vice of excessive delegation. Section 10 of the Act of 1932 is reproduced as under :

"10 Power of Local Government to make certain offences cognizable and non-bailable.-(I) The Local Government may, by notification in the local official Gazette, declare that any offence punishable under ***Section 186, 188, 189, 190, 228, 295A, 298, 505, 506 or 507 of the Indian Penal Code***, when committed in any area specified in the notification shall, notwithstanding anything contained in the Code Criminal Procedure, 1898, be cognizable and thereupon the Code of Criminal Procedure, 1898, shall, while such notification remains in force, be deemed to be amended accordingly.

(2) The Local Government may, in like manner and subject to the like conditions and with the like effect, declare that an offence punishable under ***Section 188 or Section 506 of the Indian Penal Code*** shall be non-bailable."

12. The Full Bench proceeded to hold that "Section 10 of the Act of 1932 and Notification No. 777/VIII-9-4 (2) (87) dated July 31, 1989 are valid.

13. The aforesaid Full Bench decision in Meta Sewak Upadhyay (Supra) has been approved by the Hon'ble Supreme Court in Aires Rodrigues versus Vishwajeet P. Rane (2017) 11 SCC 62.

14. The validity of the aforesaid notification dated 31st July 1989 having been upheld by a Full Bench of this Court in Meta Sewak Upadhyay (Supra) and the Full Bench decision having been approved by the Hon'ble Supreme Court in Aires Rodrigues (Supra), there is no doubt that an offence under Section 506 IPC, if committed in the State of U.P. is a cognizable offence.

15. Therefore, the contention of the learned counsel for the applicant/accused has been charged with commission of non-cognizable offences only based on the decision in Dr. Rakesh Kumar Sharma (Supra), is misconceived as in that case, the accused had been charged only with offence under Section 504 IPC, which is a non-cognizable offence whereas in the instant case, the applicant has been charged with the offences under Sections 504 and 506 IPC, one of which, i.e. the offence under Section 506 is a cognizable offence.

16. It is expressly provided in Sub-Section 4 of Section 155 Code of Criminal Procedure 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."

17. In view of the aforesaid provisions of law, since the accused had been charged under Sections 504 and 506 IPC, he has to be tried for both the offences in the manner prescribed for trial of cognizable offences.

18. Therefore, the application lacks merit and it is accordingly rejected.

(2022)01ILR A319
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.12.2021

BEFORE

THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Application U/S 482 Cr.P.C. No. 5009 of 2021

Ravi & Ors. ...Applicants
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicants:
Sri Bipin Kumar, Ms. Deepti, Sri Shobhit Dubey, Sri Sudhir Dixit

Counsel for the Opposite Parties:
G.A., Sri Ajit Kumar

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - -Sections 2(u),4,5,26,156(3),164,173,190,193,200,204,207,209,230,319,460,461 & 465 - Indian Penal Code, 1860 - Sections 363,366 & 376D - The Protection of Children From Sexual Offences Act, 2012 - Section 3/4 , 5/6 - Constitution of India - Article 15,21,39 - Inherent power non-commitment of the case, ipso facto, would not vitiate the trial by Sessions Court unless *failure of justice* has in fact been occasioned thereby or the accused can establish that he has been prejudiced as a result thereof - irregularity in procedure, if any, with regard to committal would not be a cause of injustice or prejudice to the applicants.(Para -75,83)

(B) Criminal Law - The Protection of Children From Sexual Offences Act, 2012 - Section 33(1) - power of the Special Court to take cognizance - without any committal of the accused - to the extent of any inconsistency - would override the general provisions under the Code, by virtue of the provisions under Section 42-A read with Section 31 of the POCSO Act. (Para -81)

Application filed - seeking to quash entire proceedings as well as summoning order - passed by Special judge , POCSO - police report submitted - under section 363 IPC - only against applicant no. 1 - prior to taking cognizance - application filed by opposite party no. 3 (prosecutrix) - cognizance may also be taken under section 3/4 POCSO Act and Section 376D,366,363IPC - view of Magistrate - power to take cognizance with the Special Court constituted under the POCSO Act and not with the Magistrate - papers transmitted to Special Court, POCSO - directed registration of the case - issuance of summons to applicants - hence present application .

HELD:-Order of summoning and also the proceedings of the criminal case, of which quashment is sought, being in accord with the scheme of the statutory enactment, cannot be said to suffer from any illegality so as persuade this Court to exercise its inherent jurisdiction under Section 482 of the Code.(Para -84)

Application u/s 482 Cr.P.C. dismissed. (E-7)

List of Cases cited:-

1. Balveer Singh & anr. Vs St. of Raj. & anr., (2016) 6 SCC 680

2. Dharam Pal & ors. Vs St. of Har. & anr., (2014) 3 SCC 306

3. Minu Kumari & anr. Vs St. of Bihar & ors., (2006) 4 SCC 359

4. Annu @ Smt. Anuradha & ors. Vs St. of U.P. & anr., (Application u/s 482 No. 32910 of 2019

5. Sudhir Kumar Jain & anr. Vs St. of U.P. & anr., (Application u/s 482 No. 137 of 2018, decided on 07.02.2018)

6. Minu Kumari & anr. Vs St. of Bihar & ors., (2006) 4 SCC 359

7. Raghubans Dubey Vs St. of Bihar, AIR 1967 SC 1167

8. Joginder Singh & anr. Vs St. of Punj. & anr., (1979) 1 SCC 345

9. S.K. Latfur Rahman& ors. Vs The St., 1985 CrLJ 1238

10. Kishun Singh & ors. Vs St. of Bihar, (1993) 2 SCC 16

11. Ranjit Singh Vs St. of Punj., (1998) 7 SCC 149

12. Dharam Pal& ors. Vs St. of Har. & anr., (2004) 13 SCC 9

13. Dharam Pal& ors. Vs St. of Har. & anr., (2014) 3 SCC 306

14. Ajay Kumar Parmar Vs St. of Raj., (2012) 12 SCC 406

15. Balveer Singh & anr. Vs St. of Raj. & anr., (2016) 6 SCC 680

16. St. through Central Bureau of Investigation Chennai Vs Arul Kumar, (2016) 11 SCC 733

17. A.R.Antulay Vs Ramdas Sriniwas Nayak & anr., (1984) 2 SCC 500

18. Harshad S.Mehta& ors. Vs St. of Mah/, (2001) 8 SCC 267

19. Pradeep S. Wodeyar Vs The St. of Karn/, 2021 SCC Online SC 1140

20. A.R.Antulay Vs Ramdas Sriniwas Nayak & anr., (1984) 2 SCC 500

21. Santhosh De Vs Archana Guha, AIR 1994 SC 1229

22. St. of Madhya Pradesh Vs Bhooraji , (2001) 7 SCC 679

23. Rattiram & ors. Vs St. of M.P., (2012) 4 SCC 516

24. Hussainara Khatoon (1) Vs St. of Bihar, (1980) 1 SCC 81

25. Moti Lal Saraf Vs St. of J&K (2006) 10 SCC 560

26. Raj Deo Sharma Vs St. of Bihar (1998) 7 SCC 507

27. Balveer Singh & anr. Vs St. of Raj. & anr., (2016) 6 SCC 680

28. Dharam Pal& ors. Vs St. of Har. & anr. , (2014) 3 SCC 306

(Delivered by Hon'ble Dr. Yogendra Kumar Srivastava, J.)

1. Heard Sri Sudhir Dixit, alongwith Sri Anupam Shyam Dwivedi, Sri Utakarsh Dixit and Sri Shobhit Pratap Singh learned counsel for the applicants, Sri Vinod Kant, learned Additional Advocate General assisted by Sri Pankaj Saxena, learned Additional Government Advocate-I appearing for the State-opposite party no.1 and Sri Rajneesh Pratap Singh appearing alongwith Sri Ajit Kumar, learned counsel for the opposite party no.3.

2. The present application under Section 482 of the Code of Criminal Procedure, 19731 has been filed seeking to quash the entire proceedings of Criminal Case No.2377 of 2020 pending before the Special Judge, POCSO, Aligarh as well as summoning order dated 17.10.2020 arising out of Case Crime No.428 of 2019, under Sections 363, 366, 376D of the Indian Penal Code2 and Section 5/6 of the Protection of Children from Sexual Offences Act, 20123, Police Station Khair, District Aligarh in terms of which learned Judge has summoned the applicant no.1, under Sections 366, 376D IPC and Section 5/6 POCSO Act and also summoned the applicant nos. 2 and 3, under Sections 363, 366, 376D IPC and Section 5/6 POCSO Act, Police Station Khair, District Aligarh.

3. Pleadings in the case indicate that the proceedings were commenced pursuant to an FIR dated 02.09.2019, registered as Case Crime No.428/2019, under Section 363 IPC, Police Station Khair, District Aligarh, whereupon the case was investigated and a police report dated 04.06.2020 was submitted, under section 363 IPC, only against the applicant- no.1. Prior to taking cognizance an application was filed by the opposite party no.3-

prosecutrix stating that having regard to the facts of the case, cognizance may also be taken under Section 3/4 POCSO Act and Section 376D, 366, 363 IPC and enclosing therewith her affidavit and her statement recorded under Section 164 of the Code and placing reliance on the decisions of the Supreme Court in **Balveer Singh and Another vs. State of Rajasthan and Another4** and **Dharam Pal and Others vs. State of Haryana and Another5.**

4. The learned Magistrate upon examining the papers, placed alongwith the application filed by the opposite party no.3-prosecutrix, took the view that looking to the offences disclosed in the application the power to take cognizance in the matter would be with the Special Court constituted under the POCSO Act and not with the Magistrate and in view thereof the papers were transmitted to the Special Court, POCSO, Aligarh. The case was thereafter taken up by the Special Judge, POCSO and taking into consideration the facts of the case, hearing the parties concerned and also examining the legal position, the Special Judge, POCSO vide order dated 17.10.2020 directed registration of the case and issuance of summons to the applicants herein. It is at this stage that the present application under Section 482 of the Code has been filed seeking quashing of the entire proceedings of the criminal case and also the summoning order dated 17.10.2020 passed by the Special Judge, POCSO.

5. Learned counsel for the applicants has sought to assail the order passed by the Special Judge, POCSO in terms of which the applicants have been summoned and also quashing of the proceedings by submitting as under:-

5.1 The learned Magistrate while passing the order dated 16.09.2020 has neither taken cognizance of the offence as per the provisions under section 190 (1) of the Code nor committed the case after following the procedure under Sections 207 and 209 of the Code and in this manner the Magistrate has adopted a procedure which is not provided for under the Code. In this regard he has placed reliance on the judgment in the case of **Minu Kumari and another vs. State of Bihar and others6.**

5.2. It is pointed out that upon receiving the police report under section 173 (2) of the Code, the options available to the Magistrate were either to: (i) accept the report and take cognizance of the offence and issue process, or (ii) disagree with the report and drop the proceedings, or (iii) direct further investigation under section 156 (3) and require the police to make a further report.

5.3 The police report having been submitted against the applicant no.1 only under Section 363 of the Code, the application moved by the prosecutrix could at best have been treated to be a protest petition and the Magistrate could have treated the same as a complaint case and taken cognizance under section 190 (1) (a) of the Code.

5.4 The judgment of the Hon'ble Supreme Court in the case of **Balveer Singh (supra)** which has been relied upon by the Magistrate has no application to the facts of the present case.

5.5 Referring to sub-section (1) of Section 28 of the POCSO Act, it is submitted that the Special Court designated under the sub-section is for the purpose of trying the offences under the Act and in view of the saving clause under section 31, the provisions of the Code would apply to

proceedings before a Special Court. Accordingly, it is contended that the procedure adopted by the Special Court being contrary to the Code the same is legally unsustainable.

6. Controverting the aforesaid assertions the learned Additional Advocate General submits as under:-

6.1 A plain reading of the FIR discloses the age of the victim to be less then 18 years. The statement of the victim recorded under Section 164 of the Code supports the FIR version and also discloses the offence under section 376 IPC. The aforementioned material having been placed alongwith the police report, the Magistrate, upon taking notice thereof, has rightly held that the case would be covered within the ambit of the POCSO Act and in view of the procedure provided under section 33(1) the matter would be cognizable by the designated Special Court without the accused being committed to it for trial. In view of the aforesaid, the Magistrate having not been required under law to commit the accused for trial and the matter being cognizable by the designated Special Court under the POCSO Act, the Magistrate rightly transmitted the file to the designated Special Judge.

6.2 Referring to the decision in the case of **Minu Kumari** (supra) it is submitted that upon receiving the police report under section 173 (2) of the Code it was open to the Magistrate to disagree with the report and take the view that there is sufficient ground for proceeding further. Having taken that view and noticing that the offence disclosed would be covered under the special Act i.e. POCSO Act and the procedure prescribed under section 33 (1) was required to be followed, the Magistrate had no option but to transmit the records to the designated Special Judge inasmuch as the provisions of the Code are applicable only to the extent as provided under Section 31 of the said Act.

6.3 As regards the contention on behalf of the applicant that police report having been submitted against the applicant no.1 only under section 363, the application moved by the first informant could at best be treated to be a protest petition and the Magistrate could have treated the same as a complaint and taken cognizance under section 190(1) (a), reliance is placed on the Constitution Bench decision in the case of **Dharam Pal and Others (supra)** to submit that one of the choices open to the Magistrate upon disagreeing with the report would be to issue process and summon the accused or in case he is satisfied that a case has been made out, which was triable by a Court of Session, he may commit the case to the Court of Session to proceed further in the matter.

6.4 In the instant case, the Magistrate being satisfied that the facts of the case disclosed an offence under the special Act. i.e. POCSO Act and as per terms thereof the case was triable by the designated Special Court, and in view of the procedure under section 33(1) the accused was not required to be committed, the Magistrate has rightly transmitted the records to the designated Special Court. The designated Special Court upon receipt of the police report has thereafter followed the procedure under section 33(1) and acting as a court of original jurisdiction has taken cognizance and summoned the accused.

6.5 In view of the procedure prescribed under section 33(1) of the POCSO Act, which is a special Act, the provision with regard to taking cognizance under section 193 and the necessity of the case being committed to the Court of Sessions after completing the procedural requirement under sections 207 and 209 of the Code would not be applicable in view of the saving clause under section 5 of the Code.

6.6 The judgments in the case of **Annu alias Smt. Anuradha and Others Vs. State of U.P. and Another7 and Sudhir Kumar Jain and Another vs. State of U.P. and Another8** relating to sections 207 and 209 were passed in the context of the general law and not with reference to the provisions of the special Act and therefore, would have no application to the facts of the present case.

6.7 Reliance is placed on the Constitution Bench judgment in the case of **Dharampal** (supra) and also the judgment in the case of **Balveer Singh** (supra) in so far as they lay down the law in the general context that the Magistrate in the event he disagrees with the report has an option to issue process and summon the accused or if he is satisfied that a case is made out, which is triable by the Court of Sessions, he may commit the case to the court concerned to proceed further in the matter.

6.8 As regards the contention that in case of an offence under the POCSO Act the police report ought to have directly been placed before the designated Special Court, it is pointed out that as per the chargesheet submitted by the Investigating Officer the offence under section 363 was only disclosed and accordingly the same was placed before the jurisdictional Magistrate. It was thereafter that the concerned Magistrate upon taking notice of the facts and the material placed before him disclosed commission of offence under the POCSO Act, which is triable by the designated Special Court, transmitted the file to the said Special Court for proceeding further.

7. Sri Rajnish Pratap Singh appearing alongwith Sri Ajit Kumar, learned counsel for the opposite party no.3, has supported the contention raised by the learned Additional Advocate General and points out that the POCSO Act being a special enactment the procedure prescribed therein would be required to be followed and in terms thereof the designated Special Court is fully empowered to take cognizance and issue summons upon receiving of the police report transmitted to him by the jurisdictional Magistrate.

8. The present application brings to fore interesting questions with regard to the manner of taking cognizance in the context of a special Act i.e. the POCSO Act, and its interplay with the general provisions under the Code.

9. The POCSO Act was enacted to protect children from offences of sexual assault, sexual harassment and pornography and provide for establishment of Special Courts for trial of such offences and for matters connected therewith or incidental thereto.

10. The statement of objects and reasons refers to Article 15 of the Constitution, which, interalia, confers upon the State powers to make special provision for children. Further, reference is made to Article 39, which, interalia, provides that the State shall in particular direct its policy

towards securing that the tender age of children are not abused and their childhood and youth are protected against exploitation and they are given facilities to develop in a healthy manner and in conditions of freedom and dignity.

11. It also contains reference to the United Nations Convention on the Rights of Children, ratified by India, which requires the State Parties to undertake all appropriate national, bilateral and multilateral measures to prevent (a) the inducement or coercion of a child to engage in any unlawful sexual activity; (b) the exploitative use of children in prostitution or other unlawful sexual practices; and (c) the exploitative use of children in pornographic performances and materials.

12. Taking note of the data collected by the National Crime Records Bureau which showed an increase in cases of sexual offences against children and also noticing that sexual offences against children were not adequately addressed by the extant laws and a large number of such offences were neither specifically provided for nor adequately penalised, it was felt that offences against children need to be defined explicitly and countered through commensurate penalties as an effective deterrence and that the interests of the child, both as a victim as well as a witness, needs to be protected.

13. The POCSO Act was therefore enacted as a self contained comprehensive legislation interalia to provide for protection of children from the offences of sexual assault, sexual harassment and pornography with due regard for safeguarding the interest and well being of the child at every stage of the judicial process, incorporating child-friendly procedures for reporting, recording of evidence, investigation and trial of offences and provision for establishment of Special Court for speedy trial of such offences.

14. The procedure for reporting of cases under the POCSO Act is provided for under Chapter V, and the relevant provisions thereunder are being extracted below :-

"19. Reporting of offences. (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) any person (including the child), who has apprehension that an offence under this Act is likely to be committed or has knowledge that such an offence has been committed, he shall provide such information to,--

(a) the Special Juvenile Police Unit; or

(b) the local police.

(2) Every report given under sub-section (1) shall be--

(a) ascribed an entry number and recorded in writing;

(b) be read over to the informant;

(c) shall be entered in a book to be kept by the Police Unit.

(3) Where the report under sub-section (1) is given by a child, the same shall be recorded under sub-section (2) in a

simple language so that the child understands contents being recorded.

(4) In case contents are being recorded in the language not understood by the child or wherever it is deemed necessary, a translator or an interpreter, having such qualifications, experience and on payment of such fees as may be prescribed, shall be provided to the child if he fails to understand the same.

(5) Where the Special Juvenile Police Unit or local police is satisfied that the child against whom an offence has been committed is in need of care and protection, then, it shall, after recording the reasons in writing, make immediate arrangement to give him such care and protection (including admitting the child into shelter home or to the nearest hospital) within twenty-four hours of the report, as may be prescribed.

(6) The Special Juvenile Police Unit or local police shall, without unnecessary delay but within a period of twenty-four hours, report the matter to the Child Welfare Committee and the Special Court or where no Special Court has been designated, to the Court of Session, including need of the child for care and protection and steps taken in this regard.

(7) No person shall incur any liability, whether civil or criminal, for giving the information in good faith for the purpose of sub-section (1).

20. Obligation of media, studio and photographic facilities to report cases. Any personnel of the media or hotel or lodge or hospital or club or studio or photographic facilities, by whatever name called, irrespective of the number of persons employed therein, shall, on coming across any material or object which is sexually exploitative of the child (including pornographic, sexually-related or making obscene representation of a child or children) through the use of any medium, shall provide such information to the Special Juvenile Police Unit, or to the local police, as the case may be.

21. Punishment for failure to report or record a case.- (1) Any person, who fails to report the commission of an offence under sub-section (1) of section 19 or Section 20 or who fails to record such offence under sub-section (2) of Section 19 shall be punished with imprisonment of either description which may extend to six months or with fine or with both.

2. Any person, being in-charge of any company or an institution (by whatever name called) who fails to report the commission of an offence under sub-section (1) of section 19 in respect of a subordinate under his control, shall be punished with imprisonment for a term which may extend to one year and with fine.

3. The provisions of sub-section (1) shall not apply to a child under this Act

22. Punishment for false complaint or false information.-(1) Any person, who makes false complaint or provides false information against any person, in respect of an offence committed under Sections 3,5,7 and Section 9, solely with the intention to humiliate, extort or threaten or defame him, shall be punished with imprisonment for a term which may extend to six months or with fine or with both.

2. Where a false complaint has been made or false information has been provided by a child, no punishment shall be imposed on such child.

(3) Whoever not being a child, makes a false complaint or provides false information against a child, knowing it to be false, thereby victimising such child in any of the offences under this Act, shall be punished with imprisonment which may extend to one year or with fine or with both.

23. Procedure for media.-(1) No person shall make any report or present comments on any child from any form of media or studio or photographic facilities without having complete and authentic information, which may have the effect of lowering his reputation or infringing upon his privacy.

(2) No reports in any media shall disclose, the identity of a child including his name, address, photograph, family details, school, neighbourhood or any other particulars which may lead to disclosure of identity of the child:

Provided that for reasons to be recorded in writing, the Special Court, competent to try the case under the Act, may permit such disclosure, if in its opinion such disclosure is in the interest of the child.

3. The publisher or owner of the media or studio or photographic facilities shall be jointly and severally liable for the acts and omissions of his employee.

4. Any person who contravenes the provisions of sub-section (1) or sub-section (2) shall be liable to be punished with imprisonment of either description for a period which shall not be less than six months but which may extend to one year or with fine or with both."

15. Chapter VII of the POCSO Act relates to Special Courts, and the provisions thereunder are as follows :-

"**28. Designation of Special Courts.**-(1) For the purposes of providing a speedy trial, the State Government shall in consultation with the Chief Justice of the High Court, by notification in the Official Gazette, designate for each district, a Court of Session to be a Special Court to try the offences under the Act:

Provided that if a Court of Session is notified as a children's court under the Commissions for Protection of Child Rights Act, 2005 or a Special Court designated for similar purposes under any other law for the time being in force, then, such court shall be deemed to be a Special Court under this section.

2. While trying an offence under this Act, a Special Court shall also try an offence [other than the offence referred to in sub-section (1)], with which the accused may, under the Code of Criminal Procedure, 1973, be charged at the same trial.

3. The Special Court constituted under this Act, notwithstanding anything in the Information Technology Act, 2000 (21 of 2000), shall have jurisdiction to try offences under section 67-B of that Act in so far as it relates to publication or transmission of sexually explicit material depicting children in any act, or conduct or

manner or facilitates abuse of children online.

29. Presumption as to certain offences.- Where a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3,5,7 and Section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved.

30. Presumption of culpable mental state.-(1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

2. For the purposes of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.

Explanation.- In this section, "culpable mental state" includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact.

31. Application of Code of Criminal Procedure, 1973 to proceedings before a Special Court.- Save as otherwise provided in this Act, the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) (including the provisions as to bail and bonds) shall apply to the proceedings before a Special Court and for the purposes of the said provisions, the Special Court shall be deemed to be a Court of Sessions and the person conducting a prosecution before a Special Court, shall be deemed to be a Public Prosecutor.

32. Special Public Prosecutors.- (1) The State Government shall, by notification in the Official Gazette, appoint a Special Public Prosecutor for every Special Court for conducting cases only under the provisions of this Act.

2. A person shall be eligible to be appointed as a Special Public Prosecutor under sub-section (1) only if he had been in practice for not less than seven years as an advocate.

3. Every person appointed as a Special Public Prosecutor under this section shall be deemed to be a Public Prosecutor within the meaning of clause (u) of Section 2 of the Code of Criminal Procedure, 1973 (2 of 1974) and provision of that Code shall have effect accordingly."

16. It is pertinent to notice that in terms of sub-section (1) of Section 28, for the purposes of providing a speedy trial, for each district, designation of a Court of Session to be a Special Court to try the offences under the Act, has been provided for. Sub-section (2) of Section 28 makes it clear that while trying an offence under the Act, the Special Court shall also try an offence, with which the accused may, under the Code be charged at the same trial.

17. Section 31 makes the provisions of the Code applicable to proceedings before a Special Court and envisages that for the purposes of the said provisions, the Special Court shall be deemed to be a Court of Sessions and the person conducting a prosecution before a Special

Court, shall be deemed to be a Public Prosecutor.

18. The procedure and powers of Special Courts and the manner of recording of evidence is provided for under Chapter VIII of the POCSO Act. The procedure and powers of Special Courts is provided under Section 33, which reads as follows :-

"33. Procedure and powers of Special Court.- (1) A Special Court may take cognizance of any offence, without the accused being committed to it for trial, upon receiving a complaint of facts which constitute such offence, or upon a police report of such facts.

2. The Special Public Prosecutor, or as the case may be, the counsel appearing for the accused shall, while recording the examination-in-chief, cross-examination or re-examination of the child, communicate the questions to be put to the child to the Special Court which shall in turn put those questions to the child.

3. The Special Court may, if it considers necessary, permit frequent breaks for the child during the trial.

4. The Special Court shall create a child-friendly atmosphere by allowing a family member, a guardian, a friend or a relative, in whom the child has trust or confidence, to be present in the court.

5. The Special Court shall ensure that the child is not called repeatedly to testify in the court.

6. The Special Court shall not permit aggressive questioning or character assassination of the child and ensure that dignity of the child is maintained at all times during the trial.

7. The Special Court shall ensure that the identity of the child is not disclosed at any time during the course of investigation or trial:

Provided that for reasons to be recorded in writing, the Special Court may permit such disclosure, if in its opinion such disclosure is in the interest of the child.

Explanation.- For the purposes of this sub-section, the identity of the child shall include the identity of the child's family, school, relatives, neighbourhood or any other information by which the identity of the child may be revealed.

8. In appropriate cases, the Special Court may, in addition to the punishment, direct payment of such compensation as may be prescribed to the child for any physical or mental trauma caused to him or for immediate rehabilitation of such child.

9. Subject to the provisions of this Act, a Special Court shall, for the purpose of the trial of any offence under this Act, have all the powers of a Court of Session and shall try such offence as if it were a Court of Session, and as far as may be, in accordance with the procedure specified in the Code of Criminal Procedure, 1973(2 of 1974) for trial before a Court of Session."

19. Sub-section (1) of Section 33 provides that a Special Court may take cognizance of any offence, without the accused being committed to it for trial, upon receiving a complaint of facts which

constitute such offence, or upon a police report of such facts.

20. Sub-section (9) of Section 33 mandates that subject to the provisions of the Act, a Special Court shall, for the purpose of the trial of any offence under this Act, have all the powers of a Court of Session and shall try such offence as if it were a Court of Session, and as far as may be, in accordance with the procedure specified in the Code for trial before a Court of Session.

21. Section 42-A makes it clear that the provisions of the special enactment shall be in addition to and not in derogation of the provisions of any other law for the time being in force and, in case of any inconsistency, the provisions of the Act shall have overriding effect on the provisions of any such law to the extent of the inconsistency. Section 42-A reads as follows :-

"42-A. Act not in derogation of any other law.- The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force and, in case of any inconsistency, the provisions of this Act shall have overriding effect on the provisions of any such law to the extent of the inconsistency."

22. As per the general provisions under the Code after completion of the stage of investigation and placing of the final report by the police to a competent Magistrate, the stage of trial is to begin. As a precursor of the stage, the steps which are envisaged under the Code are as follows : (i) taking cognizance of the offence; (ii) ascertaining whether any prima facie case exists against the accused person; and in case it exists, then (a) to issue process against the accused person in order to secure his presence at the time of his trial, (b) to supply to the accused person copies of police statements; (iii) consolidating different proceedings pertaining to the same case; and (iv) if the case is exclusively triable by a Sessions Court, committing the case to that court.

23. The provisions under the Code contemplate two alternative modes in which the criminal law can be set in motion -- by giving information to the police under Section 154 or on receipt of a complaint or information by a Magistrate. The former would lead to investigation by the police and may be followed by forwarding of a police report under Section 173 on the basis whereof cognizance may be taken by the Magistrate under Section 190 (1) (b). In the case of the latter, the Magistrate may either direct investigation by the police under Section 156 (3) or inquire into the case under Section 202 before taking cognizance of the offence under Section 190 (1) (a) or Section 190 (1) (c), as the case may be. The Magistrate, upon taking cognizance of the offence, may proceed to try the offender except where the case is transferred under Section 191, or commit him for trial under Section 209 if the offence is triable exclusively by a Court of Session.

24. Chapter XIV of the Code relates to conditions requisite for initiation of proceedings. Section 190 provides as to when a Magistrate may take cognizance of any offence. Section 190reads as follows :-

"190. Cognizance of offences by Magistrates.-

(1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second

class specially empowered in this behalf under sub- section (2), may take cognizance of any offence-

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a police report of such facts;

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub- section (1) of such offences as are within his competence to inquire into or try."

25. Section 190, as aforestated, sets out the different ways in which a Magistrate can take cognizance of an offence i.e. take notice of an allegation disclosing commission of a crime with a view to setting the law in motion to bring the offender to book. The manner in which cognizance can be taken, of an offence alleged to have been committed, is described in clauses (a), (b) and (c) of sub-section (1) of the Section.

26. The meaning of the expression 'take cognizance', though not defined, has been held to be referable to a stage where the Magistrate takes notice of the accusations and applies his mind to the allegations made in the complaint or police report or information and on being satisfied that the allegations, if proved, would constitute an offence, decides to initiate judicial proceedings against the alleged offender. Cognizance is to be in regard to the offence and not the offender. It has also been held that mere application of mind by the Magistrate would not amount to taking cognizance unless the same is done for the purpose of proceeding under Sections 200/204 of the Code.

27. The Magistrate's power to take cognizance of an offence upon a report forwarded by the police was subject matter of consideration in **Minu Kumari and another Vs. State of Bihar and others6,** and it was held that even when police report is filed stating that no offence is made out, the Magistrate can ignore the conclusion arrived at by the Investigating Officer and would be competent to apply its independent mind and take cognizance of the case, if he thinks fit that the facts emerging from the investigation lead to a prima facie view that commission of an offence is made out. In such a situation, the Magistrate would not be bound to follow the procedure under Sections 200 and 202 for taking cognizance of the case under Section 190 (1) (a), though it would be open for him to act under Section 200 or Section 202 as well. It was observed that there is no obligation on the Magistrate to accept the report if he does not agree with the opinion formed by the police.

28. The different situations which may arise upon a report being forwarded by the police to the Magistrate under Section 173 (2) (i), were discussed in the aforestated case of **Minu Kumari** and it was observed as follows :-

"11. When a report forwarded by the police to the Magistrate under Section 173(2)(i) is placed before him several situations arise: the report may conclude that an offence appears to have been

committed by a particular person or persons and in such a case, the Magistrate may either (1) accept the report and take cognizance of the offence and issue process, or (2) may disagree with the report and drop the proceeding, or (3) may direct further investigation under Section 156(3) and require the police to make a further report. The report may on the other hand state that according to the police, no offence appears to have been committed. When such a report is placed before the Magistrate he again has option of adopting one of the three courses open i.e. (1) he may accept the report and drop the proceeding; or (2) he may disagree with the report and take the view that there is sufficient ground for further proceeding, take cognizance of the offence and issue process; or (3) he may direct further investigation to be made by the police under Section 156(3). The position is, therefore, now well settled that upon receipt of a police report under Section 173(2) a Magistrate is entitled to take cognizance of an offence under Section 190(1)(b) of the Code even if the police report is to the effect that no case is made out against the accused. The Magistrate can take into account the statements of the witnesses examined by the police during the investigation and take cognizance of the offence complained of and order the issue of process to the accused. Section 190(1)(b) does not lay down that a Magistrate can take cognizance of an offence only if the investigating officer gives an opinion that the investigation has made out a case against the accused. The Magistrate can ignore the conclusion arrived at by the investigating officer and independently apply his mind to the facts emerging from the investigation and take cognizance of the case, if he thinks fit, exercise his powers under Section 190(1)(b) and direct the issue of process to the accused. The Magistrate is not bound in such a situation to follow the procedure laid down in Sections 200 and 202 of the Code for taking cognizance of a case under Section 190(1)(a) though it is open to him to act under Section 200 or Section 202 also. [See *India Carat (P) Ltd. v. State of Karnataka* (1989) 2 SCC 132]."

29. It would therefore follow that if on receipt of an information under Section 154 of the Code in regard to a cognizable offence, the concerned police officer proceeds for an investigation and submits a police report under Section 173, the Magistrate may take cognizance and in case the offence is exclusively triable by a Court of Session, he is required to follow the procedure set out in Section 209 which provides that when in a case instituted on a 'police report', as defined in Section 2(r), or otherwise, the accused appears or is brought before the Magistrate and 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 remand the accused to custody.

30. It may be worthwhile to take note that certain offences are exclusively triable by the Sessions Court according to Section 26 of the Code read with the First Schedule. However, the Court of Sessions cannot directly take cognizance unless the same is committed to it by the Magistrate. For the purpose of committing such a case to the Court of Sessions, Section 209 prescribes the necessary procedure and in terms thereof, it is provided that when the accused appears or is brought before the Magistrate and it appears to the Magistrate that the offence is triable exclusively by the Court of Sessions, he shall: (i) commit, after complying with the provisions of Section 207 or Section 208, the case to the

Court of Sessions, and subject to the provisions relating to bail, remand the accused to custody until such commitment has been made; (ii) subject to the provisions relating to bail, remand the accused to custody during, and until the conclusion of the trial; (iii) send to that court the record of the case and the documents and articles, if any, which are to be produced in evidence; (iv) notify the Public Prosecutor of the commitment of the case to the Court of Sessions.

31. In terms of aforestated provisions under Section 209, the Magistrate is only to examine the police report and other documents referred to in the section so as to find out whether the facts stated in the report make out an offence triable exclusively by the Court of Sessions and once it appears to him that the said position exists, he is to commit the case to the Court of Sessions. In reaching the said conclusion, the Magistrate is not required to weigh the evidence and the probabilities of the case or to hold an enquiry. The Magistrate, however, would be entitled to sift and weigh the materials on record, but only for seeing whether there is sufficient evidence for commitment, and not whether there is sufficient evidence for conviction.

32. Section 193 of the Code which relates to cognizance of offences by Court of Session mandates that except as otherwise expressly provided by the Code or by any other law, no Court of Session shall take cognizance of any offence as a court of original jurisdiction unless the case has been committed to it by a Magistrate under the Code. In order to appreciate the scope of Section 193, the provision as it stands presently and also the provision under the old Code may be taken note of. Section 193, the provision as it exists under the new Code, and as it was

under the old Code, are being extracted below :-

Old Code

"193. Cognizance of offences by Courts of Session.-- (1) Except as otherwise expressly provided by this Code or by any other law for the time being in force, no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the accused has been committed to it by a Magistrate duly empowered in that behalf."

New Code

"193. Cognizance of offences by Courts of Session.-- Except as otherwise expressly provided by this Code or by any other law for the time being in force, no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless **the case has been committed** to it by a Magistrate under this Code."

33. Section 193 corresponds to sub-section (1) of the old Section 193 with substitution of the words "case" and "under this Code" for "accused" and "duly empowered in that behalf" respectively. The scheme of commitment has been modified as per the recommendations of the report of the **41st Law Commission, Vol. 1, Chapters XV and XVIII9.**

34. It may be noticed that under the old provision the Court of Session could not take cognizance of an offence as a court of original jurisdiction unless the accused was committed to it whereas under the new provision, as it stands, the expression "accused" has been replaced by the words "the case". As already noticed, under Section 190, cognizance is to be taken of the offence and not the offender; accordingly, Section 193 now provides for committal of the case and not of the offender. Section 209 also speaks of commitment of case to Court of Session, when offence is triable exclusively by it.

35. A combined reading of the aforesaid provisions would show that under the old Code, as per the language of Section 193 (as it then was), the Court of Session could not take cognizance of an offence as a Court of original jurisdiction unless the accused was committed to it. The aforesaid restriction is now removed, the case having once been committed, under Section 193, as it presently stands.

36. In order to examine as to what would be the import of the expression "taking cognizance of an offence", it would be useful to refer to the decision in **Raghubans Dubey Vs. State of Bihar10** where one of the contentions urged was that the Magistrate had taken cognizance of the offence so far as the accused were concerned but not as regards the appellant and it was held that once cognizance has been taken by the Magistrate, he takes cognizance of an offence and not the offenders; once he takes cognizance of an offence it is his duty to find out who the offenders really are and once he comes to the conclusion that apart from the persons sent up by the police some other persons are involved, it is his duty to proceed against those persons and summoning of the additional accused was held to be part of the proceeding initiated by his taking cognizance of an offence.

37. Considering the provisions of Section 193 read with Section 209 of the present Code in juxtaposition with the provisions under Section 193 and 209 of the Old Code, in **Joginder Singh and another Vs. State of Punjab and another11,** the earlier decision in the case of **Raghubans Dubey** was referred and it was held that when a case is committed to a Court of Session in respect of an offence, under Section 193 read with Section 209 of the Code, the Court of Session takes cognizance of the offence and not of the accused. It was observed as follows :-

"6. It will be noticed that both under Section 193 and Section 209 the commitment is of the case and not of 'the accused' whereas under the equivalent provision of the old Code, viz. Section 193(1) and Section 207-A it was 'the accused' who was committed and not 'the case.' It is true that there cannot be a committal of the case without there being an accused person before the Court, but this only means that before a case in respect of an offence is committed there must be some accused suspected to be involved in the crime before the Court but once "the case in respect of the offence qua those accused who are before the Court is committed then the cognizance of the offence can be said to have been taken properly by the Sessions Court and the bar of Section 193 would be out of the way and summoning of additional persons who appear to be involved in the crime from the evidence led during the trial and directing them to stand their trial along with those who had already been committed must be

regarded as incidental to such cognizance and a part of the normal process that follows it..."

38. The change brought about in Section 193 of the Code from that under the Old Code was taken note of in the case of **S.K. Latfur Rahman and others Vs. The State12**, and again referring to the decision in **Raghubans Dubey,** it was held that the Court of Session takes cognizance of the case or the offence as a whole and, therefore, would be entitled to summon any one who, on the material before it, appears to be guilty of such offence to stand trial before it. It was reiterated that what is committed to the Court of Session by the Magistrate is the case or the offence for trial and not the individual offender, and to hold otherwise would be again relapsing into the fallacy that cognizance is taken against individual accused persons and not of the offence as such. It was stated thus :-

"Therefore, what the law under Section 193 seeks to visualise and provide for now is that the whole of the incident constituting the offence is to be taken cognizance of by the Court of Session on commitment and not that every individual offender must be so committed or that in case it is not so done then the Court of Session would be powerless to proceed against persons regarding whom it may be fully convinced at the very threshold of the trial that they are prima facie guilty of the crime as well .... Once the case has been committed, the bar of Section 193 is removed or, to put it in other words, the condition therefore stands satisfied vesting the Court of Session with the fullest jurisdiction to summon any individual accused of the crime."

39. The question as to whether a Court of Session to which a case is committed for trial by a Magistrate can, without itself recording evidence, summon a person not named in the Police Report presented under Section 173 of the Code to stand trial along with those already named therein, in exercise of powers conferred Section 319 of the Code, came up for consideration in **Kishun Singh and others Vs. State of Bihar13,** and it was held that the Court of Session, on committal of a case to it, has jurisdiction to take cognizance of offence and summon persons not named as offenders, whose complicity in the crime comes to light from the material available on record to stand trial along with those already named therein. It was further held that on committal, the restriction on the Court of Session to take cognizance of an offence as a court of original jurisdiction gets lifted. It was stated thus :-

"16...We have also pointed out the difference in the language of Section 193 of the two Codes; under the old Code the Court of Session was precluded from taking cognizance of any offence as a court of original jurisdiction unless the accused was committed to it whereas under the present Code the embargo is diluted by the replacement of the words the accused by the words the case. Thus, on a plain reading of Section 193, as it presently stands once the case is committed to the Court of Session by a Magistrate under the Code, the restriction placed on the power of the Court of Session to take cognizance of an offence as a court of original jurisdiction gets lifted. On the Magistrate committing the case under Section 209 to the Court of Session the bar of Section 193 is lifted thereby investing the Court of Session

complete and unfettered jurisdiction of the court of original jurisdiction to take cognizance of the offence which would include the summoning of the person or persons whose complicity in the commission of the crime can prima facie be gathered from the material available on record."

40. The view taken in **Kishun Singh** that powers of the Sessions Court under Section 193 of the Code to take cognizance of the offence would include summoning of the person or persons whose complicity in the commission of the offence can prima facie be gathered from the materials available on record, was not followed in a three-Judge Bench of the Supreme Court decision in **Ranjit Singh Vs. State of Punjab14**, wherein it was held that there is no power except that in Section 319 by which Court of Session can array a new person as an accused and that there is no intermediary stage in between at which the Court of Session can add to the array of the accused persons. In **Ranjit Singh** it was held that from the stage of committal till the Sessions Court reaches the stage indicated in Section 230 of the Code, that court would deal only with the accused referred to in Section 209 and there is no intermediary stage till then enabling the Sessions Court to add any other person to the array of the accused.

41. The matter came up before a three Judge Bench of the Supreme Court in **Dharam Pal and others Vs. State of Haryana and another15** which disagreed with the views expressed in Ranjit Singh case. Thereafter the case came up for consideration before the Constitution Bench in **Dharam Pal and others Vs. State of Haryana and another5** and the questions referred for consideration were as follows :-

"7.1. Does the Committing Magistrate have any other role to play after committing the case to the Court of Session on finding from the police report that the case was triable by the Court of Session?

7.2. If the Magistrate disagrees with the police report and is convinced that a case had also been made out for trial against the persons who had been placed in column 2 of the report, does he have the jurisdiction to issue summons against them also in order to include their names, along with Nafe Singh, to stand trial in connection with the case made out in the police report?

7.3. Having decided to issue summons against the appellants, was the Magistrate required to follow the procedure of a complaint case and to take evidence before committing them to the Court of Session to stand trial or whether he was justified in issuing summons against them without following such procedure?

7.4. Can the Sessions Judge issue summons under Section 193 CrPC as a court of original jurisdiction?

7.5. Upon the case being committed to the Court of Session, could the Sessions Judge issue summons separately under Section 193 of the Code or would he have to wait till the stage under Section 319 of the Code was reached in order to take recourse thereto?

7.6. Was *Ranjit Singh* case *[Ranjit Singh v. State of Punjab,* (1998) 7 SCC 149, which set aside the decision in Kishun Singh case [*Kishun Singh v. State*

of Bihar, (1993) 2 SCC 16], rightly decided or not?"

42. On the first question, the Constitution Bench did not accept the contention that on receipt of a police report that the case was triable by Court of Session, the Magistrate had no other role, but to commit the case for trial to the Court of Session, which could only resort to Section 319 of the Code to array any other person as accused in the trial. It was held that the effect of such an interpretation would lead to a situation where neither the Committing Magistrate would have any control over the persons named in column 2 of the police report nor the Sessions Judge, till the Section 319 stage was reached in the trial. Furthermore, in the event the Sessions Judge ultimately found material against the persons named in column 2 of the police report, the trial would have to be commenced de novo against such persons which would not only lead to duplication of the trial, but would also prolong the same.

43. The view expressed in **Kishun Singh** case was held to be more acceptable in view of the consistent legal position that the Magistrate has ample powers to disagree with the final report that may be placed by the police authorities under Section 173(2) of the Code and to proceed against the accused persons dehors the police report, which power the Sessions Court does not have till the Section 319 stage is reached.

44. Taking a view that the Magistrate has a role to play while committing the case to the Court of Session upon taking cognizance on the police report submitted before him under Section 173(2) of the Code, it was held that in the event the Magistrate disagrees with the police report, he has two choices: (i) he may act on the basis of a protest petition that may be filed; or (ii) he may, while disagreeing with the police report, issue process and summon the accused. Thereafter, if on being satisfied that a case has been made out to proceed against the persons named in column 2 of the report, the Magistrate may proceed to try the said persons or if he was satisfied that the case has been made out which was triable by the Court of Session, he may commit the case to a Court of Session to proceed further in the matter.

45. On the third question as to the procedure to be followed by the Magistrate if he was satisfied that a prima facie case had been made out to go to trial despite the final report submitted by the police, the Constitution Bench in the case of Dharam Pal held that in such an event, if the Magistrate decided to proceed against the accused persons, he would have to proceed on the basis of the police report itself and either inquire into the matter or commit it to the Court of Session if the same was found to be triable by that Court.

46. On the question as to whether upon the case being committed, the Court of Session could issue summons under Section 193 as a court of original jurisdiction or would be required to wait till the stage under Section 319 was reached in order to take recourse thereto, it was held that the language of Section 193 of the Code very clearly indicates that once the case is committed to the Court of Session by the learned Magistrate, the Court of Session assumes original jurisdiction and all that goes with the assumption of such jurisdiction. It was further held that the provisions of Section 209 would therefore,

have to be understood as the learned Magistrate playing a passive role in committing the case to the Court of Session on finding from the police report that the case was triable by the Court of Session and there cannot be any question of part cognizance being taken by the Magistrate and part cognizance being taken by the learned Sessions Judge.

47. Agreeing with the views expressed in **Kishun Singh** *case*, it was observed that the Sessions Court has jurisdiction on committal of a case to it, to take cognizance of the offences of the persons not named as offenders but whose complicity in the case would be evident from the materials available on record and to summon them to stand trial along with the other accused. Answering the reference, the observations made in the decision in **Dharam Pal** case, were as follows:-

"33. As far as the first question is concerned, we are unable to accept the submissions made by Mr Chahar and Mr Dave that on receipt of a police report seeing that the case was triable by Court of Session, the Magistrate has no other function, but to commit the case for trial to the Court of Session, which could only resort to Section 319 of the Code to array any other person as accused in the trial. In other words, according to Mr Dave, there could be no intermediary stage between taking of cognizance under Section 190(1)(b) and Section 204 of the Code issuing summons to the accused. The effect of such an interpretation would lead to a situation where neither the Committing Magistrate would have any control over the persons named in column 2 of the police report nor the Sessions Judge, till the Section 319 stage was reached in the trial. Furthermore, in the event the Sessions Judge ultimately found material against the persons named in column 2 of the police report, the trial would have to be commenced de novo against such persons which would not only lead to duplication of the trial, but also prolong the same.

34. The view expressed in Kishun Singh case [*Kishun Singh v. State of Bihar*, (1993) 2 SCC 16, in our view, is more acceptable since, as has been held by this Court in the cases referred to hereinbefore, the Magistrate has ample powers to disagree with the final report that may be filed by the police authorities under Section 173(2) of the Code and to proceed against the accused persons dehors the police report, which power the Sessions Court does not have till the Section 319 stage is reached. The upshot of the said situation would be that even though the Magistrate had powers to disagree with the police report filed under Section 173(2) of the Code, he was helpless in taking recourse to such a course of action while the Sessions Judge was also unable to proceed against any person, other than the accused sent up for trial, till such time evidence had been adduced and the witnesses had been cross-examined on behalf of the accused.

35. In our view, the Magistrate has a role to play while committing the case to the Court of Session upon taking cognizance on the police report submitted before him under Section 173(2) CrPC. In the event the Magistrate disagrees with the police report, he has two choices. He may act on the basis of a protest petition that may be filed, or he may, while disagreeing with the police report, issue process and summon the accused. Thereafter, if on being satisfied that a case had been made out to proceed against the persons named in column 2 of the report, proceed to try the

said persons or if he was satisfied that a case had been made out which was triable by the Court of Session, he may commit the case to the Court of Session to proceed further in the matter.

36. This brings us to the third question as to the procedure to be followed by the Magistrate if he was satisfied that a prima facie case had been made out to go to trial despite the final report submitted by the police. In such an event, if the Magistrate decided to proceed against the persons accused, he would have to proceed on the basis of the police report itself and either inquire into the matter or commit it to the Court of Session if the same was found to be triable by the Sessions Court.

37. Questions 4, 5 and 6 are more or less interlinked. The answer to Question 4 must be in the affirmative, namely, that the Sessions Judge was entitled to issue summons under Section 193 CrPC upon the case being committed to him by the learned Magistrate.

38. Section 193 of the Code speaks of cognizance of offences by the Court of Session and provides as follows:

"**193.Cognizance of offences by Courts of Session**.--Except as otherwise expressly provided by this Code or by any other law for the time being in force, no Court of Session shall take cognizance of any offence as a court of original jurisdiction unless the case has been committed to it by a Magistrate under this Code."

The key words in the section are that "no Court of Session shall take cognizance of any offence as a court of original jurisdiction unless the case has been committed to it by a Magistrate under this Code". The above provision entails that a case must, first of all, be committed to the Court of Session by the Magistrate. The second condition is that only after the case had been committed to it, could the Court of Session take cognizance of the offence exercising original jurisdiction. Although, an attempt has been made by Mr Dave to suggest that the cognizance indicated in Section 193 deals not with cognizance of an offence, but of the commitment order passed by the learned Magistrate, we are not inclined to accept such a submission in the clear wordings of Section 193 that the Court of Session may take cognizance of the offences under the said section.

39. This takes us to the next question as to whether under Section 209, the Magistrate was required to take cognizance of the offence before committing the case to the Court of Session. It is well settled that cognizance of an offence can only be taken once. In the event, a Magistrate takes cognizance of the offence and then commits the case to the Court of Session, the question of taking fresh cognizance of the offence and, thereafter, proceed to issue summons, is not in accordance with law. If cognizance is to be taken of the offence, it could be taken either by the Magistrate or by the Court of Session. The language of Section 193 of the Code very clearly indicates that once the case is committed to the Court of Session by the learned Magistrate, the Court of Session assumes original jurisdiction and all that goes with the assumption of such jurisdiction. The provisions of Section 209 will, therefore, have to be understood as the learned Magistrate playing a passive role in committing the case to the Court of Session on finding from the police report that the case was triable by the Court of Session. Nor can there be any question of part cognizance being taken by the Magistrate and part cognizance being taken by the learned Sessions Judge.

40. In that view of the matter, we have no hesitation in agreeing with the views expressed in *Kishun Singh case [Kishun Singh v. State of Bihar, (1993)* 2 SCC 16, that the Sessions Court has jurisdiction on committal of a case to it, to take cognizance of the offences of the persons not named as offenders but whose complicity in the case would be evident from the materials available on record. Hence, even without recording evidence, upon committal under Section 209, the Sessions Judge may summon those persons shown in column 2 of the police report to stand trial along with those already named therein.

41. We are also unable to accept Mr Dave's submission that the Sessions Court would have no alternative, but to wait till the stage under Section 319 CrPC was reached, before proceeding against the persons against whom a prima facie case was made out from the materials contained in the case papers sent by the learned Magistrate while committing the case to the Court of Session."

48. The powers and duties of a Magistrate in committal proceedings in respect of an offence exclusively triable by Sessions Court and the sustainability of the act of refusal by the Magistrate to take cognizance and consequent discharge/acquittal of the accused relying upon evidence led by the accused even without committing the case to the Sessions Court was examined in **Ajay Kumar Parmar Vs. State of Rajasthan16,** and it was held that the scheme of the Code and in particular the provisions under Sections 207 to 209 make it clear that committal of a case exclusively triable by the Court of Session in a case instituted by police is mandatory; and once the Magistrate reaches a *prima facie* conclusion that the facts alleged in the report make out an offence triable exclusively by Court of Session, the Magistrate has no jurisdiction to probe the matter any further and evaluate evidence related thereto. The offence upon being seen to be triable by the Sessions Court, the Magistrate has to commit the same to that Court - such committal being mandatory. The observations made in the judgment in this regard are as follows :-

"14. In *Sanjay Gandhi v. Union of India*, (1978) 2 SCC 39, this Court while dealing with the competence of the Magistrate to discharge an accused, in a case like the instant one at hand, held: (SCC pp. 40-41, para 3)

"3. ... it is not open to the committal court to launch on a process of satisfying itself that a prima facie case has been made out on the merits. The jurisdiction once vested in him under the earlier Code but has been eliminated now under the present Code. Therefore, to hold that he can go into the merits even for a prima facie satisfaction is to frustrate Parliament's purpose in remoulding Section 207-A (old Code) into its present non-discretionary shape. Expedition was intended by this change and this will be defeated successfully if interpretatively we hold that a dress rehearsal of a trial before the Magistrate is in order. In our view, the narrow inspection hole through which the committing Magistrate has to look at the case limits him merely to ascertain whether the case, as disclosed by the police report, appears to the Magistrate to show an offence triable solely by the Court of Session. Assuming the facts to be correct as stated in the police report,...the Magistrate has simply to commit for trial before the Court of Session. If, by error, a wrong

section of the Penal Code is quoted, he may look into that aspect....If made-up facts unsupported by any material are reported by the police and a sessions offence is made to appear, it is perfectly open to the Sessions Court under Section 227 CrPC to discharge the accused. This provision takes care of the alleged grievance of the accused."

Thus, it is evident from the aforesaid judgment that when an offence is cognizable by the Sessions Court, the Magistrate cannot probe into the matter and discharge the accused. It is not permissible for him to do so, even after considering the evidence on record, as he has no jurisdiction to probe or look into the matter at all. His concern should be to see what provisions of the penal statute have been mentioned and in case an offence triable by the Sessions Court has been mentioned, he must commit the case to the Sessions Court and do nothing else.

15. Thus, we are of the considered opinion that the Magistrate had no business to discharge the appellant. In fact, Section 207-A in the old CrPC, empowered the Magistrate to exercise such a power. However, in CrPC, 1973, there is no provision analogous to the said Section 207-A. He was bound under law, to commit the case to the Sessions Court, where such application for discharge would be considered. The order of discharge is therefore, a nullity, being without jurisdiction.

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17. The court should not pass an order of acquittal by resorting to a course of not taking cognizance, where prima facie case is made out by the investigating agency. More so, it is the duty of the court to safeguard the rights and interests of the victim, who does not participate in the discharge proceedings. At the stage of application of Section 227, the court has to sift the evidence in order to find out whether or not there is sufficient ground for proceeding against the accused. Thus, appreciation of evidence at this stage, is not permissible. [Vide *P. Vijayan v. State of Kerala, (2010) 2 SCC 398 and R.S. Mishra v. State of Orissa* (2011) 2 SCC 689*]*

18. The scheme of the Code, particularly, the provisions of Sections 207 to 209 CrPC, mandate the Magistrate to commit the case to the Court of Session, when the charge-sheet is filed. A conjoint reading of these provisions makes it crystal clear that the committal of a case exclusively triable by the Court of Session, in a case instituted by the police is mandatory. The scheme of the Code simply provides that the Magistrate can determine, whether the facts stated in the report make out an offence triable exclusively, by the Court of Session. Once he reaches the conclusion that the facts alleged in the report, make out an offence triable exclusively by the Court of Session, he must commit the case to the Sessions Court.

19. The Magistrate, in exercise of its power under Section 190 CrPC, can refuse to take cognizance if the material on record warrants so. The Magistrate must, in such a case, be satisfied that the complaint, case diary, statements of the witnesses recorded under Sections 161 and 164 CrPC, if any, do not make out any offence. At this stage, the Magistrate performs a judicial function. However, he cannot appreciate

the evidence on record and reach a conclusion as to which evidence is acceptable, or can be relied upon. Thus, at this stage appreciation of evidence is impermissible. The Magistrate is not competent to weigh the evidence and the balance of probability in the case."

49. The power of Sessions Court to take cognizance under Section 193 as a court of original jurisdiction in the two situations: (A) when the Magistrate has played an active role in taking/refusing cognizance before committing the case under Section 209; and (B) when the Magistrate has played a passive role in committing the case under Section 209, was considered in **Balveer Singh and another Vs. State of Rajasthan and another4.** Distinguishing the two situations, it was held that in situation A i.e. of active committal, when the Magistrate has already exercised the power of cognizance, the Sessions Court cannot take cognizance for a second time "as a court of original jurisdiction" under Section 193, as cognizance of an offence can only be taken once - however; in such situation it can exercise its revisional jurisdiction. In situation B i.e. a case of *passive committal*, since Magistrate had not exercised the power of cognizance, the Sessions Court was free to exercise the same for the first time "as a court of original jurisdiction" under Section 193.

50. The provisions under the Code are applicable in respect of investigation, inquiry or trial of every offence under the substantive criminal law i.e. whether such offence is punishable under the IPC or under any special or local law. However, in respect of certain offences covered by a special law which prescribes a special procedure for the manner or place of investigation, the provisions thereof would prevail. This follows from Sections 4 and 5 of the Code, which are as follows:-

"4.Trial of offences under the Indian Penal Code and other laws.-

(1) All offences under the Indian Penal Code(45 of 1860) shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained.

(2) All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences.

5.Saving.-

Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force."

51. Sub-section (1) of Section 4 provides for investigation, inquiry or trial of all offences under the Penal Code according to provisions of the Code. In terms of sub-section (2) of Section 4, offences even under any other law shall be dealt in accordance with the provisions of the Code subject to any separate procedure having been provided under any other enactment. In the absence of any specific provision made in any other statute indicating that offences would have to be

investigated, inquired into, tried and otherwise dealt with according to that statute, the same would have to be investigated, inquired into, tried and otherwise dealt with according to the provisions of the Code, which is the parent statute providing for investigation, inquiry and trial of cases by criminal courts of various designations. Section 5 of the Code is a saving clause and saves the special procedure provided by any other law.

52. Section 31 of the POCSO Act provides for application of the provisions of the Code to proceedings before the designated Special Court under the POCSO Act and for the purposes of the said provisions, the Special court shall be deemed to be a Court of Sessions. Section 31 which makes the provisions of the Code applicable to proceedings under the POCSO Act, however begins with "save as otherwise provided in this Act", which would imply that the provisions of the Code would be applicable to proceedings before the designated Special Court under the POCSO Act, unless otherwise provided under the said Act.

53. In this regard, it would also be relevant to notice that Section 42-A of the POCSO Act mandates that the provisions of the Act shall be in addition to and not in derogation with the provisions of any other law for the time being in force and, in case of any inconsistency, the provisions of the Act shall have overriding effect on the provisions of any such law to the extent of the inconsistency.

54. A conjoint reading of the aforestated provisions under Sections 31 and 42-A would indicate that unless a different procedure is provided under the POCSO Act, the provisions under the Code would be applicable; however, in case of any inconsistency, the provisions of the POCSO Act would have an overriding effect.

55. Sub-section (1) of Section 33 of the POCSO Act empowers the designated Special Court to take cognizance of any offence under the Act without the accused being committed to it for trial, upon receiving a complaint of facts which constitute such offence, or upon a police report of such facts. It therefore contemplates two contingencies under which the Special Court may take cognizance: (i) upon a complaint of facts constituting an offence under the POCSO being directly received by the Special Court as per the provisions under Section 19 of the POCSO Act; or (ii) upon a police report under Section 173 (2) (i) of such facts.

56. In terms of the aforestated provisions the designated Special Court is empowered to take cognizance without any committal of the accused. This marks a departure from the general procedure under the Code, and in particular Section 193 which stipulates that the Court of Session cannot take cognizance of any offence as a court of original jurisdiction unless the case has been committed to it by the Magistrate under the Code. The effect of sub-section (1) of Section 33 of the POCSO Act which empowers the Special Court to take cognizance without the accused being committed to it for trial, would therefore have the effect of waiving the otherwise mandatory requirement of Section 193 of the Code and in a way lifts embargo under Section 193. The procedure provided under sub-section (1) of Section 33 with regard to

the power of the Special Court to take cognizance, without any committal of the accused, to the extent of inconsistency, would override the general provisions under the Code, by virtue of Section 42-A read with Section 31 of the POCSO Act. The Special Judge would, accordingly, be empowered to take cognizance straightaway and not to have the committal route through a Magistrate.

57. The effect of sub-section (1) of Section 31 in empowering the Special Court to take cognizance without committal of the accused would lead to the question as to whether the jurisdiction of the Magistrate to take cognizance has been taken away since there is no necessity of committal and the special court can straightaway take cognizance of the offence. In this regard it would be relevant to take notice that sub-section (1) of Section 33 envisages that a special court may take cognizance of any offence without the accused being committed to it for trial. It therefore gives an option to the special court to take cognizance straightaway and not to have the committal route through a Magistrate; however the general procedure prescribed under Section 190 of the Code empowering the Magistrate to take cognizance of such offences though triable by Court of Session is not done away with.

58. A similar view was taken in **State through Central Bureau of Investigation Chennai Vs. Arul Kumar17,** in the context of the provisions of the Prevention of Corruption Act, 1988 whereunder in terms of Section 5 (1), the Special Judge is empowered to take cognizance of offence without the accused being committed to it for trial, and it was held that the same has the effect of waiving the otherwise mandatory requirement of Section 193; however, it nowhere provides that cognizance cannot be taken by the Magistrate at all.

59. It may also be taken note of that in terms of Section 31 which makes the provisions of the Code applicable to proceedings before a special court it is provided that for the purposes of the said provision the special court shall be deemed to be a court of sessions. The special court therefore cannot be equated to a Court of Sessions. The special court has been given the position of a Court of Session by a deeming provision and even this deeming provision has been made subject to the condition "as otherwise provided in this Act". The other provisions of the Act to which this deeming provision would be subject, would include Section 33 which empowers the special court to take cognizance upon a complaint or a police report without following the committal route. A question would therefore arise as to whether for the purpose of Section 33 of the Act, the deeming fiction would apply and the Special Court can be treated as a Court of Session.

60. Sub-section (1) of Section 33 confers power on the Special Court to take cognizance of any offence without the necessity of the accused being committed to it for trial, and in terms of sub-section (9) thereof, the Special Court for the purpose of the trial of any offence under the Act, has been conferred the powers of a Court of Session, and is to try such offence as if it were a Court of Session, as far as may be, in accordance with the procedure specified in the Code for trial before a Court of Session.

61. This creates a situation where the Special Court while taking cognizance may not be deemed to be a Court of Session whereas for the purpose of trial of any

offence under the Act it would exercise the powers of a Court of Session and is to follow the procedure specified in the Code for trial before a Court of Session. It would therefore be necessary to examine the position of a Special Judge and to see as to what extent the deeming provision under which the Special Court is to be held to be a Court of Session, would extend.

62. The aforestated question with regard to the position of a Special Judge was examined in the Constitution Bench decision in **A.R.Antulay Vs. Ramdas Sriniwas Nayak and another18,** in the context of the provisions of the Criminal Law Amendment Act, 1952 and it was held the Court of Special Judge is a court of original jurisdiction and in order to make it functionally oriented some powers were conferred by the statute setting up the court, and except those specifically conferred and specifically denied, it has to function as a court of original criminal jurisdiction not being hidebound by the terminological status description of Magistrate or a Court of Session. It was stated that the view that a Special Judge must fit in the slot of a "Magistrate" or a "Court of Session" is erroneous. It was stated thus :-

"27...Shorn of all embellishment, the Court of a Special Judge is a court of original criminal jurisdiction. As a court of original criminal jurisdiction in order to make it functionally oriented some powers were conferred by the statute setting up the court. Except those specifically conferred and specifically denied, it has to function as a court of original criminal jurisdiction not being hidebound by the terminological status description of Magistrate or a Court of Session. Under the Code it will enjoy all powers which a court of original criminal jurisdiction enjoys save and except the ones specifically denied."

63. The aforementioned position with regard to the Special Court enjoying all powers which a court of original criminal jurisdiction enjoys, whether of a Magistrate or a Court of Session, save and except the ones specifically denied, was reiterated in **Harshad S.Mehta and others Vs. State of Maharashtra19** in the context of the provisions of the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992. It was held the Special Court enjoys all the powers of court of original jurisdiction and it holds dual capacity and powers both of Magistrate and Court of Session depending upon the stage of the case.

64. On a similar analogy the deeming clause under Section 31 of the POCSO Act would have to be held limited for the purpose specified in the section and the same cannot be held to be a fetter on the powers of the Special Court to take cognizance of any offence, without the necessity of the accused having been committed to it for trial, upon receiving a complaint of facts constituting such offence or upon a police report, as per the mandate of Section 33.

65. The designated Special Court would therefore be empowered to take cognizance of any offence, as per terms of sub-section (1) of Section 33, without the accused being committed to it for trial, in both contingencies i.e. upon receiving a complaint of facts which constitute such offence, or upon a police report of such facts.

66. The matter may be examined from another perspective, as to whether the order taking cognizance, if held to be irregular, can be said to have occasioned failure of justice or to have vitiated the proceedings. Chapter XXXV of the Code is in respect of irregular proceedings. Section 465, under Chapter XXXV, which is relevant for the ensuing discussion, is being extracted below :-

"465. Finding or sentence when reversible by reason of error, omission or 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."

67. Section 460 pertains to irregularities which do not vitiate proceedings, whereas Section 461 is in respect of irregularities which vitiate proceedings. Section 465 of the Code embodies the principle that the finding, sentence or order passed by the court of competent jurisdiction would not be reversible on account of any error, omission or irregularity unless the same has occasioned a "failure of justice". The section relates to proceedings before trial or any inquiry, and since cognizance is pre-trial or inquiry stage, any irregularity of a cognizance order would be covered under the provision.

68. The object of provisions contained under Chapter XXXV of the Code has been subject matter of consideration in a recent decision of the Supreme Court in **Pradeep S. Wodeyar Vs. The State of Karnataka20,** wherein it has been held that the purpose of these provisions is to prevent irregularities, that do not go to the root of the case, from delaying the proceedings. Taking notice of a growing tendency on part of the accused using delaying tactics by seeking to challenge every interlocutory order with a view to prolong the proceedings and prevent the commencement or conclusion of the trial, and referring to the earlier decisions in **A.R.Antulay vs Ramdas Sriniwas Nayak And Another18 and Santhosh De Vs. Archana Guha21**, it has been observed as follows :-

"44. The overarching purpose of Chapter XXXV CrPC, as is evident from a reading of Sections 460 to 466, is to prevent irregularities that do not go to the root of the case from delaying the proceedings. Sections 462-464 lay down specific irregularities which would not vitiate the proceedings. Section 465 on the other hand is a broad residuary provision that covers all irregularities that are not covered by the above provisions. This is evident from the initial words of Section 465, namely, "Subject to the provisions

hereinabove contained". Therefore, irregular proceedings that are not covered under Sections 461-464 could be covered under Section 465. It is also evident that the theme of "failure of justice', uniformly guides all the provisions in the Chapter. There is no indication in Section 465 and in Sections 462-464 that the provisions only apply to orders of conviction or acquittal. All the provisions use the words "finding, sentence or order". Though one of the major causes of judicial delay is the delay caused from the commencement of the trial to its conclusion, there is no denying that delay is also predominantly caused in the pre-trial stage. Every interlocutory order is challenged and is on appeal till the Supreme Court, on grounds of minor irregularities that do not go to the root of the case. The object of Chapter XXXV of the CrPC is not only to prevent the delay in the conclusion of proceedings after the trial has commenced or concluded, but also to curb the delay at the pre-trial stage. It has been recognized by a multitude of judgments of this Court that the accused often uses delaying tactics to prolong the proceedings and prevent the commencement or conclusion of the trial. The object of Chapter XXXV is to further the constitutionally recognized principle of speedy trial. This was highlighted by Justice Jeevan Reddy while writing for a two judge Bench in **Santhosh De v. Archana Guha** where the learned judge observed:

"15. The facts of this case impel us to say how easy it has become today to delay the trial of criminal cases. An accused so minded can stall the proceedings for decades together, if he has the means to do so. Any and every single interlocutory order is challenged in the superior Courts and the superior Courts, we are pained to say, are falling prey to their stratagems. We expect the superior Courts to resist all such attempts. Unless a grave illegality is committed, the superior Courts should not interfere. They should allow the Court which is seized of the matter to go on with it. There is always an appellate Court to correct the errors. One should keep in mind the principle behind Section 465 Cr. P.C. That any and every irregularity or infraction of a procedural provision cannot constitute a ground for interference by a superior Court unless such irregularity or infraction has caused irreparable prejudice to the party and requires to be corrected at that stage itself, because such frequent interference by superior Court at the interlocutory stages tends to defeat the ends of Justice instead of serving those ends. It should not be that a man with enough means is able to keep the law at bay. That would mean the failure of the very system."

45. Section 465 would also be applicable to challenges to interlocutory orders such as a cognizance order or summons order on the ground of irregularity of procedure. This interpretation is supported by sub-section (2) to Section 465 which states that while determining if the irregularity has occasioned a failure of justice, the Court shall have regard to whether the objection could or should have been raised at an earlier stage in the proceeding. Therefore, the very fact that the statute provides that the Court is to consider if the objection could have been raised earlier, without any specific mention of the stage of the trial, indicates that the provision covers challenges raised at any stage. The Court according to sub-Section (2) is to determine if the objection was raised at the earliest."

69. The provisions under Section 465 of the Code have also been held to be applicable to challenges to interlocutory orders such as a cognizance order or a summons order, on the ground of any error, omission or irregularity, which has occasioned a failure of justice. The test for establishing if there has been a failure of justice for the purpose of Section 465 is whether the alleged error, omission or irregularity has caused prejudice to the accused. It would therefore be required to be seen whether condoning the irregularity, if any, in taking cognizance and issuing summons, would lead to a "failure of justice".

70. In the facts of the present case what needs to be examined is whether the act of the Magistrate in transmitting the record of the case to the Special Court and the order of cognizance and issuance of process having been passed thereupon by the Special Court can be said to have occasioned any "failure of justice", even assuming that there was an error or irregularity in the procedure, as alleged on behalf of the applicants. For the aforestated purpose, consideration would have to be accorded to the restricted role assigned to the Magistrate at the stage of commitment under the Code of Criminal Procedure 1973 in contradistinction to the exhaustive procedure under the Code of Criminal Procedure, 189822.

71. Section 209 of the Code of 1973 which deals with commitment of case to a Court of Session when an offence is triable exclusively by it reads as follows :-

"209. Commitment of case to Court of Session when offence is triable exclusively by it.--When in a case instituted on a police report or otherwise, the accused appears or is brought before the Magistrate and it appears to the Magistrate that the offence is triable exclusively by the Court of Session, he shall--

(a) commit, after complying with the provisions of Section 207 or Section 208, as the case may be, the case to the Court of Session, and subject to the provisions of this Code relating to bail, remand the accused to custody until such commitment has been made;

(b) subject to the provisions of this Code relating to bail, remand the accused to custody during, and until the conclusion of, the trial;

(c) send to that court the record of the case and the documents and articles, if any, which are to be produced in evidence;

(d) notify the Public Prosecutor of the commitment of the case to the Court of Session."

72. Before coming into force of the Code of 1973, Section 207 of the Code of 1898 dealt with committal proceedings. In terms of the Criminal Law Amendment Act, 1955, Section 207 of the principal Act was substituted by Sections 207 and 207-A, which read as under :-

"207. Procedure in inquiries preparatory to commitment.--In every inquiry before a Magistrate where the case is triable exclusively by a Court of Session or High Court, or, in the opinion of the Magistrate, ought to be tried by such court, the Magistrate shall--

(a) In any proceeding instituted on a police report, follow the procedure specified in Section 207-A; and

(b) In any other proceeding, follow the procedure specified in the other provisions of this Chapter.

207-A. Procedure to be adopted in proceedings instituted on police report.--(1) When, in any proceeding instituted on a police report, the Magistrate receives the report forwarded under Section 173, he shall, for the purpose of holding an inquiry under this section, fix a date which shall be a date not later than fourteen days from the date of the receipt of the report, unless the Magistrate, for reasons to be recorded, fixes any later date.

(2) If, at any time before such date, the officer conducting the prosecution applies to the Magistrate to issue a process to compel the attendance of any witness or the production of any document or thing, the Magistrate shall issue such process unless, for reasons to be recorded, he deems it unnecessary to do so.

(3) At the commencement of the inquiry, the Magistrate shall, when the accused appears or is brought before him, satisfy himself that the documents referred to in Section 173 have been furnished to the accused and if he finds that the accused has not been furnished with such documents or any of them, he shall cause the same to be so furnished.

(4) The Magistrate shall then proceed to take the evidence of such persons, if any, as may be produced by the prosecution as witnesses to the actual commission of the offence alleged; and if the Magistrate is of opinion that it is necessary in the interests of justice to take the evidence of any one or more of the other witnesses for the prosecution, he may take such evidence also.

(5) The accused shall be at liberty to cross-examine the witnesses examined under sub-section (4), and in such case, the prosecutor may re-examine them.

(6) When the evidence referred to in sub-section (4) has been taken and the Magistrate has considered all the documents referred to in Section 173 and has, if necessary, examined the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him and given the prosecution and the accused an opportunity of being heard, such Magistrate shall, if he is of opinion that such evidence and documents disclose no grounds for committing the accused person for trial, record his reasons and discharge him, unless it appears to the Magistrate that such person should be tried before himself or some other Magistrate, in which case he shall proceed accordingly.

(7) When, upon such evidence being taken, such documents being considered, such examination (if any) being made and the prosecution and the accused being given an opportunity of being heard, the Magistrate is of opinion that the accused should be committed for trial, he shall frame a charge under his hand, declaring with what offence the accused is charged.

(8) As soon as such charge has been framed, it shall be read and explained to the accused and a copy thereof shall be given to him free of cost.

(9) The accused shall be required at once to give in, orally or in writing, a list

of the persons, if any, whom he wishes to be summoned to give evidence on his trial:

Provided that the Magistrate may, in his discretion, allow the accused to give in his list or any further list of witnesses at a subsequent time; and, where the accused is committed for trial before the High Court, nothing in this sub-section shall be deemed to preclude the accused from giving, at any time before his trial, to the clerk of the State a further list of the persons whom he wishes to be summoned to give evidence on such trial.

(10) When the accused, on being required to give in a list under sub-section (9), has declined to do so, or when he has given in such list, the Magistrate may make an order committing the accused for trial by the High Court or the Court of Session, as the case may be, and shall also record briefly the reasons for such commitment.

(11) When the accused has given in any list of witnesses under sub-section (9) and has been committed for trial, the Magistrate shall summon the witnesses included in the list to appear before the court to which the accused has been committed:

Provided that where the accused has been committed to the High Court, the Magistrate may, in his discretion, leave such witnesses to be summoned by the clerk of the State and such witnesses may be summoned accordingly:

Provided also that if the Magistrate thinks that any witness is included in the list for the purpose of vexation of delay, or of defeating the ends of justice, the Magistrate may require the accused to satisfy him that there are reasonable grounds for believing that the evidence of such witness is material, and if he is not so satisfied, may refuse to summon the witness (recording his reasons for such refusal), or may before summoning him require such sum to be deposited as such Magistrate thinks necessary to defray the expense of obtaining the attendance of the witness and all other proper expenses.

(12) Witnesses for the prosecution, whose attendance before the Court of Session or the High Court is necessary and who appear before the Magistrate, shall execute before him bonds binding themselves to be in attendance when called upon by the Court of Session or the High Court to give evidence.

(13) If any witness refuses to attend before the Court of Session or the High Court, or execute the bond above directed, the Magistrate may detain him in custody until he executes such bond or until his attendance at the Court of Session or the High Court is required, when the Magistrate shall send him in custody to the Court of Session or the High Court as the case may be.

(14) When the accused is committed for trial, the Magistrate shall issue an order to such person as may be appointed by the State Government in this behalf, notifying the commitment, and stating the offence in the same form as the charge; and shall send the charge, the record of the inquiry and any weapon or other thing which is to be produced in evidence, to the Court of Session or where the commitment is made to the High Court, to the clerk of the State or other officer appointed in this behalf by the High Court.

(15) When the commitment is made to the High Court and any part of the record is not in English, an English translation of such part shall be forwarded with the record.

(16) Until and during the trial, the Magistrate shall, subject to the provisions of this Code regarding the taking of bail, commit the accused by warrant to custody."

73. The necessity to demonstrate "failure of justice" for exercise of powers under Section 465 (1) in the context of challenge to an order of cognizance by the Sessions Court, being the Special Court under the SC and ST (Prevention of Atrocities) Act, without the case being committed by a Magistrate was subject matter of consideration in **State of Madhya Pradesh Vs. Bhooraji23** and a view was taken that it was for the accused to show that "a failure of justice" had occasioned on account of such irregularity in the trial proceedings and where the accused fails to show the same the specified court under the special Act would not cease to be a "court of competent jurisdiction" merely because of any procedural lapse. The order passed by the High Court quashing the entire trial proceedings was held to be erroneous and was set aside. The provision with regard to committal to the Sessions Court by the Magistrate prior to enactment of the Code of 1973, and subsequent thereto was examined. It was seen that before enactment of Code of 1973, the committal court could examine witnesses and records before deciding to commit the case to the Court of Sessions; however, after 1973, the committal court, in police charge-sheeted case cannot examine any witnesses at all and the Magistrate has only to commit the cases involving offences exclusively triable by the Court of Sessions. It was therefore held after commencement of the Code of 1973 it is not possible for an accused to raise a contention that by passing the committal proceedings had deprived him of the opportunity to cross-examine witnesses in the committal court and that had caused prejudice to his defence. It was stated thus :-

"18. It is apposite to remember that during the period prior to the Code of Criminal Procedure, 1973, the committal court, in police charge-sheeted cases, could examine material witnesses, and such records also had to be sent over to the Court of Session along with the committal order. But after 1973, the committal court, in police charge-sheeted cases, cannot examine any witness at all. The Magistrate in such cases has only to commit the cases involving offences exclusively triable by the Court of Session. Perhaps it would have been possible for an accused to raise a contention before 1973 that skipping committal proceedings had deprived him of the opportunity to cross-examine witnesses in the committal court and that had caused prejudice to his defence. But even that is not available to an accused after 1973 in cases charge-sheeted by the police. We repeatedly asked the learned counsel for the accused to tell us what advantage the accused would secure if the case is sent back to the Magistrate's Court merely for the purpose of retransmission of the records to the Sessions Court through a committal order. We did not get any satisfactory answer to the above query put to the counsel."

74. The question as to whether cognizance taken by the Sessions Court

directly without commitment of case by Magistrate in accordance with Section 193 would have the effect of vitiating the trial, came to be examined by a three-Judge Bench of the Supreme Court in **Rattiram and others Vs. State of Madhya Pradesh24**, and on a comparison of the committal proceedings under the Code of 1973 with the procedure under the 1898 CrPC and taking into view the constricted role of Magistrate in committal proceedings under Section 209 of the Code of 1973, it was held that non-commitment of the case, ipso facto, would not vitiate the trial by Sessions Court unless failure of justice has in fact been occasioned thereby or the accused can establish that he has been prejudiced as a result thereof. It was observed that obliteration of certain rights of accused at committal stage under the Code of 1973 in contrast to the provisions of the old Code showed the legislative intent that every stage in criminal proceedings was not to be treated as vital and the provisions under the Code are to be interpreted to subserve substantive objects of criminal trial. The right to speedy trial was held not to be the exclusive right of the accused but is a collective requirement of society and also the entitlement of the victim. On a comparative analysis of the provisions under the Code of 1973 in juxtaposition with the provisions of the old Code, it was observed as follows :-

"53. On a bare perusal of the abovequoted provisions, it is plain as day that an exhaustive procedure was enumerated prior to commitment of the case to the Court of Session. As is evincible, earlier if a case was instituted on a police report, the Magistrate was required to hold enquiry, record satisfaction about various aspects, take evidence as regards the actual commission of the offence alleged and further was vested with the discretion to record evidence of one or more witnesses. Quite apart from the above, the accused was at liberty to cross-examine the witnesses and it was incumbent on the Magistrate to consider the documents and, if necessary, examine the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him by the prosecution and afford the accused an opportunity of being heard and if there was no ground for committing the accused person for trial, record reasons and discharge him.

54. Thus, the accused enjoyed a substantial right prior to commitment of the case. It was indeed a vital stage. But, in the committal proceedings in praesenti, the Magistrate is only required to see whether the offence is exclusively triable by the Court of Session. Mr Fakhruddin, learned Senior Counsel, would submit that the use of the words "it appears to the Magistrate" are of immense signification and the Magistrate has the discretion to form an opinion about the case and not to accept the police report.

55. To appreciate the said submission, it is apposite to refer to Section 207 of the 1973 Code which lays down for furnishing of certain documents to the accused free of cost. Section 209(a) clearly stipulates that providing of the documents as per Section 207 or Section 208 is the only condition precedent for commitment. It is noteworthy that after the words, namely, "it appears to the Magistrate", the words that follow are "that the offence is triable exclusively by the Court of Session". The limited jurisdiction conferred on the Magistrate is only to verify the

nature of the offence. It is also worth noting that thereafter, a mandate is cast that he "shall commit".

56. Evidently, there is a sea of difference in the proceeding for commitment to the Court of Session under the old Code and under the existing Code. There is nothing in Section 209 of the Code to even remotely suggest that any of the protections as provided under the old Code has been telescoped to the existing one.

57. It is worth noting that under the Code of Criminal Procedure, 1898, a full-fledged Magisterial enquiry was postulated in the committal proceeding and the prosecution was then required to examine all the witnesses at this stage itself. In 1955, Parliament by Act 26 of 1955 curtailed the said procedure and brought in Section 207-A to the old Code. Later on, the **Law Commission of India in its 41st Report**, recommended thus:

"18.19. Abolition of committal proceedings recommended.--After a careful consideration we are of the unanimous opinion that committal proceedings are largely a waste of time and effort and do not contribute appreciably to the efficiency of the trial before the Court of Session. While they are obviously time-consuming, they do not serve any essential purpose. There can be no doubt or dispute as to the desirability of every trial, and more particularly of the trial for a grave offence, beginning as soon as practicable after the completion of investigation. Committal proceedings which only serve to delay this step, do not advance the cause of justice. The primary object of protecting the innocent accused from the ordeal of a sessions trial has not been achieved in practice; and the other main object of apprising the accused in sufficient detail of the case he has to meet at the trial could be achieved by other methods without going through a very partial and ineffective trial rehearsal before a Magistrate. We recommend that committal proceedings should be abolished."

We have reproduced the same to accentuate the change that has taken place in the existing Code. True it is, the committal proceedings have not been totally abolished but in the present incarnation, it has really been metamorphosed and the role of the Magistrate has been absolutely constricted.

58. In our considered opinion, because of the restricted role assigned to the Magistrate at the stage of commitment under the new Code, the non-compliance with the same and raising of any objection in that regard after conviction attracts the applicability of the principle of "failure of justice" and the convict appellant becomes obliged in law to satisfy the appellate court that he has been prejudiced and deprived of a fair trial or there has been miscarriage of justice. The concept of fair trial and the conception of miscarriage of justice are not in the realm of abstraction. They do not operate in a vacuum. They are to be concretely established on the bedrock of facts and not to be deduced from procedural lapse or an interdict like commitment as enshrined under Section 193 of the Code for taking cognizance under the Act. It should be a manifestation of reflectible and visible reality but not a routine matter which has roots in appearance sans any reality. Tested on the aforesaid premised reasons, it is well-nigh impossible to conceive of any failure of

justice or causation of prejudice or miscarriage of justice on such non-compliance. It would be totally inapposite and inappropriate to hold that such non-compliance vitiates the trial."

75. Further, elucidating on the concepts of speedy trial and treatment of a victim in criminal jurisprudence, it was stated thus :- [**Rattiram** case (SCC p.541, para 59)]

"59. At this juncture, we would like to refer to two other concepts, namely, speedy trial and treatment of a victim in criminal jurisprudence based on the constitutional paradigm and principle. The entitlement of the accused to speedy trial has been repeatedly emphasised by this Court. It has been recognised as an inherent and implicit aspect in the spectrum of Article 21 of the Constitution. The whole purpose of speedy trial is intended to avoid oppression and prevent delay. It is a sacrosanct obligation of all concerned with the justice dispensation system to see that the administration of criminal justice becomes effective, vibrant and meaningful. The concept of speedy trial cannot be allowed to remain a mere formality [see ***Hussainara Khatoon (1) v. State of Bihar***, (1980) 1 SCC 81, ***Moti Lal Saraf v. State of J&K*** (2006) 10 SCC 560 and ***Raj Deo Sharma v. State of Biha***r (1998) 7 SCC 507].

60. While delineating on the facets of speedy trial, it cannot be regarded as an exclusive right of the accused. The right of a victim has been given recognition in Mangal Singh v. Kishan Singh (2009) 17 SCC 303 wherein it has been observed thus : (SCC p. 307, para 14)

"14. ... Any inordinate delay in conclusion of a criminal trial undoubtedly has a highly deleterious effect on the society generally, and particularly on the two sides of the case. But it will be a grave mistake to assume that delay in trial does not cause acute suffering and anguish to the victim of the offence. In many cases the victim may suffer even more than the accused. There is, therefore, no reason to give all the benefits on account of the delay in trial to the accused and to completely deny all justice to the victim of the offence."

61. It is worth noting that the Constitution Bench in Iqbal Singh Marwah v. Meenakshi Marwah (2005) 4 SCC 370 (SCC p. 387, para 24) though in a different context, had also observed that delay in the prosecution of a guilty person comes to his advantage as witnesses become reluctant to give evidence and the evidence gets lost.

62. We have referred to the aforesaid authorities to illumine and elucidate that the delay in conclusion of trial has a direct nexus with the collective cry of the society and the anguish and agony of an accused (quaere a victim). Decidedly, there has to be a fair trial and no miscarriage of justice and under no circumstances, prejudice should be caused to the accused but, a pregnant one, every procedural lapse or every interdict that has been acceded to and not objected at the appropriate stage would not get the trial dented or make it unfair. Treating it to be unfair would amount to an undesirable state of pink of perfection in procedure. An absolute apple-pie order in carrying out the adjective law, would only be sound and fury signifying nothing.

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64. Be it noted, one cannot afford to treat the victim as an alien or a total stranger to the criminal trial. The criminal jurisprudence, with the passage of time, has laid emphasis on victimology which fundamentally is a perception of a trial from the viewpoint of the criminal as well as the victim. Both are viewed in the social context. The view of the victim is given due regard and respect in certain countries. In respect of certain offences in our existing criminal jurisprudence, the testimony of the victim is given paramount importance. Sometimes it is perceived that it is the duty of the court to see that the victim's right is protected. A direction for retrial is to put the clock back and it would be a travesty of justice to so direct if the trial really has not been unfair and there has been no miscarriage of justice or failure of justice.

65. We may state without any fear of contradiction that if the failure of justice is not bestowed its due signification in a case of the present nature, every procedural lapse or interdict would be given a privileged place on the pulpit. It would, with unnecessary interpretative dynamism, have the effect potentiality to cause a dent in the criminal justice delivery system and eventually, justice would become illusory like a mirage. It is to be borne in mind that the legislature deliberately obliterated certain rights conferred on the accused at the committal stage under the new Code. The intendment of the legislature in the plainest sense is that every stage is not to be treated as vital and it is to be interpreted to subserve the substantive objects of the criminal trial.

66. Judged from these spectrums and analysed on the aforesaid premises, we come to the irresistible conclusion that the objection relating to non-compliance with Section 193 of the Code, which eventually has resulted in directly entertaining and taking cognizance by the Special Judge under the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, does not vitiate the trial and on the said ground alone, the conviction cannot be set aside or there cannot be a direction of retrial..."

76. In the facts of the present case, consequent to the placing of the police report before the Magistrate under Section 363 IPC, only against the applicant no. 1, before the Magistrate could take cognizance, an application is stated to have been filed by the opposite party no. 3-prosecutrix that having regard to the facts of the case, cognizance may also be taken under Sections 3/4 of the POCSO Act and Sections 376D, 366, 363 IPC, and also enclosing therewith her affidavit and statement recorded under Section 164 of the Code and placing reliance on the judgment of the Supreme Court in the case of **Balveer Singh and another Vs. State of Rajasthan and another4 and Dharam Pal and others Vs. State of Haryana and another5.**

77. It has been pointed out that FIR discloses the age of the prosecutrix to be less than 18 years and her statement recorded under Section 164 of the Code supports the FIR version and is also indicative of the offence under Section 376 IPC. The aforementioned material having been placed along with the police report, the Magistrate, upon taking notice thereof, took the view that looking to the offences disclosed in the application the power to take cognizance in the matter would be

with the Special Court constituted under the POCSO Act and not with the Magistrate, as per the provisions under Section 33 (1) of the POCSO Act which empowers the Special Judge to take cognizance without following the committal route.

78. There cannot be any dispute on the point that on receiving the police report under Section 173 (2) of the Code, the Magistrate was under no obligation to accept the report and it was open to him to disagree with the report and take the view that there was sufficient ground to proceed further. Having taken that view and noticing that the offence disclosed would be covered under the special Act i.e. POCSO Act, and the procedure prescribed under Section 33 (1) thereof was required to be followed, the Magistrate had no option but to transmit the records to the designated Special Judge inasmuch as the provisions of the Code, as per the deeming clause under Section 31 of the Act, would be applicable only to the extent provided therein. The designated Special Court, upon receipt of the police report, transmitted through the Magistrate, was fully empowered to take cognizance of the offence, without the requirement of the accused being committed to it for trial, in view of the procedure prescribed under sub-section (1) of Section 33 of the Act.

79. The POCSO Act being a special enactment the procedure prescribed therein would be required to be followed. The applicability of the provisions of the Code as per the deeming clause under Section 31 of the Act is only to the extent provided therein and in view of Section 42-A the provisions of the Act shall have an overriding effect on the provisions of any such law to the extent of inconsistency. This leads to an inference that unless a different procedure is provided under the POCSO Act, the provisions under the Code would be applicable; however, in case of any inconsistency, the provisions of the POCSO Act would have an overriding effect.

80. Section 33 (1) of the Act which empowers the Special Court to take cognizance of any offence, without the accused being committed to it for trial, marks a departure from the general procedure under the Code and in particular Section 193 thereof which stipulates that the Court of Session cannot take cognizance of any offence as a court of original jurisdiction unless the case has been committed to it by the Magistrate under the Code.

81. Sub-section (1) of Section 33 would therefore have the effect of waiving the otherwise mandatory requirement of Section 193 of the Code and in a way it lifts the embargo under Section 193. The procedure provided under Section 33 (1) with regard to the power of the Special Court to take cognizance, without any committal of the accused, to the extent of any inconsistency, would override the general provisions under the Code, by virtue of the provisions under Section 42-A read with Section 31 of the POCSO Act.

82. The police report relating to facts constituting an offence under the POCSO Act having been placed before the Special Court, upon being transmitted by the Magistrate, the Special Court was fully empowered to take cognizance of the offence as per the powers and procedure under Section 33 (1), without the

requirement of committal of the accused, and thereafter to summon the accused-applicants to face trial.

83. The diminished role of the committing court under the Code of 1973 while committing the case to the Court of Session; particularly when a case is instituted on the basis of a police report and it appears to the Magistrate that the offence is triable exclusively by the Court of Session, would also be a reason to arrive at an inference that irregularity in procedure, if any, with regard to committal would not be a cause of injustice or prejudice to the applicants.

84. The order of summoning passed by the Special Judge, POCSO and also the proceedings of the criminal case, of which quashment is sought, being in accord with the scheme of the statutory enactment, cannot be said to suffer from any illegality so as persuade this Court to exercise its inherent jurisdiction under Section 482 of the Code.

85. The application thus fails and is accordingly dismissed.

(2022)01ILR A357
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.01.2022

BEFORE

THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Application U/S 482 Cr.P.C. No.5688 of 2018

Smt. Laxmi Devi & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Ram Kumar Pal

Counsel for the Opposite Parties:
G.A., Sri Anmol Tiwari

(अ) फौजदारी कानून - भारतीय दंड प्रक्रिया संहिता ,1973 - धारा 482 - अंतर्निहित शक्तियां - धारा 156(3) ,200,202 ,203 - भारतीय दंड संहिता, 1860 - धारा 302,306,354,376,384,385,498-A,506,511 - जब तक अपराधी द्वारा उसको या अन्य व्यक्ति को साशय क्षति पहुंचाने के भय के कारण व उसके द्वारा बेईमानी से उत्प्रेरित होकर कोई संपत्ति या मूल्यवान या हस्ताक्षरित या मुद्रांकित कोई चीज, जिसे मूल्यवान प्रतिभूति में परिवर्तित किया जा सके, किसी व्यक्ति को प्रदान ना हो गई हो, तब तक उद्यापन का अपराध पूर्ण नहीं हो सकता है। (पैरा - 10)

आवेदक संख्या 1, व विपक्षी संख्या 2 एक दूसरे के विरुद्ध अलग-अलग तारीख पर एक प्रथम सूचना रिपोर्ट , धारा 156 (3) दंड प्रक्रिया संहिता के उपरांत दर्ज कराई - प्रार्थना पत्र परिवाद के रूप में दर्ज किया गया - प्रतिपक्ष संख्या 2(वादी) व गवाह का बयान धारा दर्ज किया गया - तदुपरांत आदेश दिनांक 27.02 .2017 द्वारा धारा 384, 385 ,506 भारतीय दंड संहिता के अंतर्गत दंडनीय अपराध के मामले में आवेदक गणों को द्वारा समन आहूत किया गया - आवेदक गण पर उद्यापन करने व उद्यापन करने के लिए किसी व्यक्ति को किसी छति के भय में डालने व आपराधिक अभित्रास के आरोप लगाए - अनुचित दबाव डालने के उद्देश्य के लिए दायर किया गया। (पैरा - 1,3)

निर्णय : परिवाद के कथन व साक्षियों के बयान से, आवेदक गण द्वारा धारा 384, 385, 511 भारतीय दंड संहिता के अंतर्गत प्रथम दृष्टया अपराध कारित होना नहीं प्रतीत होता है । यदि परिवाद व साथियों के बयान में लगाए गए और अविवादित आरोप से किसी भी अपराध

का कृत्य का होना प्रकट नहीं होता हो या अपराध के आवश्यक अवयव उपस्थित नहीं हो तो यह न्यायालय अपनी अंतर्निहित शक्तियों का उपयोग करते हुए आदेशिका (सम्मन) निरस्त कर सकता है। अक्षेपित आदेश निरस्त किया जाता है। (परा-14)

धारा 482 के अन्तर्गत दायर आवेदन पत्र स्वीकार किया जाता है । (E-7)

<u>उद्धृत मामलों की सूची</u> :

1.
एस0डब्लू0 पलानितकर प्रति बिहार राज्य : (2002) 1 एस0सी0सी0 241

2.केवल कृष्णनन प्रति सूरजभान व अन्य : (1980) सप्पली एस0सी0सी0 499

3.बिरला कॉरपोरेशन लिमिटेड प्रति एडवेन्टेज इन्वेस्ट मेन्ट व होल्डिंग लिमिटड : (2019) 16 एस0सी0सी0 610

4.श्रीमती नागव्वा प्रति विरन्ना शिवलिंगगप्पा कोंजा ल्गी व अन्य : (1976) 3 एस0सी0सी0 736,

5.माधवराव जीवाजीराव सिंधिया व अन्य प्रति सम्भा जीराव चन्द्रोजीराव अंगरे व अन्य : (1988)। एस0सी 0सी0 692

6.कमल शिवाजी पोकामेकर प्रति महाराष्ट्र राज्य व अ न्य : (2019) 14 एस0सी0सी0 350

7.इसांगा मुसुम्बा व अन्य प्रति महाराष्ट्र शासन व अ न्य : (2014) 15 एस.सी.सी. 357

(Delivered by Hon'ble Saurabh Shyam Shamshery, J.)

1. तथ्यात्मक प्रारुप

क) आवेदक संख्या 1, श्रीमती लक्ष्मी देवी ने एक प्रथम सूचना रिपोर्ट संख्या 0311, दिनांक 29.03.2015 को, विपक्षी संख्या 2 व उसके अन्य रिश्तेदार के विरुद्ध, भारतीय दण्ड संहिता की धारा 302, 354, 498-ए, 511 के अंतर्गत आवेदन धारा 156 (3) दण्ड प्रक्रिया संहिता, दिनांक 05.01.2015 के कार्यवाही के उपरान्त दर्ज करवाई कि:-

"1. यह कि प्रार्थिनी का दामाद रमाशंकर कुशवाहा उसके भाई राजू, मनोज, शंकरलाल, लल्लन पुत्र रामनरायन तथा श्रीमती वीना कुशवाहा पत्नी मनोज कुशवाहा निवासिनी म0नं0 112 मसवानपुर थाना कल्यानपुर कानपुर नगर प्रार्थिनी की पुत्री श्रीमती बसन्ती पत्नी रमाशंकर को पिछले लगभग तीन साल से काफी ज्यादा प्रताड़ित करके उसके साथ अत्यधिक मारपीट करते थे तथा उसे आत्महत्या कर लेने के लिये उकसाते थे। 2. यह कि दामाद रमाशंकर के गलत सम्बन्ध एक महिला से होने के कारण प्रार्थिनी की पुत्री उसका विरोध करती थी किन्तु रमाशंकर का सहयोग उसके उक्त भाई करते थे। उक्त लोगों की जमीन एक्कायर होने के कारण सरकारी मुआवजा मिला है जिसके कारण उक्त सभी भाई आपस में बैठकर शराब भी पीते थे। तमाम लोगों के साथ जुआ भी खेलते थे। 3. यह कि मनोज कुशवाहा भी प्रार्थिनी की पुत्री पर गलत नजर रखता था लिहाजा उसके साथ शराब पीकर कई बार छेड़छाड़ भी कर चुका था व बलात्कार के प्रयास में भी था जानकारी पर प्रार्थिनी कई बार अपनी पुत्री के घर में जाकर पूर्व में कई दिनों तक रुकी भी थी। मनोज की पत्नी क्षेत्रीय सभासद है लिहाजा इन लोगों को स्थानीय पुलिस का संरक्षण भी प्राप्त है। 4. यह कि दिनांक 18.12.2014 को प्रार्थिनी को अज्ञात व्यक्ति से सूचना मिली की उक्त लोग प्रार्थिनी की पुत्री की हत्या की योजना बना रहे हैं। सूचना पर प्रार्थिनी अपने पुत्र के साथ तत्काल पुत्री बसन्ती की ससुराल करीब 2:30 बजे दिन

पहुँची तो उक्त सभी लोग घर के अन्दर प्रार्थिनी की पुत्री को फांसी पर लटका रहे थे। 5. यह कि प्रार्थिनी की आहट पर सभी भाग खड़े हुए। प्रार्थिनी की पुत्री की हालत खराब थी। थोड़ा थोड़ा बोल पा रही थी तब उसने बताया कि देवर मनोज ने उसके साथ शराब पीकर बलात्कार का प्रयास किया है जिसकी शिकायत पर सभी लोगों को मनोज ने बरगलाया और परिवार को बेइज्जती से बचाने के लिए सभी ने मिलकर बसन्ती की हत्या करने के इरादे से आत्महत्या का रुप देने के लिये जबरिया फांसी पर लटका दिया। 6. यह कि उसने यह भी बताया कि रमाशंकर ने प्रार्थिनी की पुत्री को पकड़ा राजू व शंकरलाल ने पैर पकड़े, लल्लन ने भी लिपट कर पकड़ा मुह बन्द किया। बीना कुशवाहा ने फांसी का फन्दा गले में डाला था मनोज ने कड़े में रस्सी फंसा कर खींचा जिसमें उक्त सभी लोगों ने सहयोग किया। 7. यह कि प्रार्थिनी की पुत्री की हालत नाजुक थी तब तुरन्त प्रार्थिनी अपने पुत्र के साथ पास के अस्पताल ले गयी तथा अन्य लोगों व पुलिस को भी 100 नंबर पर सूचना दिया तब तक उसकी मृत्यु हो गयी। 8. यह कि मौके पर पुलिस आयी जहाँ पर पति रमाशंकर व उसके भाई आदि फरार थे बाद में पुलिस के कहने पर पुत्री बसन्ती को हैलट ले जाया गया जहाँ पर भी डाक्टरों ने उसे मृत बनाया। 9. यह कि प्रार्थिनी ने घटना की सूचना पुलिस को दिया तो पोस्टमार्टम के बाद कार्यवाही का आश्वासन दिया तब से लगातार प्रार्थिनी थाना कल्यानपुर दौड़ती रही किन्तु प्रार्थिनी का मुकदमा दर्ज नहीं किया गया। तब प्रार्थिनी द्वारा जरिये डाक प्रार्थनापत्र दिनांक 24.12.2014 श्रीमान् एस0एस0 पी0 साहब कानपुर नगर को व थानाध्यक्ष कल्यानपुर को प्रेषित किया तथा एस0एस0पी0 साहब से भी व्यक्तिगत रुप में मिली किन्तु आज तक प्रार्थिनी का मुकदमा दर्ज नहीं किया गया। उक्त अभियुक्त बीना कुशवाहा क्षेत्रीय सभासद है जिसके कारण थाना पुलिस उनके प्रभाव में होने के कारण मुकदमा दर्ज नहीं कर रही है। 10. यह कि न्यायहित में प्रार्थिनी का मुकदमा दर्ज कर विवेचना किये जाने हेतु थाना प्रभारी कल्यानपुर को आदेशित किया जाना न्यायोचित होगा।"

(ख) तदोपरान्त विपक्षी संख्या 2 ने, आवेदक संख्या 1 व उसके तीनों पुत्र (आवेदक संख्या 2 लगात् 4) के विरुद्ध एक प्रार्थना पत्र धारा 156(3) दं0प्र0सं0, दिनांक 21.01.2015 को न्यायालय सी.एम.एम. II, कानपुर नगर में भा0दं0सं0 की धारा 306, 384, 385, 506 के अंतर्गत दायर की कि:-

"2. यह कि प्रार्थी की शादी बसन्ती पुत्री स्व0 हीरालाल नि0-देवकलिया थाना अकबरपुर जिला कानपुर देहात से अर्सा करीबन 20 वर्ष पूर्व हुई थी प्रार्थी और बसन्ती के संसर्ग से एक पुत्र अभिषेक उम्र करीब 15 वर्ष पैदा हुआ जो प्रार्थी के पास है। प्रार्थी की पैत्रक जमीन एक्कायर होने के कारण प्रार्थी को मुआवजा धनराशि प्राप्त हुई थी उससे प्रार्थी की पत्नी बसन्ती ने अपनी माँ से 5 वर्ष पूर्व दो बीघा जमीन सम्पूर्ण विक्रय धनराशि अदा करके क्रय की थी। जो प्रार्थी की सास लक्ष्मी देवी के कब्जे में थी कुछ समय बाद प्रार्थी की सास श्रीमती लक्ष्मी देवी, साले श्रीपाल, रामपाल, शिवपाल की नीयत खराब हो गई और उक्त जमीन पर जबरन कब्जा कर लिया तथा प्रार्थी व प्रार्थी की पत्नी बसन्ती पर उक्त जमीन पुनः अपने नाम करने का दबाव देने लगे और मानसिक शारीरिक रुप से प्रार्थी की पत्नी बसन्ती को प्रताड़ित करने लगे तथा झूठे मुकदमें में बंद करा देने व हत्या कर देने की धमकी देने लगे उपरोक्त लोगों की प्रताड़ना से प्रार्थी की पत्नी बसन्ती मानसिक रुप से अस्वस्थ हो गयी। दिनांक 18.12.14 को समय करीबन 2 बजे दिन में प्रार्थी की सास लक्ष्मी देवी पत्नी स्व0 हीरालाल,

साले श्रीपाल, पुत्र स्व0 हीरालाल निवासीगण देवकलिया थाना अकबरपुर कानपुर देहात, रामपाल, शिवपाल, पुत्रगण स्व0 हीरालाल निवासी तरगांव थाना गजनेर जिला कानपुर देहात एकराय होकर प्रार्थी के घर पर आये और प्रार्थी की पत्नी बसन्ती पर उपरोक्त जमीन पुनः अपने नाम करने का दबाव दिया और तरह-तरह से प्रताड़िता किया और चले गये उपरोक्त लोगों की प्रताड़ना के कारण प्रार्थी की पत्नी बसन्ती ने उसी दिन समय करीबन 4 बजे दिन में कमरे में लगे पंखे से फांसी लगाकर आत्महत्या कर ली उस समय प्रार्थी बैंक गया था वापस घर आने पर प्रार्थी ने अपनी पत्नी को कमरे में फांसी पर लटका पाया। उपरोक्त लोग गायब थे। प्रार्थी ने अपने फोन नम्बर 7668759818 से उपरोक्त लोगों को पत्नी के फांसी लगाकर आत्महत्या कर लेने की सूचना दी और उपरोक्त घटना की सूचना प्रार्थी के भाई रविशंकर ने सम्बन्धित थाना कल्यानपुर में दी जिसके आधार पर प्रार्थी की पत्नी बसन्ती का प्रार्थी की सास लक्ष्मी देवी, साले श्रीपाल, रामपाल, शिवपाल की उपस्थिति में पंचनामा होकर दि0 19.12.14 को पोस्टमार्टम हुआ। प्रार्थी अपनी पत्नी बसन्ती की लाश प्राप्त कर उसका अंतिम संस्कार किया। मुहल्लेवालों द्वारा यह कहे जाने पर कि बसन्ती की आत्महत्या का कारण बसन्ती की माँ और भाई है। उक्त बाते सुनकर प्रार्थी की सास लक्ष्मी देवी, साले श्रीपाल, रामपाल, शिवपाल उपरोक्त ने प्रार्थी की धमकी दी कि यदि आप हम लोगों के खिलाफ कोई कार्यवाही की तो हम तुम लोगों को झूठे संगीन मुकदमें में फंसाकर जेल में सड़वा देंगे और उक्त धमकी देते हुये चले गये। उपरोक्त घटना को अश्वनी मिश्रा दिनेश कुशवाहा नि0-मसवानपुर कानपुर नगर तथा अन्य मोहल्ले के लोगों ने देखा व सुना है।

3. यह कि प्रार्थी उपरोक्त घटना की रिपोर्ट लिखाने थाना कल्यानपुर गया जहाँ पर पुलिसवालों ने कहा कि जाँच में जो मुल्जिम होगा उसी के खिलाफ कार्यवाही की जायेगी। कहते हुये प्रार्थी को वापस कर दिया परन्तु रिपोर्ट आज तक नहीं लिखी गई। तब प्रार्थी ने दिनांक17.01.15 को एस0एस0 पी0 कानपुर नगर, एस0ओ0 कल्यानपुर, सी0ओ0 कल्यानपुर, डी0 आई0जी0 कानपुर जोन, कानपुर, डी0 जी0 पी0 उ0प्र0 शासन लखनऊ को पंजीकृत डाक से प्रार्थनापत्र दिये परन्तु फिर भी आज तक रिपोर्ट नहीं लिखी गई। प्रार्थना पत्र व रजिस्ट्री रसीदों की फोटोंप्रतियां साथ में संलग्न है।

4. यह कि प्रार्थी की पत्नी बसन्ती का पंचनामा दि0 19.12.14 को हुआ तथा पोस्टमार्टम भी दि0 19.12.14 को हुआ। फोटोकॉपियां साथ में संलग्न है।

5. यह कि सम्बन्धित थाना पुलिस प्रार्थी की रिपोर्ट दर्ज नहीं कर रही है जिससे प्रार्थी के पास श्रीमान जी के समक्ष प्रार्थनापत्र प्रस्तुत के अलावा अन्य कोई रास्ता रिपोर्ट लिखाने का नहीं रहा है।"

(ग) उक्त प्रार्थनापत्र पर ए.सी.एम.एम. (II), कानपुर नगर द्वारा आदेश दिनांक 06.02.2015 पारित किया गया कि, उक्त प्रार्थनापत्र को परिवाद के रुप में दर्ज किया जाता है व पत्रावली वास्ते अग्रिम कार्यवाही के लिए पेश हो।

(घ) उपरोक्त आदेशानुसार रमाशंकर (प्रतिपक्ष सं0 2) (वादी) का ब्यान धारा 200 दं0प्र0सं0 के अंतर्गत, गवाह दिनेश व गवाह अश्वनि का ब्यान धारा 202 दं0प्र0सं0 के अंतर्गत दर्ज करे गये। तद्उपरान्त आदेश दिनांक 27.02.2017 द्वारा धारा 384, 385, 506 भा0दं0सं0 के अन्तर्गत दण्डनीय अपराध के मामले में आवेदकगणों को द्वारा समन आहूत किया गया। आदेश का प्रासंगिक भाग निम्न है-

"संक्षेप में परिवादपत्र के अनुसार कथानक इस प्रकार है कि प्रार्थी की शादी बसन्ती से अर्सा करीब 20 वर्ष पूर्व हुई थी प्रार्थी और बसन्ती के संसर्ग से एक पुत्र अभिषेक पैदा हुआ जो प्रार्थी के पास है। प्रार्थी की पैत्रक जमीन एक्कायर होने के कारण प्रार्थी को मुआवजा धनराशि प्राप्त हुई थी उससे प्रार्थी की पत्नी बसन्ती ने अपनी माँ से 05 वर्ष पूर्व दो बीघा जमीन सम्पूर्ण धनराशि अदा करके क्रय की थी, जो प्रार्थी के सास लक्ष्मी देवी के कब्जे में थी कुछ समय बाद प्रार्थी की सास लक्ष्मी देवी, साले श्रीपाल, रामपाल, शिवपाल की नीयत खराब हो गई और उक्त जमीन पर जबरन कब्जा कर लिया तथा प्रार्थी व प्रार्थी की पत्नी बसन्ती पर उक्त जमीन पुनः अपने नाम करने का दबाव देने लगे और मानसिक व शारीरिक रुप से प्रार्थी की पत्नी बसन्ती को प्रताड़ित करने लगे तथा झूठे मुकदमें में बंद करा देने व हत्या कर देने की धमकी देने लगे उपरोक्त विपक्षीगण की प्रताड़ना से प्रार्थी की पत्नी बसन्ती मानसिक रुप से अस्वस्थ हो गयी। दिनांक 18.12.14 को समय करीबन 2:00 बजे दिन में विपक्षीगण एकराय होकर प्रार्थी के घर पर आये और प्रार्थी की पत्नी बसन्ती पर उपरोक्त जमीन पुनः अपने नाम करने का दबाव दिया और तरह-तरह से प्रताड़िता किया और चले गये उपरोक्त लोगों की प्रताड़ना के कारण प्रार्थी की पत्नी बसन्ती ने उसी दिन समय करीबन 4:00 बजे दिन में कमरे में लगे पंखे से फांसी लगाकर आत्महत्या कर ली, उस समय प्रार्थी बैंक गया था वापस घर आने पर प्रार्थी ने अपनी पत्नी को कमरे में फांसी पर लटका पाया। उक्त के बावत संबंधित थाने व उच्चाधिकारियों को सूचित किया गया किन्तु कोई कार्यवाही नहीं हुई।

पत्रावली पर उपलब्ध साक्ष्य बयान परिवादी अंतर्गत धारा-200 दं0प्र0सं0 एवं धारा-202 दं0प्र0सं0 के अन्तर्गत परीक्षित साक्षीगण दिनेश व अश्वनी मिश्रा की साक्ष्य के आधार पर प्रथम दृष्टया अभियुक्तगण श्रीमती लक्ष्मी देवी, श्रीपाल, रामपाल व शिवपाल के विरुद्ध धारा-384, 385, 506 भा0दं0सं0 के तहत मामला बनता प्रकट होता है। अतः अभियुक्तगण उपरोक्त को तलब किया जाना न्यायोचित प्रकट होता है।"

(ङ) प्रकरण की पत्रावली के अनुसार आवेदक संख्या 1 की पुत्री व विपक्षी संख्या 2 की पत्नी जिसकी मृत्यु 18.12.2014 को हुई थी, उसके शव विच्छेदन आख्या के अभिमत के अनुसार उसकी मृत्यु का तत्काल कारण दम घुटना (asphyxia), बताया गया, जिसका कारण मृत्यु पूर्व (anti mortem) फाँसी (hanging) बताया गया।

(च) उपरोक्त आदेश वर्तमान प्रार्थना पत्र में आक्षेपित किया गया है। प्रति शपथपत्र व प्रत्युत्तर शपथपत्र दाखिल किये जा चुके हैं।

2. **<u>आवेदकगण का पक्ष</u>**

(क) आवेदकगण का पक्ष रखते हुए उनके विद्वान अधिवक्ता श्री राम कुमार पाल के कथन किया कि विपक्षी संख्या 2 व उसके परिवार के विरुद्ध धारा 156 (3) दं0प्र0सं0 (दिनांक 05.01.2015) के माध्यम से एक प्रथम सूचना रिपोर्ट संख्या 311 वर्ष 2015, दिनांक 29.03.2015 को धारा 302, 354, 376, 498-ए, 511 भारतीय दण्ड संहिता के अन्तर्गत दर्ज कराई, जिसकी विषयवस्तु का उल्लेख पूर्व में किया जा चुका है, कि इन्होने उसकी पुत्री की कथित रुप से हत्या 18.12.2014 को कर दी व उसको कथित रुप से आत्महत्या का रुप दे दिया गया। आवेदक संख्या 1 द्वारा प्रार्थना पत्र दिनांक 05.01.2015 प्रथम सूचना रिपोर्ट दर्ज करने के लिए दायर करने के तुरन्त बाद ही विपक्षी संख्या

2 ने एक प्रार्थना पत्र दिनांक 21.01.2015 प्रथम सूचना रिपोर्ट दर्ज करने के लिए दायर किया, जिसके अनुसार आवेदकगण पर उद्दापन करने व उद्दापन करने के लिए किसी व्यक्ति को किसी क्षति के भय में डालने व आपराधिक अभित्रास के आरोप लगाये, जो न केवल दुष्भावना से प्रेरित थे परन्तु उनके द्वारा दायर प्रार्थना पत्र का जवाब देने के लिए व उन पर अनुचित दबाव डालने के उद्देश्य के लिए दायर किया गया था।

(ख) विद्वान अधिवक्ता ने यह भी कथन किया कि परिवाद के अन्तःवस्तु, धारा 200 दं0प्र0सं0 के अंतर्गत वादी के ब्यान व धारा 202 दं0प्र0सं0 के अंतर्गत अन्य गवाहों के ब्यान के आधार पर विद्वान अवर न्यायालय के पास, सम्मन करने का पर्याप्त आधार होने का उचित संतोष नहीं था। आवेदक गण के विरुद्ध प्रथम दृष्टया मामला ही नहीं बनता है। उद्दापन व उसको कारित करने के लिए किसी क्षति के भय में डालने व आपराधिक अभित्रास के तत्व, प्रथम दृष्टया भी इस मामले में उपस्थित नहीं है। अतः उपरोक्त सम्मन का आदेश व उसके क्रम में समस्त आपराधिक कार्यवाही को निरस्त किया जाना चाहिए।

3. **<u>वादी (विपक्षी संख्या 2) का पक्ष</u>**

विपक्षी संख्या 2 के विद्वान अधिवक्ता श्री अनमोल तिवारी ने उपरोक्त बहस का विरोध किया। उन्होने तर्क दिया कि आवेदक संख्या 1, द्वारा दर्ज प्रथम सूचना रिपोर्ट पर अन्वेषण के उपरान्त अन्तिम रिपोर्ट दायर कर दी गयी थी। आवेदक द्वारा प्रोटेस्ट प्रार्थना पत्र दायर किया गया था। परन्तु इसके अग्रिम कार्यवाही का कोई साक्ष्य इस न्यायालय के समक्ष नहीं लाया गया है। इसके विपरीत विपक्षी 2 द्वारा दायर परिवाद, उसकी गवाही व अन्य गवाहों की ब्यानों के आधार पर आवेदकगण के विरुद्ध धारा 384, 385, 511 भा0दं0सं0 के अंतर्गत अपराध कारित करने का प्रथम दृष्टया मामला बनता है जिसमें कोई विधिक त्रुटि नहीं है इसलिये इस न्यायालय के समक्ष उसकी अन्तर्निहित शक्ति के उपयोग का कोई मामला नहीं बनता है। अतः वर्तमान प्रार्थना पत्र निरस्त किया जाये।

4. विद्वान अधिवक्तागणों को सुना व पत्रावली का अवलोकन किया।

5. **मजिस्ट्रेटों से परिवाद व उच्च न्यायालय की अन्तर्निहित शक्तियां की विधि:-**

(क) मजिस्ट्रेट से किये गए परिवाद की प्रक्रियात्मक योजना को दंड प्रक्रिया संहिता, 1973 (दं0प्र0सं0) के अध्याय 15 में उल्लेखित किया गया है। परिवाद दायर होने पर संज्ञान लेने वाला मजिस्ट्रेट, परिवादी की और यदि कोई साक्षी उपस्थित हो तो उसकी शपथ पर परीक्षा करेगा और ऐसा सारांश लेखबद्ध भी करेगा। यदि परिवाद लिखित रुप में किसी लोकसेवक ने अपने पदीय कर्तव्यों के निर्वहन में कार्य करते हुए या कार्य करने का तात्पर्य रखते हुए दायर किया हो या मजिस्ट्रेट मामले की जाँच या विचरण के लिए धारा 192 दं0प्र0सं0 के अधीन किसी अन्य मजिस्ट्रेट के हवाले कर दिया हो तब मजिस्ट्रेट के लिये परिवादी व साक्ष्य की परीक्षा करना आवश्यक नहीं है। अगर मजिस्ट्रेट परिवाद व साक्ष्य की परीक्षा करने के उपरान्त अन्य मजिस्ट्रेट के हवाले करता है तो बाद वाले मजिस्ट्रेट को उनकी फिर से परीक्षा करना आवश्यक नहीं है। (देखें धारा 200 दं प्र सं)। यदि लिखित परिवाद ऐसे मजिस्ट्रेट को किया गया हो, जो उस अपराध का संज्ञान करने में सक्षम नहीं है तो ऐसा पृष्ठांकन कर उसको समुचित न्यायालय में पेश करने के लिये लौटा देगा, और अगर परिवाद लिखित नहीं है, तो परिवादी को समुचित न्यायालय जाने का निर्देश देगा। (देखें धारा 201 दं प्र सं)

(ख) मजिस्ट्रेट ऐसे अपराध, जिसका संज्ञान लेने के लिए वह प्राधिकृत हो या धारा 192 के अधीन उसके हवाले किया गया हो और ठीक समझता है और ऐसे मामले जहाँ अभियुक्त का निवास उसके क्षेत्राधिकार से परे हो, तो अभियुक्त के विरुद्ध आदेशिका जारी करना मुल्तवी कर सकता है, और यह विनिश्चत करने के प्रयोजन से की कार्यवाही करने के पर्याप्त आधार हैं या नहीं, या तो मामले की जाँच स्वयं कर सकता है और अगर ठीक लगे तो साक्षी का साक्ष्य शपथ पर ले भी सकता, या किसी पुलिस अधिकारी से अन्य किसी व्यक्ति से, जिसको वो ठीक समझे (उस व्यक्ति को वारंट के बिना गिरफ़्तार करने के सिवाय वो सब अधिकार होगे जो पुलिस थाने के भारसाधक अधिकारी को होते है), अन्वेषण किये जाने के लिए निर्देश दे सकता है, परन्तु अन्वेषण किये जाने के लिए निर्देश निम्न होने पर नहीं दिया जा सकता है:- जहां मजिस्ट्रेट को यह प्रतीत होता हो, अपराध जिसका परिवाद किया गया है अनन्यत: सेशन न्यायालय द्वारा विचारणीय है, परन्तु परिवादी से अपने साक्ष्य को पेश करने की अपेक्षा करेगा और उसकी शपथ पर परीक्षा करेगा अन्यथा जहां परिवाद न्यायालय द्वारा नहीं किया गया है, जब तक परिवादी की या उपस्थित साक्षियों की (यदि कोई हो) धारा 200 के अधीन शपथ पर परीक्षा नहीं कर ली जाती है। (देखें धारा 202 दं प्र सं)

(ग) यदि परिवादी के और साक्षियों के शपथ पर किए गये कथन पर (यदि कोई हो) और धारा 202 के अधीन जाँच या अन्वेषण (यदि कोई है) के परिणाम पर विचार करने के पश्चात, मजिस्ट्रेट की यह राय है कि कार्यवाही करने के लिये पर्याप्त आधार नहीं है, तो वो परिवाद ख़ारिज कर देगा, व ऐसा करने के अपने कारण को संक्षेप में अभिलिखित करेगा। (देखें धारा 203 दं प्र सं) और यदि अपराध का संज्ञान करने वाले मजिस्ट्रेट की राय में कार्यवाही करने के लिए पर्याप्त आधार है तो वो धारा 204 दं0प्र0सं0 के प्रावधानों के अंतर्गत यथोचित आदेशिका जारी करेगा।

(घ) उच्चतम न्यायालय के निर्णयों की श्रृंखला की यह अवधारणा है, कि धारा 203 दं0 प्र0सं0, में उल्लेखित "पर्याप्त आधार' पर मजिस्ट्रेट की राय होने का अर्थ वो "संतोष' है, जितना अभियुक्त के खिलाफ प्रथम दृष्टया मामला बनने के लिए पर्याप्त आधार का होना हो, न कि वो "संतोष' जो अभियुक्त के ख़िलाफ़ दोष सिद्ध होने के लिए पर्याप्त आधार का होना होता है। आदेशिका जारी करते समय मजिस्ट्रेट को उपलब्ध साक्ष्य का मूल्यांकन का माप दंड वैसा नहीं हो सकता है, जैसा की न्यायालय विचारण के समय करता है और न ही साक्ष्य का मूल्यांकन करते समय वो मानक अपनाना है, जो मजिस्ट्रेट आरोप की विरचना के समय ध्यान में रखता है। **(देखें एस0डब्लू0 पलानितकर प्रति बिहार राज्य:(2002) 1 एस0सी0सी0 241, केवल कृष्णनन प्रति सूरजभान व अन्य:(1980) सप्पली एस0सी0सी0 499)**

(ङ) आदेशिका जारी करने की प्रक्रिया यांत्रिक नहीं होनी चाहिए और न ही वो अभियुक्त का उत्पीडन करने के साधन के रूप में उपयोग होनी चाहिए। आरोपियों को आपराधिक मामले में पेश होने के लिए बुलाए जाने की आदेशिका जारी करने की प्रक्रिया एक गंभीर विषय है और आदेश में विधिक विवेक का उपयोग न होना व आवश्यक विवरण की कमी को केवल, प्रक्रियागत अनियमितता नहीं माना जा सकता है। **(देखें बिरला कॉरपोरेशन लिमिटेड प्रति एडवेन्टेज इन्वेस्टमेन्ट व होल्डिंग लिमिटड (2019) 16 एस0सी0सी0 610)**

(च) किसी आपराधिक कार्यवाही को रद्द तभी किया जा सकता, जब परिवाद व साक्षियों

के ब्यान का विवरण किसी अपराध को उद्घाटित नहीं करता है, या शिकायत निरर्थक हो और केवल अपराधी को परेशान या उस पर अत्याचार करने के लिए करी गयी हो। परन्तु परीक्षण के दौरान उपलब्ध बचाव या वो तथ्य जो परीक्षण के अन्त में दोषरहित होने का कारण बन सकते हो, उनके आधार पर परिवाद निरस्त नहीं किया जा सकता है। आपराधिक शिकायतों को केवल इस आधार पर भी समाप्त नहीं किया जा सकता है कि उसमें लगाए गए आरोप दीवानी प्रकृति के हैं, यदि कथित अपराध के तत्व शिकायत में प्रथम द्रष्टव्य उद्घाटित होते हो। उच्च न्यायालय को अपने अन्तर्निहित शक्ति का उपयोग, मजिस्ट्रेट के न्यायिक विवेकाधिकार को अपने न्यायिक विवेकाधिकार से प्रतिस्थापित करने हेतु यह जांच नहीं करनी चाहिये कि क्या परिवाद में उल्लेखित आरोप अगर सिद्ध हो जाते हैं तो क्या अपराधी को सजा मिल जायेगी। ऐसी जांच धारा 202 द0प्र0सं0 के अन्तर्गत कि जाने वाली जांच प्रक्रिया की योजना से अभिन्न है।

(छ) यदि परिवाद व साक्षियों के ब्यान में लगाये गये अविवादित आरोप से किसी भी अपराध का कृत्य का होना प्रकट नहीं होता हो या अपराध के आवश्यक अवयव उपस्थित नहीं हो या परिवाद किसी विधिक प्रावधान के कारण बाधित या निषेध हो तो इन परिस्थितियों में उच्च न्यायालय अन्तर्निहित शक्तियों का उपयोग कर आदेशिका निरस्त कर सकती है। परन्तु यह ध्यान में रखना होगा कि इन असधारण शक्तियों का दायरा तो व्यापक है, परंतु इसका उपयोग संयम् एवम् सावधानीपूर्वक ही करना चाहिए। **(देखें श्रीमती नागव्वा प्रति विरन्ना शिवलिंगगप्पा कोंजाल्गी व अन्य (1976) 3 एस0सी0सी0 736, माधवराव जीवाजीराव सिंधिया व अन्य प्रति सम्भाजीराव चन्द्रोजीराव अंगरे व अन्य (1988)। एस0सी0सी0 692, कमल शिवाजी पोकामेकर प्रति महाराष्ट्र राज्य व अन्य (2019) 14 एस0सी0सी0 350)**

6. **<u>विश्लेषण एवं निष्कर्ष</u>**

उपरोक्त विधि विश्वलेषण की पृष्ठभूमि में वर्तमान प्रकरण के तथ्यों के आधार पर, यह निर्धारित करना है कि क्या परिवाद के कथन व साक्षियों के ब्यान से, आवेदकगण द्वारा धारा 384, 385, 511 भा0दं0सं0 के अन्तर्गत प्रथम दृष्ट्या अपराध कारित होना प्रतीत होता है या नहीं अथवा किसी अन्य विधिक कारण से आदेशिका निरस्त की जा सकती है।

7. आवेदक के विद्वान अधिवक्ता का सर्वप्रथम तर्क है कि उनके द्वारा धारा 156 (3) की प्रक्रिया के लिए प्रार्थना पत्र दिनांक 5.1.2015 के माध्यम से एक प्रथम सूचना रिपोर्ट दिनांक 29.03.2015 विपक्षी संख्या 2 व उसके परिवार के विरुद्ध दर्ज करवाई। विपक्षी संख्या 2 ने इसका जवाब देने हेतु व आवेदक पर दबाव बनाने के लिए धारा 156 (3) की प्रक्रिया के लिए प्रार्थना पत्र दिनांक 21.01.2015 (आवेदक के प्रार्थना पत्र के तुरंत बाद) दायर किया जिस पर आदेशानुसार परिवाद वाद दर्ज हुआ जिसके क्रम में धारा 200 व 202 दं0प्र0सं0 के ब्यानों के आधार पर आवेदकगण को सम्मन की आदेशिका पारित की गयी। इस स्तर पर यह ध्यान देना आवश्यक है कि आवेदकगण द्वारा उनके द्वारा दिये गये प्रार्थनापत्र पर आदेश के उपरान्त दर्ज प्रथम सूचना रिपोर्ट पर अन्तिम रिपोर्ट आने के बाद उनके द्वारा दायर प्रोटेस्ट प्रार्थना पत्र पर पारित आदेश व वर्तमान में अन्वेषण यदि कोई हुआ है तो उसकी वर्तमान स्थिति के सम्बन्ध में न तो कोई कथन ही कहा गया है और न ही इस सम्बन्ध में कोई दस्तावेज पत्रावली पर उपलब्ध है। जबकि विपक्षी संख्या 2 के द्वारा दाखिल प्रार्थना पत्र को परिवाद मानते हुए दं0प्र0सं0 के अन्तर्गत कार्यवाही करते हुए वर्तमान में सम्मन आदेशित किया गया है, अतः आवेदक गण का कथन/तर्क कि समस्त कार्यवाही केवल आवेदकगण पर दबाव डालने

के लिए की गयी है, सत्य प्रतीत नहीं होता है। अतः यह तर्क अस्वीकार किया जाता है।

8. अब न्यायालय को यह निर्धारित करना है कि अवर न्यायालय द्वारा आवेदकगण के विरुद्ध आदेशिका पारित करने में कोई वैधानिक त्रुटि हुई है या नहीं। इसके लिए सर्वप्रथम धारा 383, 384, 385 व 506 भा0दं0सं0 का उल्लेख करना आवश्यक है जो निम्न है।

*"**383. उद्दापन**- जो कोई किसी व्यक्ति को स्वयं उस व्यक्ति को या किसी अन्य व्यक्ति को कोई क्षति करने के भय में साशय डालता है, और तद्द्वारा इस प्रकार भय में डाले गए व्यक्ति को, कोई सम्पत्ति या मूल्यवान प्रतिभूति या हस्ताक्षरित या मुद्रांकित कोई चीज जिसे मूल्यवान प्रतिभूति में परिवर्तित किया जा सके, किसी व्यक्ति को परिदत्त करने के लिए बेईमानी से उत्प्रेरित करता है, वह "उद्दापन" करता है।*

***384. उद्दापन के लिए दण्ड**- जो कोई उद्दापन करेगा वह दोनों में से किसी भांति के कारावास से, जिसकी अवधि तीन वर्ष तक की हो सकेगी, या जुर्माने से, या दोनों से, दण्डित किया जायेगा।*

***385. उद्दापन करने के लिए किसी व्यक्ति को क्षति के भय में डालना**- जो कोई उद्दापन करने के लिए किसी व्यक्ति को किसी क्षति के पहुँचाने के भय में डालेगा या भय में डालने का प्रयत्न करेगा, वह दोनों में से किसी भांति के कारावास से, जिसकी अवधि दो वर्ष तक की हो सकेगी, या जुर्माने से, या दोनों से, दण्डित किया जायेगा।*

***506. आपराधिक अभित्रास के लिए दण्ड**- जो कोई आपराधिक अभित्रास का अपराध करेगा, वह दोनों में से किसी भांति के कारावास से, जिसकी अवधि दो वर्ष तक की हो सकेगी, या जुर्माने से, या दोनों से, दण्डित किया जाएगा।*

यदि धमकी मृत्यु या घोर उपहति इत्यादि कारित करने की हो- तथा यदि धमकी मृत्यु या घोर उपहति कारित करने की, या अग्नि द्वारा किसी सम्पत्ति का नाश कारित करने की या मृत्यु दण्ड से या आजीवन कारावास से, या सात वर्ष की अवधि तक के कारावास से दण्डनीय अपराध कारित करने की, या किसी स्त्री पर अस्तित्व का लांछन लगाने की हो, तो वह दोनों में से किसी भांति के कारावास से, जिसकी अवधि सात वर्ष तक की हो सकेगी, या जुर्माने से, या दोनों से, दण्डित किया जायेगा।"

9. धारा 383 भा0दं0सं0 में उद्दापन के अपराध का विवरण दिया गया है, जिसके अनुसार इस अपराध के आवश्यक अवयव हैं:- (I) अपराधी, किसी व्यक्ति को स्वयं उस व्यक्ति को या अन्य व्यक्ति को कोई क्षति करने के भय में डालता है। (ii) क्षति करने का भय साशय हो, (iii) अपराधी उस भय में डाले गये व्यक्ति को कोई संपत्ति या मूल्यवान या हस्ताक्षरित या मुद्रांकित कोई चीज जिसे मूल्यवान प्रतिभूति में परिवर्तित किया जा सके, किसी व्यक्ति को परिदत्त करने के लिए बेइमानी से उत्प्रेरित करे।

10. उच्चतम न्यायालय ने इसाक **इसांगा मुसुम्बा व अन्य प्रति महाराष्ट्र शासन व अन्य : (2014) 15 एस.सी.सी. 357** के मामले में उद्दापन के अवयव पर विचार किया और यह अवधारित किया कि जब तक अपराधी द्वारा उसको या अन्य व्यक्ति को साशय क्षति पहुँचाने के भय के कारण व उसके द्वारा बेइमानी से उत्प्रेरित होकर कोई संपत्ति या मूल्यवान या हस्ताक्षरित या मुद्रांकित कोई चीज, जिसे मूल्यवान प्रतिभूति में परिवर्तित किया जा सके,

किसी व्यक्ति को प्रदान न हो गयी हो, तब तक उद्दापन का अपराध पूर्ण नहीं हो सकता है।

11. वर्तमान प्रकरण में अविवादित रुप से मृतका ने अपनी माता (आवेदक सं0 1) से क्रय की गयी भूमि को वापस नहीं किया है, जो आपराधिक परिवाद व धारा 200 व 202 दं0प्र0सं0 के अंतर्गत दर्ज ब्यानों के परिशीलन से भी पूर्ण रुप से परिलक्षित होता है। अतः वर्तमान प्रकरण में उद्दापन के समस्त अवयव, प्रथम दृष्टया भी पूर्ण नहीं होते हैं। अतः वर्तमान प्रकरण में उद्दापन (धारा 383 भा0दं0 सं0) का कोई अपराध प्रथम दृष्टया भी नहीं प्रकट होता है। अतः उसे धारा 384 भा0दं0सं0 के अन्तर्गत सजा होने के भी प्रथम दृष्ट्या मामला नहीं बनता है।

12. अब न्यायालय को यह देखना है क्या धारा 385 भा0दं0सं0 (उद्दापन करने के लिए किसी व्यक्ति को क्षति के भय में डालना) का अपराध क्या पत्रावली पर उपस्थित आपराधिक परिवाद, धारा 200 व 202 दं0प्र0सं0 के ब्यान के मद्देनजर प्रथम दृष्टया बनता है या नहीं। आपराधिक परिवाद व वादी व गवाहों के ब्यानों में यह कथन किया गया है कि आवेदकगण वादी की पत्नी पर जमीन पुनः उनके नाम करने का दबाव देने लगे और मानसिक व शारीरिक रुप से उसको प्रताड़ित करने लगे।

13. धारा 385 के अवयव उद्दापन का प्रयास करते हुए किसी व्यक्ति को किसी क्षति के भय में डालने या डालने का प्रयत्न करने का अपराध को वर्णित करते हैं। वर्तमान प्रकरण में आपराधिक परिवाद, धारा 200 व 202 दं0प्र0सं0 के ब्यानों से प्रथम दृष्टया वादी की पत्नी को उद्दापन करने का प्रयास करते हुए उसको मानसिक व शारीरिक प्रताड़ना पहुँचाना कहा गया है। परन्तु इस नाते कैसे उसको भय में डालने या डालने का प्रयत्न करने का कोई विनिष्ठ साक्ष्य या कथन पत्रावली पर उपस्थित नहीं है और न ही यह कथन किया गया है कि क्या मानसिक या क्या शारीरिक प्रताड़ना पहुंचायी गई थी। अतः वर्तमान प्रकरण में धारा 385 भा0दं0 सं0 के अवयव प्रथम दृष्टया उपस्थित न होने के कारण इस अपराध के कारित होने का मामला भी नहीं बनता है। इसी प्रकार धारा 506 भा0दं0सं0 के भी अवयव भी उपस्थित न होने के कारण भी उस अपराध के घटित होने का प्रथम दृष्टया मामला नहीं बनता है।

14. जैसा की पूर्व में विश्लेषण किया गया है कि यदि परिवाद व साक्षियों के ब्यान में लगाये गये अविवादित आरोप से किसी भी अपराध का कृत्य का होना प्रकट नहीं होता हो या अपराध के आवश्यक अवयव उपस्थित नहीं हो तो यह न्यायालय अपनी अन्तर्निहित शक्तियों का उपयोग करते हुए आदेशिका (सम्मन) निरस्त कर सकता है।

15. अतः उपरोक्त विश्लेषण का एक ही परिणाम है कि यह आवेदन स्वीकार करने योग्य है तद्नुसार स्वीकार किया जाता है तथा आक्षेपित आदेश दिनांक 27.02.2017 जो ए0सी0एम0 द्वितीय, कानपुर नगर द्वारा परिवाद संख्या-776/15, रमाशंकर बनाम श्रीमती लक्ष्मी देवी आदि, अन्तर्गत धारा-384, 385, 506 भा0द0सं0 के मामले में पारित किया गया है, निरस्त किया जाता है।

(2022)01ILR A366
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.12.2021

BEFORE

THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Application U/S 482 Cr.P.C. No. 12578 of 2021

Badri Prasad & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Sarveshwar Singh @ S.S. Chauhan

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

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power - Sections 173,190(1)(b),193,200,202,203,204,460,461 & 465 - Indian Penal Code, 1860 - Sections 324, 323 and 504 - taking cognizance of an offence - cognizance - taking judicial notice - there is no legal requirement that the Magistrate should pass a speaking order indicating reasons, at the stage of taking cognizance - in the absence of any legal requirement for the Magistrate to have given detailed reasons in an order taking cognizance and issuing process the same cannot be held to be vitiated only on the ground that the order is not a reasoned order.(Para - 43,48)

Application filed seeking quashing of the charge-sheet - principal ground - order passed by Magistrate - taking cognizance is without application of mind - passed mechanically without assigning any detailed reasons.

HELD:-Order of cognizance passed by the Magistrate after having advantage of perusing the police report and the materials therewith, the same therefore cannot be assailed only on the ground that it does not give detailed reasons. Court not inclined to exercise its inherent jurisdiction under Section 482 CrPC.Para - 56,57)

Application u/s 482 Cr.P.C. dismissed. (E-7)

List of Cases cited:-

1. Pepsi Foods Ltd. Vs Special Judicial Magistrate , (1998) 5 SCC 749

2. Fakhruddin Ahmad Vs St. of Utaranchal, (2008) 17 SCC 157

3. Ankit Vs St. of U.P. & anr., (2009) 67 ACC 532

4. Vineet Agarwal & ors. Vs St. of U.P. & anr., (Application U/S 482 No. 15450 of 2020, decided on 11.11.2020)

5. St. of Guj. Vs Afroz Mohammad Hasanfatta, AIR 2019 SC 2499

6. U.P. P.C.B. Vs M/s. Mohan Meakins Ltd. & ors., (2000) 3 SCC 745

7. Kanti Bhadra Shah & anr. Vs St. of W.B., (2000) 1 SCC 722

8. Mathai Vs St. of Kerala, (2005) 3 SCC 260

9. Darshan Singh Ram Kishan Vs The St. of Mah., (1971) 2 SCC 654

10. S.K.Sinha, Chief Enforcement Officer Vs Videocon International Ltd., (2008) 2 SCC 492

11. Supdt. & Remembrancer of Legal Affairs Vs Abani Kumar Banerjee, AIR 1950 Cal 437

12. R.R. Chari Vs St. of U.P., AIR 1951 SC 207

13. Narayandas Bhagwandas Madhavdas Vs St. of W.B., AIR 1959 SC 1118

14. Gopal Das Sindhi Vs St. of Assam, AIR 1961 SC 986

15. Nirmaljit Singh Hoon Vs St. of W.B., (1973) 3 SCC 753

16. Darshan Singh Ram Kishan Vs St. of Mah., (1971) 2 SCC 654

17. Devarapalli Lakshminarayana Reddy Vs V. Narayana Reddy, (1976) 3 SCC 252

18. Fakhruddin Ahmad Vs St. of Uttaranchal & anr.,(2008) 17 SCC 157

19. Ajit Kumar Palit Vs St. of W.B, AIR 1963 SC 765

20. Emperor Vs Sourindra Mohan Chuckerbutty, ILR (1910) 37 Cal 412

21. Chief Enforcement Officer Vs Videocon International Ltd. (2008) 2 SCC 492,

22. Supdt. & Remembrancer of Legal Affairs Vs Abani Kumar Banerjee, AIR 1950 Cal 437

23. R.R. Chari Vs St. of U.P. , AIR 1951 SC 297

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

25. R.R. Chari Vs St. of U.P.12, St. of W.B. Vs Mohd. Khalid, AIR 1951 SC 207

26. St. of Karnataka & anr. Vs Pastor P. Raju, (1995) 1 SCC 728

27. St. of WB Vs Mohd. Khalid, (1995) 1 SCC 684

28. Kanti Bhadra Shah & anr. Vs The St. of W.B., (2000) 1 SCC 722

29. U.P. P.C.B. Vs Mohan Meakins Ltd. & ors., (2000) 3 SCC 745

30. Rajesh Talwar Vs CBI Delhi & anr., (2012) 4 SCC 245

31. Bhushan Kumar & anr. Vs St. (NCT of Delhi) & anr., (2012) 5 SCC 424

32. Chief Enforcement Officer Vs Videocon International Ltd., (2008) 2 SCC 492

33. Kanti Bhadra Shah Vs St. of W.B., (2000) 1 SCC 722

34. Nagawwa Vs Veeranna Shivalingappa Konjalgi, (1976) 3 SCC 736

35. Chief Controller of Imports & Exports Vs Roshanlal Agarwal, (2003) 4 SCC 139

36. U.P. P.C.B. Vs Bhupendra Kumar Modi, (2009) 2 SCC 147

37. Nupur Talwar Vs C.B.I. & anr., (2012) 11 SCC 465

38. Kanti Bhadra Shah Vs St. of W.B., (2000) 1 SCC 722

39. U.P. P.C.B. Vs Bhupendra Kumar Modi, (2009) 2 SCC 147

40. Chief Controller of Imports & Exports Vs Roshanlal Agarwal, (2003) 4 SCC 139

41. Bhushan Kumar & anr. Vs St. (NCT of Delhi) & anr., (2012) 5 SCC 424

42. Sunil Bharti Vs C.B.I. , (2015) 4 SCC 609

43. St. of Guj. Vs Afroz Mohammed Hasanfatta , (2019) 20 SCC 539

44. Nupur Talwar Vs C.B.I. & anr.,(2012) 11 SCC 465

45. Pradeep S. Wodeyar Vs The St. of Karn. ,2021 SCC Online SC 1140

46. A.R.Antulay Vs Ramdas Sriniwas Nayak & Anr.,(1984) 2 SCC 500

47. Santhosh De Vs Archana Guha, AIR 1994 SC 1229

48. Pepsi Foods Ltd. Vs Special Judicial Magistrate, (1998) 5 SCC 749

49. Fakhruddin Ahmad Vs St. of Utaranchal, (2008) 17 SCC 157

50. Ankit Vs St. of U.P. & anr.,(2009) 67 SCC 532

51. Vineet Agarwal & ors. Vs St. of U.P. & anr., Application U/S 482 no. 15450 of 2020, decided on 11.11.2020

52. Deputy Chief Controller Import & Export Vs Roshan Lal Agrawal, (2003) 4 SCC 139

53. U.P. P.C.B. Vs Mohan Meakins & ors., (2003) 3 SCC 745

54. Kanti Bhadra Shah & anr. Vs The St. of W.B., (2000) 1 SCC 722

(Delivered by Hon'ble Dr. Yogendra Kumar Srivastava, J.)

1. Heard Sri S.S.Chauhan, learned counsel for the applicants and Sri Vinod Kant, learned Additional Advocate General, appearing alongwith Sri Pankaj Saxena, learned Additional Government Advocate-I for the State-opposite party.

2. The present application under Section 482 CrPC has been filed seeking quashing of the charge-sheet dated 20.11.2020 in Case Crime No. 402/2020 under Sections 324, 323 and 504 Indian Penal Code Police Station Bhojipura, District Bareilly pending in the court of Additional Chief Judicial Magistrate, Bareilly with a further prayer to stay the proceedings of the aforesaid case.

3. The principal ground which is sought to be urged for seeking quashing of the proceedings is that the order dated 19.02.2021 passed by the Magistrate taking cognizance is without application of mind and has been passed mechanically without assigning any detailed reasons. It has been further argued that as per the FIR version, the weapon used in commission of offence could not be described to be a "dangerous weapon" so as to constitute an offence under Section 324 IPC and this aspect of the matter having not been examined by the Magistrate while taking cognizance of the charge-sheet, the order taking cognizance cannot be sustained. In support of his submissions, learned counsel for the applicants has referred to the decisions in **Pepsi Foods Ltd. v. Special Judicial Magistrate1, Fakhruddin Ahmad Vs. State of Utaranchal2, Ankit Vs. State of U.P. and another3, and Vineet Agarwal and others Vs. State of U.P. and another4.**

4. Learned Additional Advocate General has controverted the aforesaid submissions by pointing out that the question as to whether the weapon of offence in a given case would be a "dangerous weapon" would be a question of fact to be examined on the basis of evidence. In the instant case, from the nature of injuries as have been shown in the injury report, it cannot be conclusively said at this stage of the proceedings that the weapon of offence cannot be held to be a "dangerous weapon".

5. Learned Additional Advocate General has submitted that pursuant to the registration of the FIR dated 09.11.2020, the matter was investigated and a police report under Section 173 of the Code was submitted. The Magistrate having the advantage of police report and material submitted along with the same has taken cognizance in exercise of powers under Section 190 (1) (b) and the order taking cognizance clearly states that the Magistrate had perused the charge-sheet, the case diary and the materials which had been submitted along with the same and on the basis thereof had held that there was sufficient material to take cognizance and to register the case. He has further submitted that while taking cognizance under Section 190 (1) (b), it is not mandatory for the court to record detailed reasons for its satisfaction. In support of his submissions, learned AGA-I has placed reliance upon the decisions in **State of Gujarat Vs. Afroz Mohammad Hasanfatta5, U.P. Pollution Control Board Vs. M/s. Mohan Meakins Ltd. and others6, Kanti Bhadra Shah and another Vs. State of West Bengal7, and Mathai Vs. State of Kerala8**

6. The principal issue which thus arises is with regard to the manner of taking cognizance and issuing process as per the procedure prescribed under the Code and as to whether detailed and elaborate reasons are required to be recorded at the stage of taking cognizance or issuing of process.

7. After completion of the stage of investigation and placing of the final report by the police to a competent Magistrate, the stage of trial is to begin. As a precursor of the stage, the steps which are envisaged under the Code are as follows : (i) taking cognizance of the offence; (ii) ascertaining whether any prima facie case exists against the accused person; and in case it exists, then (a) to issue process against the accused person in order to secure his presence at the time of his trial, (b) to supply to the accused person copies of police statements; (iii) consolidating different proceedings pertaining to the same case; and (iv) if the case is exclusively triable by a Sessions Court, committing the case to that court.

8. Chapter XIV of the Code relates to conditions requisite for initiation of proceedings. Section 190 provides as to when a Magistrate may take cognizance of any offence. Section 190 reads as follows :-

"**190. Cognizance of offences by Magistrates.-**

(1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub- section (2), may take cognizance of any offence-

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a police report of such facts;

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub- section (1) of such offences as are within his competence to inquire into or try."

9. A complaint referred to under sub-section (1) (a) of Section 190 is defined under Section 2 (d) of the Code, which is as follows:-

"(d) "complaint" means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report.

Explanation.- A report made by a police officer in a case which discloses, after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be the complainant."

10. The police report referred to in sub-section (1) (b) has been defined under Section 2 (r), as meaning a report forwarded by a police officer to a Magistrate under sub-section (2) of section 173. The police report refers to be the report forwarded by the police on completion of the investigation.

11. Section 193 relates to cognizance of offences by Courts of Session, which is as follows:-

"**193. Cognizance of offences by Courts of Session.-** Except as otherwise expressly provided by this Code or by any other law for the time being in force, no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the case has been committed to it by a Magistrate under this Code."

12. Complaints to Magistrate are dealt with under Chapter XV of the Code. The provisions relating to examination of complainant are under Section 200. Section 202 provides for postponement of issue of process, where the Magistrate, thinks fit, to either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purposes of deciding whether or not there is sufficient ground for proceeding. Section 203 provides for dismissal of complaint in a situation where after considering the statements on oath (if any) of the complainant and of the witnesses and the result of the inquiry or investigation (if any) under Section 202, the Magistrate is of the opinion that there is no sufficient ground for proceeding. Sections 200, 202 and 203, are being extracted below:-

"200. Examination of complainant.- A Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate: Provided that, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses-

(a) if a public servant acting or purporting to act in the discharge of his official duties or a Court has made the complaint; or

(b) if the Magistrate makes over the case for inquiry or trial to another Magistrate under section 192:

Provided further that if the Magistrate makes over the case to another Magistrate under section 192 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them.

202. Postponement of issue of process.-

(1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him under section 192, may, if he thinks fit, and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding:

Provided that no such direction for investigation shall be made-

(a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Sessions; or

(b) where the complaint has not been made by a Court, unless the

complainant and the witnesses present (if any) have been examined on oath under section 200.

(2) In an inquiry under sub-section (1), the Magistrate may, if he thinks fit, take evidence of witness on oath:

Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.

(3) If an investigation under sub-section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Code on an officer in charge of a police station except the power to arrest without warrant.

203. Dismissal of complaint.-If, after considering the statements on oath (if any) of the complainant and of the witnesses and the result of the inquiry or investigation (if any) under section 202, the Magistrate is of opinion that there is no sufficient ground for proceeding, he shall dismiss the complaint, and in every such case he shall briefly record his reasons for so doing."

13. The procedure for commencement of proceedings before Magistrates is provided under Chapter XVI of the Code. Section 204 provides that if the Magistrate taking cognizance of an offence considers that there is sufficient ground for proceeding, he shall issue process against the accused person. Section 204 runs as follows :-

"204. Issue of process.-

(1) If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be-

(a) a summons-case, he shall issue his summons for the attendance of the accused, or

(b) a warrant-case, he may issue a warrant, or, if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or (if he has no jurisdiction himself) some other Magistrate having jurisdiction.

(2) No summons or warrant shall be issued against the accused under sub-section (1) until a list of the prosecution witnesses has been filed.

(3) In a proceeding instituted upon a complaint made in writing, every summons or warrant issued under sub-section (1) shall be accompanied by a copy of such complaint.

(4) When by any law for the time being in force any process-fees or other fees are payable, no process shall be issued until the fees are paid and, if such fees are not paid within a reasonable time, the Magistrate may dismiss the complaint.

(5) Nothing in this section shall be deemed to affect the provisions of section 87."

14. It would therefore be seen that cognizance of offence is the first and foremost step towards trial. The Code has not defined or specifically explained the expression "taking cognizance of an offence'. The meaning of the expression,

however, has been considered in various judicial authorities, and it would be useful to advert to the same.

15. The question as to when cognizance of an offence can be held to have been taken under Section 190 of the Code came up for consideration in **Darshan Singh Ram Kishan Vs. The State of Maharashtra9,** where it was held that cognizance takes place at a point when a Magistrate first takes judicial notice of an offence, whether on a complaint, or on a police report, or upon information of a person other than a police officer. The observations made in the judgment in this regard are as follows :-

"8. As provided by Section 190 of the Code of Criminal Procedure, a Magistrate may take cognizance of an offence either, (a) upon receiving a complaint, or (b) upon a police report, or (c) upon information received from a person other than a police officer or even upon his own information or suspicion that such an offence has been committed. As has often been held, taking cognizance does not involve any formal action or indeed action of any kind but occurs as soon as a Magistrate applies his mind to the suspected commission of an offence. Cognizance, therefore, takes place at a point when a Magistrate first takes judicial notice of an offence. This is the position whether the Magistrate takes cognizance of an offence on a complaint, or on a police report, or upon information of a person other than a police officer. Therefore, when a Magistrate takes cognizance of an offence upon a police report, prima facie he does so of the offence or offences disclosed in such report."

16. The meaning of the word "cognizance' and the point in time and determination of occurrence of cognizance together with its distinction with "issuance of process' was explained in **S.K.Sinha, Chief Enforcement Officer Vs. Videocon International Limited10**, and it was held that "cognizance' connotes to take notice judicially and it occurs simultaneously with the application of mind by the court or Magistrate to the suspected commission of an offence. The question whether cognizance of an offence was taken or not depends upon the facts and circumstances of each case and no rule of universal application can be laid down to determine it. Referring to the earlier decisions in S**updt. & Remembrancer of Legal Affairs v. Abani Kumar Banerjee11, R.R. Chari v. State of U.P.12, Narayandas Bhagwandas Madhavdas v. State of W.B.13, Gopal Das Sindhi v. State of Assam14, Nirmaljit Singh Hoon v. State of W.B.15, Darshan Singh Ram Kishan v. State of Maharashtra9**, and **Devarapalli Lakshminarayana Reddy v. V. Narayana Reddy16**, it was observed as follows :-

"19. The expression "cognizance" has not been defined in the Code. But the word (cognizance) is of indefinite import. It has no esoteric or mystic significance in criminal law. It merely means "become aware of" and when used with reference to a court or a Judge, it connotes "to take notice of judicially". It indicates the point when a court or a Magistrate takes judicial notice of an offence with a view to initiating proceedings in respect of such offence said to have been committed by someone.

20. "Taking cognizance" does not involve any formal action of any kind. It occurs as soon as a Magistrate applies his

mind to the suspected commission of an offence. Cognizance is taken prior to commencement of criminal proceedings. Taking of cognizance is thus a sine qua non or condition precedent for holding a valid trial. Cognizance is taken of an offence and not of an offender. Whether or not a Magistrate has taken cognizance of an offence depends on the facts and circumstances of each case and no rule of universal application can be laid down as to when a Magistrate can be said to have taken cognizance.

21. Chapter XIV (Sections 190-199) of the Code deals with "Conditions requisite for initiation of proceedings". Section 190 empowers a Magistrate to take cognizance of an offence in certain circumstances…

22. Chapter XV (Sections 200-203) relates to "Complaints to Magistrates" and covers cases before actual commencement of proceedings in a court or before a Magistrate. Section 200 of the Code requires a Magistrate taking cognizance of an offence to examine the complainant and his witnesses on oath. Section 202, however, enacts that a Magistrate is not bound to issue process against the accused as a matter of course. It enables him before the issue of process either to inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit for the purpose of deciding whether there is sufficient ground for proceeding further. The underlying object of the inquiry under Section 202 is to ascertain whether there is prima facie case against the accused. It thus allows a Magistrate to form an opinion whether the process should or should not be issued. The scope of inquiry under Section 202 is, no doubt, extremely limited. At that stage, what a Magistrate is called upon to see is whether there is *sufficient ground* for proceeding with the matter and not whether there is *sufficient ground for conviction of the accused.*

23. Then comes Chapter XVI (Commencement of proceedings before Magistrates). This Chapter will apply only after cognizance of an offence has been taken by a Magistrate under Chapter XIV. Section 204, whereunder process can be issued, is another material provision...

24. From the above scheme of the Code, in our judgment, it is clear that "Initiation of proceedings", dealt with in Chapter XIV, is different from "Commencement of proceedings" covered by Chapter XVI. For commencement of proceedings, there must be initiation of proceedings. In other words, initiation of proceedings must precede commencement of proceedings. Without initiation of proceedings under Chapter XIV, there cannot be commencement of proceedings before a Magistrate under Chapter XVI. The High Court, in our considered view, was not right in equating initiation of proceedings under Chapter XIV with commencement of proceedings under Chapter XVI.

25. Let us now consider the question in the light of judicial pronouncements on the point.

26. In ***Supdt. & Remembrancer of Legal Affairs v. Abani Kumar Banerjee11, t***he High Court of Calcutta had an occasion to consider the ambit and scope of the phrase "taking cognizance" under Section 190 of the Code of Criminal Procedure, 1898 which was in pari materia

with Section 190 of the present Code of 1973. Referring to various decisions, Das Gupta, J. (as His Lordship then was) stated: (AIR p. 438, para 7)

"7. ... What is "taking cognizance' has not been defined in the Criminal Procedure Code, and I have no desire now to attempt to define it. It seems to me clear, however, that before it can be said that any Magistrate has taken cognizance of any offence under Section 190(1)(a) CrPC, he must not only have applied his mind to the contents of the petition, but he must have done so for the purpose of proceeding in a particular way as indicated in the subsequent provisions of this Chapter, proceeding under Section 200, and thereafter sending it for enquiry and report under Section 202. When the Magistrate applies his mind not for the purpose of proceeding under the subsequent sections of this Chapter, but for taking action of some other kind, e.g., ordering investigation under Section 156(3), or issuing a search warrant for the purpose of the investigation, he cannot be said to have taken cognizance of the offence."

27. ***R.R. Chari v. State of U.P.12,*** was probably the first leading decision of this Court on the point. There, the police, having suspected the appellant-accused to be guilty of offences punishable under Sections 161 and 165 of the Penal Code (IPC) as also under the Prevention of Corruption Act, 1947, applied to the District Magistrate, Kanpur to issue warrant of arrest on 22-10-1947. Warrant was issued on the next day and the accused was arrested on 27-10-1947.

28. On 25-3-1949, the accused was produced before the Magistrate to answer the charge-sheet submitted by the prosecution. According to the accused, on 22-10-1947, when warrant for his arrest was issued by the Magistrate, the Magistrate was said to have taken cognizance of offence and since no sanction of the Government had been obtained before that date, initiation of proceedings against him was unlawful. The question before the Court was as to when cognizance of the offence could be said to have been taken by the Magistrate under Section 190 of the Code. Considering the circumstances under which "cognizance of offence" under sub-section (1) of Section 190 of the Code can be taken by a Magistrate and referring to ***Abani Kumar Banerjee11***, the Court, speaking through ***Kania, C.J.*** stated: (***Chari12 case***, p. 208, para 3)

"3. It is clear from the wording of the section that the initiation of the proceedings against a person commences on the cognizance of the offence by the Magistrate under one of the three contingencies mentioned in the section. The first contingency evidently is in respect of non-cognizable offences as defined in CrPC on the complaint of an aggrieved person. The second is on a police report, which evidently is the case of a cognizable offence when the police have completed their investigation and come to the Magistrate for the issue of a process. The third is when the Magistrate himself takes notice of an offence and issues the process..."

29. Approving the observations of Das Gupta, J. in Abani Kumar Banerjee11, this Court held that it was on 25-3-1949 when the Magistrate issued a notice under Section 190 of the Code

against the accused that he took "cognizance" of the offence. Since before that day, sanction had been granted by the Government, the proceedings could not be said to have been initiated without authority of law.

30. Again in ***Narayandas Bhagwandas Madhavdas v. State of W.B.13,*** this Court observed that when cognizance is taken of an offence depends upon the facts and circumstances of each case and it is impossible to attempt to define what is meant by taking cognizance. Issuance of a search warrant for the purpose of an investigation or a warrant of arrest of the accused cannot by itself be regarded as an act of taking cognizance of an offence. It is only when a Magistrate applies his mind for proceeding under Section 200 and subsequent sections of Chapter XV or under Section 204 of Chapter XVI of the Code that it can be positively stated that he had applied his mind and thereby had taken cognizance of an offence (see also ***Ajit Kumar Palit v. State of W.B.17,and Hareram Satpathy v. Tikaram Agarwala18.***

31. In ***Gopal Das Sindhi v. State of Assam14,*** referring to earlier judgments, this Court said:(AIR p. 989, para 7)

"7...We cannot read the provisions of Section 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 Section 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."

32. In ***Nirmaljit Singh Hoon v. State of W.B.15***, the Court stated that it is well settled that before a Magistrate can be said to have taken cognizance of an offence under Section 190(1)(a) of the Code, he must have not only applied his mind to the contents of the complaint presented before him, but must have done so for the purpose of proceeding under Section 200 and the provisions following that section. Where, however, he applies his mind only for ordering an investigation under Section 156(3) or issues a warrant for arrest of the accused, he cannot be said to have taken cognizance of the offence.

33. In ***Darshan Singh Ram Kishan v. State of Maharashtra9,*** speaking for the Court, Shelat, J. stated that under Section 190 of the Code, a Magistrate may take cognizance of an offence either (a) upon receiving a complaint, or (b) upon a police report, or (c) upon information received from a person other than a police officer or even upon his own information or suspicion that such an offence has been committed. As has often been said, taking cognizance does not involve any formal action or indeed action of any kind. It occurs as soon as a Magistrate applies his mind to the suspected commission of an offence. Cognizance, thus, takes place at a point when a Magistrate first takes judicial notice of an offence.

34. In ***Devarapalli Lakshminarayana Reddy v. V. Narayana Reddy16***, this Court said: (SCC p. 257, paras 13-14)

"13. It is well settled that 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. This is clear from the use of the words "may take cognizance' which in the context in which they occur cannot be equated with "must take cognizance'. The word "may' gives a discretion to the Magistrate 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, himself.

14. This raises the incidental question: What is meant by "taking cognizance of an offence' by a Magistrate within the contemplation of Section 190? This expression has not been defined in the Code. But from the scheme of the Code, the content and marginal heading of Section 190 and the caption of Chapter XIV under which Sections 190 to 199 occur, it is clear that a case can be said to be instituted in a court only when the court takes cognizance of the offence alleged therein. The ways in which such cognizance can be taken are set out in Clauses (a), (b) and (c) of Section 190(1). Whether the Magistrate has or has not taken cognizance of the offence will depend on the circumstances of the particular case including the mode in which the case is sought to be instituted, and the nature of the preliminary action, if any, taken by the Magistrate. Broadly speaking, when on receiving a complaint, the Magistrate applies his mind for the purposes of proceeding under Section 200 and the succeeding sections in Chapter XV of the Code of 1973, he is said to have taken cognizance of the offence within the meaning of Section 190(1)(a). If, instead of proceeding under Chapter XV, he has, in the judicial exercise of his discretion, taken action of some other kind, such as issuing a search warrant for the purpose of investigation, or ordering investigation by the police under Section 156(3), he cannot be said to have taken cognizance of any offence."

(emphasis supplied)

17. The meaning and connotation of the expression 'taking cognizance' again came up for consideration in **Fakhruddin Ahmad Vs. State of Uttaranchal and another2,** and it was held that the expression being of indefinite import it was neither practical nor desirable to precisely define as to what is meant by "taking cognizance' and the question as to whether the Magistrate has taken cognizance of an offence would depend upon the circumstances of the particular case, including the mode in which the case is sought to be instituted and the nature of preliminary action. Taking note of the earlier decisions in **Ajit Kumar Palit v. State of W.B17, Emperor Vs. Sourindra Mohan Chuckerbutty19 Chief Enforcement Officer v. Videocon International Ltd.10, Supdt. & Remembrancer of Legal Affairs v. Abani**

Kumar Banerjee11, and R.R. Chari v. State of U.P.12, it was stated thus :-

"9. Before examining the rival contentions, we may briefly refer to some of the relevant provisions in the Code. Chapter XIV of the Code, containing Sections 190 to 199 deals with the statutory conditions requisite for initiation of criminal proceedings and as to the powers of cognizance of a Magistrate. Sub-section (1) of Section 190 of the Code empowers a Magistrate to take cognizance of an offence in the manner laid therein. It provides that a Magistrate may take cognizance of an offence either (a) upon receiving a complaint of facts which constitute such offence; or (b) upon a police report of such facts; or (c) upon information received from any person other than a police officer, or upon his own knowledge that such offence has been committed.

10. Chapter XV containing Sections 200 to 203 deals with "Complaints to Magistrates" and lays down the procedure which is required to be followed by the Magistrate taking cognizance of an offence on complaint. Similarly, Chapter XVI deals with "Commencement of Proceedings before Magistrates". Since admittedly, in the present case, the Magistrate has taken cognizance of the complaint in terms of Section 190 of the Code, we shall confine our discussion only to the said provision. We may, however, note that on receipt of a complaint, the Magistrate has more than one course open to him to determine the procedure and the manner to be adopted for taking cognizance of the offence.

11. One of the courses open to the Magistrate is that instead of exercising his discretion and taking cognizance of a cognizable offence and following the procedure laid down under Section 200 or Section 202 of the Code, he may order an investigation to be made by the police under Section 156(3) of the Code, which the learned Magistrate did in the instant case. When such an order is made, the police is obliged to investigate the case and submit a report under Section 173(2) of the Code. On receiving the police report, if the Magistrate is satisfied that on the facts discovered or unearthed by the police there is sufficient material for him to take cognizance of the offence, he may take cognizance of the offence under Section 190(1)(b) of the Code and issue process straightaway to the accused. However, Section 190(1)(b) of the Code does not lay down that a Magistrate can take cognizance of an offence only if the investigating officer gives an opinion that the investigation makes out a case against the accused. Undoubtedly, the Magistrate can ignore the conclusion(s) arrived at by the investigating officer.

12. Thus, it is trite that the Magistrate is not bound by the opinion of the investigating officer and he is competent to exercise his discretion in this behalf, irrespective of the view expressed by the police in their report and decide whether an offence has been made out or not. This is because the purpose of the police report under Section 173(2) of the Code, which will contain the facts discovered or unearthed by the police as well as the conclusion drawn by the police therefrom is primarily to enable the Magistrate to satisfy himself whether on the basis of the report and the material referred therein, a case for cognizance is made out or not.

13. The next incidental question is as to what is meant by the expression

"taking cognizance of an offence" by a Magistrate within the contemplation of Section 190 of the Code?

14. The expression "cognizance" is not defined in the Code but is a word of indefinite import. As observed by this Court in ***Ajit Kumar Palit v. State of W.B.17***

"19... The word "cognizance' has no esoteric or mystic significance in criminal law or procedure. It merely means--become aware of and when used with reference to a court or Judge, to take notice of judicially."

Approving the observations of the Calcutta High Court in ***Emperor v. Sourindra Mohan Chuckerbutty19*** (at ILR p. 416), the Court said that

"taking cognizance does not involve any formal action, or indeed action of any kind, but occurs as soon as a Magistrate, as such, applies his mind to the suspected commission of an offence."

15. Recently, this Court in Chief Enforcement Officer v. Videocon International Ltd. (2008) 2 SCC 492 speaking through C.K. Thakker, J., while considering the ambit and scope of the phrase "taking cognizance" under Section 190 of the Code, has highlighted some of the observations of the Calcutta High Court in Supdt. & Remembrancer of Legal Affairs v. Abani Kumar Banerjee, AIR 1950 Cal 437 which were approved by this Court in R.R. Chari v. State of U.P., AIR 1951 SC 207. The observations are : (Abani Kumar Banerjee case, AIR 1950 Cal 437 [AIR p. 438, para 7].

"7. ...What is "taking cognizance' has not been defined in the Criminal Procedure Code, and I have no desire now to attempt to define it. It seems to me clear, however, that before it can be said that any Magistrate has taken cognizance of any offence under Section 190(1)(a) CrPC, he must not only have applied his mind to the contents of the petition, but he must have done so for the purpose of proceeding in a particular way as indicated in the subsequent provisions of this Chapter, proceeding under Section 200, and thereafter sending it for enquiry and report under Section 202. When the Magistrate applies his mind not for the purpose of proceeding under the subsequent sections of this Chapter, but for taking action of some other kind e.g. ordering investigation under Section 156(3), or issuing a search warrant for the purpose of the investigation, he cannot be said to have taken cognizance of the offence."

16. From the aforenoted judicial pronouncements, it is clear that being an expression of indefinite import, it is neither practicable nor desirable to precisely define as to what is meant by "taking cognizance". Whether the Magistrate has or has not taken cognizance of the offence will depend upon the circumstances of the particular case, including the mode in which the case is sought to be instituted and the nature of the preliminary action.

17. Nevertheless, it is well settled that before a Magistrate can be said to have taken cognizance of an offence, it is imperative that he must have taken notice of the accusations and applied his mind to the allegations made in the complaint or in the police report or the information received from a source other than a police report, as the case may be, and the material filed therewith. It needs little emphasis that

it is only when the Magistrate applies his mind and is satisfied that the allegations, if proved, would constitute an offence and decides to initiate proceedings against the alleged offender, that it can be positively stated that he has taken cognizance of the offence. Cognizance is in regard to the offence and not the offender."

18. The meaning of the term "cognizance' was again subject matter of consideration in **Subramanian Swamy Vs. Manmohan Singh and another20**, wherein it was held that the term though not statutorily defined, yet judicial pronouncements give it a definite meaning and connotation and broadly it means taking judicial notice by competent court of a cause or matter presented before it so as to decide whether there is basis for initiating proceedings for judicial determination. It was observed that the scope of consideration by the court at this stage would be as to whether material produced before court prima facie discloses commission of offence and a detailed enquiry and sifting of evidence is not to be undertaken at this stage. Referring to the earlier decisions in ***R.R. Chari v. State of U.P.12, State of W.B. Vs. Mohd. Khalid21, and State of Karnataka and another Vs. Pastor P. Raju22***, it was observed as follows:-

"34. The argument of the learned Attorney General that the question of granting sanction for prosecution of a public servant charged with an offence under the 1988 Act arises only at the stage of taking cognizance and not before that is neither supported by the plain language of the section nor the judicial precedents relied upon by him. Though, the term "cognizance" has not been defined either in the 1988 Act or CrPC, the same has acquired a definite meaning and connotation from various judicial precedents. In legal parlance cognizance is "taking judicial notice by the court of law, possessing jurisdiction, on a cause or matter presented before it so as to decide whether there is any basis for initiating proceedings and determination of the cause or matter judicially".

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38. The Court then referred to some of the precedents including the judgment in ***Mohd. Khalid*** case,(1995) 1 SCC 684 and observed: (***Pastor P. Raju*** case, (2006) 6 SCC 728,[SCC p. 734, para 13].

"13. It is necessary to mention here that taking cognizance of an offence is not the same thing as issuance of process. Cognizance is taken at the initial stage when the Magistrate applies his judicial mind to the facts mentioned in a complaint or to a police report or upon information received from any other person that an offence has been committed. The issuance of process is at a subsequent 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."

19. In **State of WB Vs. Mohd. Khalid21**, observing that the expression 'taking cognizance' has not been defined in the Code, it was held to mean taking notice of an offence, and to include the intention of initiating judicial proceedings against the offender in respect of that offence or taking steps to see whether there is any basis for initiating judicial proceedings or for other purposes. It was also observed that the word 'cognizance' indicates the point when

a Magistrate or a Judge first takes cognizance or judicial notice of an offence and it is entirely a different thing from initiation of proceedings; rather it is a condition precedent to the initiation of proceedings. It was further stated that while taking cognizance of an offence the Court is not required to pass a reasoned order and it can take into consideration not only police report but also on other materials on record.

"43...Then, the question is as to the meaning of taking cognizance. Section 190 of the Code talks of cognizance of offences by Magistrates. This expression has not been defined in the Code. In its broad and literal sense, it means taking notice of an offence. This would include the intention of initiating judicial proceedings against the offender in respect of that offence or taking steps to see whether there is any basis for initiating judicial proceedings or for other purposes. The word "cognizance' indicates the point when a Magistrate or a Judge first takes judicial notice of an offence. It is entirely a different thing from initiation of proceedings; rather it is the condition precedent to the initiation of proceedings by the Magistrate or the Judge. Cognizance is taken of cases and not of persons.

44. Cognizance is defined in ***Wharton's Law Lexicon 14th Edn., at page 20923***. It reads:

"Cognizance (Judicial), knowledge upon which a judge is bound to act without having it proved in evidence: as the public statutes of the realm, the ancient history of the realm, the order and course of proceedings in Parliament, the privileges of the House of Commons, the existence of war with a foreign State, the several seals of the King, the Supreme Court and its jurisdiction, and many other things. A judge is not bound to take cognizance of current events, however notorious, nor of the law of other countries."

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78. Coming to taking cognizance, it has been held by the High Court that it is not a reasoned order. We are of the view that the approach of the High Court in this regard is clearly against the decision of this Court in ***Stree Atyachar Virodhi Parishad24*** case, which is as under:

"It is in the trial, the guilt or the innocence of the accused will be determined and not at the time of framing of charge. **The court, therefore, need not undertake an elaborate enquiry in sifting and weighing the material. Nor is it necessary to delve deep into various aspects. All that the court has to consider is whether the evidentiary material on record if generally accepted, would reasonably connect the accused with the crime. No more need be enquired into."**

(emphasis supplied)

20. A similar observation with regard to there being no necessity to write detailed orders at the stage of issuing process was made in **Kanti Bhadra Shah and another Vs. The State of West Bengal7.**

21. In **U.P. Pollution Control Board Vs. Mohan Meakins Ltd. and others6**, the correctness of the order of the Sessions Court quashing the order of issuing process for the reason that the Magistrate had not passed a speaking order, which had been

affirmed by the High Court, was under consideration and referring to the decision in the case of **Kanti Bhadra** (supra) it was observed that the Sessions Judge could have himself looked into the complaint to form his own opinion where process could have been issued by the Magistrate on the basis of the averments contained in the complaint instead of relegating the work to the trial Magistrate for doing the exercise over again. It was stated thus :-

"6. In a recent decision of the Supreme Court it has been pointed out that the legislature has stressed the need to record reasons in certain situations such as dismissal of a complaint without issuing process. There is no such legal requirement imposed on a Magistrate for passing detailed order while issuing summons vide **Kanti Bhadra Shah v. State of W.B.7.** The following passage will be apposite in this context: (SCC p. 726, para 12)

"12. If there is no legal requirement that the trial court should write an order showing the reasons for framing a charge, why should the already burdened trial courts be further burdened with

such an extra work. The time has reached to adopt all possible measures to expedite the court procedures and to chalk out measures to avert all roadblocks causing avoidable delays. If a Magistrate is to write detailed orders at different stages merely because the counsel would address arguments at all stages, the snail-paced progress of proceedings in trial courts would further be slowed down. We are coming across interlocutory orders of Magistrates and Sessions Judges running into several pages. We can appreciate if such a detailed order has been passed for culminating the proceedings before them. But it is quite unnecessary to write detailed orders at other stages, such as issuing process, remanding the accused to custody, framing of charges, passing over to next stages in the trial."

7. It was unfortunate that the Sessions Judge himself did not look into the complaint at that stage to form his own opinion whether process could have been issued by the Chief Judicial Magistrate on the basis of the averments contained in the complaint. Instead the Sessions Judge relegated the work to the trial Magistrate for doing the exercise over again..."

(emphasis supplied)

22. In **Rajesh Talwar Vs. CBI Delhi and another25,** it was observed that the correctness of the order whereby cognizance of the offence has been taken by the Magistrate, unless it is perverse or based on no material, should be sparingly interfered with.

23. The meaning of the expressions "cognizance' under Section 190 and "summons' in Section 204 were considered in **Bhushan Kumar and another Vs. State (NCT of Delhi) and another26** and it was stated that while issuing summons under Section 204 a reasoned order is not required. It was held that the Magistrate is not bound to give reasons for issuing an order of summons under Section 204 and the order issuing process cannot be quashed only on the ground that the Magistrate had not passed a speaking order. The questions which were specifically considered are as follows :-

"(a) Whether taking cognizance of an offence by the Magistrate is same as summoning an accused to appear?

(b) Whether the Magistrate, while considering the question of summoning an accused, is required to assign reasons for the same?"

(emphasis supplied)

24. Taking notice of the earlier decisions in **Chief Enforcement Officer v. Videocon International Ltd.10, Kanti Bhadra Shah v. State of W.B.7, Nagawwa v. Veeranna Shivalingappa Konjalgi27, Chief Controller of Imports & Exports v. Roshanlal Agarwal28** and **U.P. Pollution Control Board v. Bhupendra Kumar Modi29** it was observed as follows :-

"11. In Chief Enforcement Officer v. Videocon International Ltd.10 (SCC p. 499, para 19) the expression "cognizance" was explained by this Court as "it merely means "become aware of' and when used with reference to a court or a Judge, it connotes "to take notice of judicially'. It indicates the point when a court or a Magistrate takes judicial notice of an offence with a view to initiating proceedings in respect of such offence said to have been committed by someone." It is entirely a different thing from initiation of proceedings; rather it is the condition precedent to the initiation of proceedings by the Magistrate or the Judge. Cognizance is taken of cases and not of persons. Under Section 190 of the Code, it is the application of judicial mind to the averments in the complaint that constitutes cognizance. At this stage, the Magistrate has to be satisfied whether there is sufficient ground for proceeding and not whether there is sufficient ground for conviction. Whether the evidence is adequate for supporting the conviction can be determined only at the trial and not at the stage of enquiry. If there is sufficient ground for proceeding then the Magistrate is empowered for issuance of process under Section 204 of the Code.

12. A "summons" is a process issued by a court calling upon a person to appear before a Magistrate. It is used for the purpose of notifying an individual of his legal obligation to appear before the Magistrate as a response to violation of law. In other words, the summons will announce to the person to whom it is directed that a legal proceeding has been started against that person and the date and time on which the person must appear in court. A person who is summoned is legally bound to appear before the court on the given date and time. Wilful disobedience is liable to be punished under Section 174 IPC. It is a ground for contempt of court.

13. Section 204 of the Code does not mandate the Magistrate to explicitly state the reasons for issuance of summons. It clearly states that if in the opinion of a Magistrate taking cognizance of an offence, there is sufficient ground for proceeding, then the summons may be issued. This section mandates the Magistrate to form an opinion as to whether there exists a sufficient ground for summons to be issued but it is nowhere mentioned in the section that the explicit narration of the same is mandatory, meaning thereby that it is not a prerequisite for deciding the validity of the summons issued.

14. Time and again it has been stated by this Court that the summoning order under Section 204 of the Code requires no explicit reasons to be stated

because it is imperative that the Magistrate must have taken notice of the accusations and applied his mind to the allegations made in the police report and the materials filed therewith.

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16. In ***Nagawwa v. Veeranna Shivalingappa Konjalgi27,*** this Court held that it is not the province of the Magistrate to enter into a detailed discussion on the merits or demerits of the case. It was further held that in deciding whether a process should be issued, the Magistrate can take into consideration improbabilities appearing on the face of the complaint or in the evidence led by the complainant in support of the allegations. The Magistrate has been given an undoubted discretion in the matter and the discretion has to be judicially exercised by him. It was further held that: (SCC p. 741, para 5)

"5. ...Once the Magistrate has exercised his discretion it is not for the High Court, or even this Court, to substitute its own discretion for that of the Magistrate or to examine the case on merits with a view to find out whether or not the allegations in the complaint, if proved, would ultimately end in conviction of the accused."

17. ***In Chief Controller of Imports & Exports v. Roshanlal Agarwal28,*** this Court, in para 9, held as under: (SCC pp. 145-46)

"9. In determining the question whether any process is to be issued or not, what the Magistrate has to be satisfied is whether there is sufficient ground for proceeding and not whether there is sufficient ground for conviction. Whether the evidence is adequate for supporting the conviction, can be determined only at the trial and not at the stage of inquiry. At the stage of issuing the process to the accused, the Magistrate is not required to record reasons...

18. In ***U.P. Pollution Control Board v. Bhupendra Kumar Modi29,*** this Court, in para 23, held as under: (SCC p. 154)

"23. It is a settled legal position that at the stage of issuing process, the Magistrate is mainly concerned with the allegations made in the complaint or the evidence led in support of the same and he is only to be prima facie satisfied whether there are sufficient grounds for proceeding against the accused."

19. This being the settled legal position, the order passed by the Magistrate could not be faulted with only on the ground that the summoning order was not a reasoned order."

(emphasis supplied)

25. The aforementioned position with regard to the order issuing summons/process not required to be a detailed and reasoned order was reiterated in **Nupur Talwar vs. Central Bureau of Investigation and another30** after noticing that the provisions under the Code do not require detailed consideration or passing of reasoned orders at the stage of summons/issuance of process. Referring to the views taken in **Kanti Bhadra Shah v. State of W.B.7, U.P. Pollution Control Board v. Bhupendra Kumar Modi29, Chief Controller of Imports & Exports v. Roshanlal Agarwal28** and **Bhushan Kumar and another Vs. State (NCT of**

Delhi) and another26, it was stated as follows:-

"11. Undoubtedly, merely for taking cognizance and/or for issuing process, reasons may not be recorded. In **Kanti Bhadra Shah v. State of W.B.7,** this Court having examined Sections 227, 239 and 245 of the Code of Criminal Procedure, concluded, that the provisions of the Code mandate, that at the time of passing an order of discharge in favour of an accused, the provisions referred to above necessitate reasons to be recorded. It was, however, noticed, that there was no such prescribed mandate to record reasons, at the time of framing charges against an accused.

12. In **U.P. Pollution Control Board v. Mohan Meakins Ltd.6** the issue whether it was necessary for the trial court to record reasons while issuing process came to be examined again, and this Court held as under: (SCC pp. 748-49 & 752, paras 2-3, 5-6 & 12)

"2. Though the trial court issued process against the accused at the first instance, they desired the trial court to discharge them without even making their first appearance in the court. When the attempt made for that purpose failed they moved for exemption from appearance in the court. In the meanwhile the Sessions Judge,...entertained a revision moved by the accused against the order issuing process to them and, quashed it on the erroneous ground that the Magistrate did not pass "a speaking order' for issuing such summons.

3. The Chief Judicial Magistrate (before whom the complaint was filed) thereafter passed a detailed order on 25-4-1984 and again issued process to the accused. That order was again challenged by the accused in revision before the Sessions Court and the same Sessions Judge...again quashed it by order dated 25-8-1984.

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5. We may point out at the very outset that the Sessions Judge was in error for quashing the process at the first round merely on the ground that the Chief Judicial Magistrate had not passed a speaking order. In fact it was contended before the Sessions Judge, on behalf of the Board, that there is no legal requirement in Section 204 of the Code of Criminal Procedure (for short "the Code') to record reasons for issuing process.

13. Whether an order passed by a Magistrate issuing process required reasons to be recorded, came to be examined by this Court again in **Chief Controller of Imports & Exports v. Roshanlal Agarwal28** wherein this Court concluded as below: (SCC pp. 145-46, para 9)

"9. In determining the question whether any process is to be issued or not, what the Magistrate has to be satisfied is whether there is sufficient ground for proceeding and not whether there is sufficient ground for conviction. Whether the evidence is adequate for supporting the conviction, can be determined only at the trial and not at the stage of inquiry. At the stage of issuing the process to the accused, the Magistrate is not required to record reasons. This question was considered recently in **U.P. Pollution Control Board v. Mohan Meakins Ltd.6** and after noticing the law laid down in Kanti Bhadra

Shah v. State of W.B. (2000) 1 SCC 722 it was held as follows: (**Mohan Meakins Ltd.** case,[(2000) 3 SCC 745, SCC p. 749, para 6)]

"The legislature has stressed the need to record reasons in certain situations such as dismissal of a complaint without issuing process. There is no such legal requirement imposed on a Magistrate for passing detailed order while issuing summons. The process issued to the accused cannot be quashed merely on the ground that the Magistrate had not passed a speaking order."

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15. It is therefore apparent, that an order issuing process, cannot be vitiated merely because of absence of reasons.

(emphasis supplied)

26. The material that may be considered while taking cognizance and issuing process was also discussed in the aforesaid decision of Nupur Talwar and it was held that the purpose of examining such material at the stage of taking cognizance and issuing process would be tentative as distinguished from consideration of actual evidence during trial. It was held that at this stage the test to be applied is as to whether there is sufficient ground for proceeding against the accused and the Magistrate is not required to weigh the evidence meticulously and to scrutinize the same as is to be done at the stage of trial. It was also observed that in the absence of any legal requirement under Section 204, it was not necessary for the Magistrate to give detailed reasons while passing an order issuing process. The observations made in the judgment in this regard are as follows :-

36. The basis and parameters of issuing process, have been provided for in Section 204 of the Code of Criminal Procedure.

37. The criteria which needs to be kept in mind by a Magistrate issuing process, have been repeatedly delineated by this Court..."

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39. The same issue was examined by this Court in Jagdish Ram v. State of Rajasthan (2004) 4 SCC 432 wherein this Court held as under: (SCC p. 436, para 10)

"10. The contention urged is that though the trial court was directed to consider the entire material on record including the final report before deciding whether the process should be issued against the appellant or not, yet the entire material was not considered. From perusal of order passed by the Magistrate it cannot be said that the entire material was not taken into consideration. The order passed by the Magistrate taking cognizance is a well-written order. The order not only refers to the statements recorded by the police during investigation which led to the filing of final report by the police and the statements of witnesses recorded by the Magistrate under Sections 200 and 202 of the Code but also sets out with clarity the principles required to be kept in mind at the stage of taking cognizance and reaching a prima facie view. At this stage, the Magistrate had only to decide whether sufficient ground exists or not for further proceeding in the matter. It is well settled that notwithstanding the opinion of the

police, a Magistrate is empowered to take cognizance if the material on record makes out a case for the said purpose. The investigation is the exclusive domain of the police. The taking of cognizance of the offence is an area exclusively within the domain of a Magistrate. At this stage, the Magistrate has to be satisfied whether there is sufficient ground for proceeding and not whether there is sufficient ground for conviction. Whether the evidence is adequate for supporting the conviction, can be determined only at the trial and not at the stage of inquiry. At the stage of issuing the process to the accused, the Magistrate is not required to record reasons.[Chief Controller of Imports & Exports v. Roshanlal Agarwal,(2003) 4 SCC 139].

All along having made a reference to the words "there is sufficient ground to proceed" it has been held by this Court that for the purpose of issuing process, all that the court concerned has to determine is: whether the material placed before it "is sufficient for proceeding against the accused"? The observations recorded by this Court extracted above, further enunciate that the term "sufficient to proceed" is different and distinct from the term "sufficient to prove and establish guilt".

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65...Sub-section (1) of Section 204 CrPC quoted above itself does not impose a legal requirement on the Magistrate to record reasons in support of the order to issue a process and in **U.P. Pollution Control Board v. Mohan Meakins Ltd.6 and Chief Controller of Imports & Exports v. Roshanlal Agarwal, (2003) 4 SCC 139** this Court has held that the Magistrate is not required to record reasons at the stage of issuing the process against the accused. In the absence of any legal requirement in Section 204 CrPC to issue process, it was not legally necessary for the Magistrate to have given detailed reasons in her order dated 9-2-2011 for issuing process to the petitioner and her husband Dr Rajesh Talwar.

66. The fact however remains that the Magistrate has given detailed reasons in the order dated 9-2-2011 issuing process and the order dated 9-2-2011 itself does not disclose that the Magistrate has considered all the relevant materials collected in the course of investigation. Yet from the mere fact that some of the relevant materials on which the petitioner relies on have not been referred to in the order dated 9-2-2011, the High Court could not have come to the conclusion in the revision filed by the petitioner that these relevant materials were not considered. Moreover, this Court has held in Nagawwa v. Veeranna Shivalingappa Konjalgi (1976) 3 SCC 736 that whether the reasons given by the Magistrate issuing process under Section 202 or 204 CrPC were good or bad, sufficient or insufficient, cannot be examined by the High Court in the revision. All that the High Court, however, could do while exercising its powers of revision under Sections 397/401 CrPC when the order issuing process under Section 204 CrPC was under challenge was to examine whether there were materials before the Magistrate to take a view that there was sufficient ground for proceeding against the persons to whom the processes have been issued under Section 204 CrPC."

(emphasis supplied)

27. The meaning and scope of expression "taking cognizance' again fell for consideration in **Sunil Bharti Vs. Central Bureau of Investigation31** and it was reiterated that though the expression has not been defined in the Code; however, when the Magistrate applies his mind for proceeding against the person concerned, he is said to have taken cognizance of an offence. It was stated that formation of such opinion is to be stated on the basis of a material available on record.

"48. Sine qua non for taking cognizance of the offence is the application of mind by the Magistrate and his satisfaction that the allegations, if proved, would constitute an offence. It is, therefore, imperative that on a complaint or on a police report, the Magistrate is bound to consider the question as to whether the same discloses commission of an offence and is required to form such an opinion in this respect. When he does so and decides to issue process, he shall be said to have taken cognizance. At the stage of taking cognizance, the only consideration before the court remains to consider judiciously whether the material on which the prosecution proposes to prosecute the accused brings out a prima facie case or not.

49. Cognizance of an offence and prosecution of an offender are two different things. Section 190 of the Code empowered taking cognizance of an offence and not to deal with offenders. Therefore, cognizance can be taken even if offender is not known or named when the complaint is filed or FIR registered. Their names may transpire during investigation or afterwards.

51. On the other hand, Section 204 of the Code deals with the issue of process, if in the opinion of the Magistrate taking cognizance of an offence, there is sufficient ground for proceeding. This section relates to commencement of a criminal proceeding. If the Magistrate taking cognizance of a case (it may be the Magistrate receiving the complaint or to whom it has been transferred under Section 192), upon a consideration of the materials before him (i.e. the complaint, examination of the complainant and his witnesses, if present, or report of inquiry, if any), thinks that there is a prima facie case for proceeding in respect of an offence, he shall issue process against the accused.

52. A wide discretion has been given as to grant or refusal of process and it must be judicially exercised. A person ought not to be dragged into court merely because a complaint has been filed. If a prima facie case has been made out, the Magistrate ought to issue process and it cannot be refused merely because he thinks that it is unlikely to result in a conviction."

28. The question as to whether at the stage of issuance of process to the accused in case of taking cognizance of an offence based upon a police report under Section 190 (1) (b) CrPC, it is mandatory for the court to record reasons for its satisfaction that there are sufficient grounds for proceeding against the accused was subject matter of consideration in **State of Gujarat Vs. Afroz Mohammed Hasanfatta5** and it was held that the Magistrate is only required to be satisfied about sufficient grounds to proceed and issue summons on basis of prima facie evidence in the charge-sheet and other documents filed by the police but the Magistrate is not explicitly required to record reasons therefor at the stage of issuing summons.

29. Distinguishing the cognizance taken on the basis of a police report from a case instituted on a private complaint, it was held, in **Afroz Mohammed Hasanfatta,** that the order for issuance of process without explicitly recording reasons for the issue of process does not suffer from any illegality. The observations and discussions made in the decision on the aforesaid point are as follows:-

"13.2...While taking cognizance of an offence under Section 190(1)(b) CrPC, whether the court has to record reasons for its satisfaction of sufficient grounds for issuance of summons

14...The order of taking cognizance of the second supplementary charge-sheet and issuance of summons to the respondent Afroz Hasanfatta reads as under:

"I take in consideration charge-sheet/complaint for the offence of Sections 420, 465, 467, 468 IPC, etc. Summons to be issued against the accused."

15. The first and foremost contention of the respondent-accused is that summoning an accused is a serious matter and the summoning order must reflect that the Magistrate has applied his mind to the facts of the case and the law applicable thereto and in the present case, the order for issuance of process without recording reasons was rightly set aside by the High Court. In support of their contention that the summoning order must record reasons showing application of mind, reliance was placed upon **Pepsi Foods Ltd. v. Special Judicial Magistrate1**, The second limb of submission of the learned Senior Counsel appearing for the respondent-accused is that there has to be an order indicating the application of mind by the Magistrate as to the satisfaction that there are sufficient grounds to proceed against the accused irrespective of the fact that whether it is a charge-sheet by the police or a private complaint.

16. It is well settled that at the stage of issuing process, the Magistrate is mainly concerned with the allegations made in the complaint or the evidence led in support of the same and the Magistrate is only to be satisfied that there are sufficient grounds for proceeding against the accused. It is fairly well settled that when issuing summons, the Magistrate need not explicitly state the reasons for his satisfaction that there are sufficient grounds for proceeding against the accused. Reliance was placed upon Bhushan Kumar v. State (NCT of Delhi)26...

17. After referring to **Bhushan Kumar v. State (NCT of Delhi),**(2012) 5 SCC 424 ***Chief Enforcement Officer v. Videocon International Ltd.10***, and other decisions, in ***Mehmood Ul Rehman v. Khazir Mohammad Tunda32***, it was held as under:

"20. The extensive reference to the case law would clearly show that cognizance of an offence on complaint is taken for the purpose of issuing process to the accused. Since it is a process of taking judicial notice of certain facts which constitute an offence, there has to be application of mind as to whether the allegations in the complaint, when considered along with the statements recorded or the inquiry conducted thereon, would constitute violation of law so as to call a person to appear before the criminal

court. It is not a mechanical process or matter of course. As held by this Court in ***Pepsi Foods Ltd. v. Special Judicial Magistrate***, (1998) 5 SCC 749, to set in motion the process of criminal law against a person is a serious matter."

The above observations made in para 20 is in the context of taking cognizance of a complaint. As per definition under Section 2(d) CrPC, complaint does not include a police report.

18. The learned Senior Counsel appearing for the respondent-accused relied upon various judgments to contend that while taking cognizance, the court has to record the reasons that prima facie case is made out and that there are sufficient grounds for proceeding against the accused for that offence. The learned Senior Counsel appearing on behalf of the respondent-accused relied upon the judgments in ***Pepsi Foods Ltd. v. Special Judicial Magistrate***, (1998) 5 SCC 749 and ***Mehmood Ul Rehman v. Khazir Mohammad Tunda, (2015) 12 SCC 420*** to contend that while taking cognizance, the court has to record reasons that prima facie case is made out and that there are sufficient grounds for proceeding against the accused for that offence. On the facts and circumstances of those cases, this Court held that the order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. However, what needs to be understood is that those cases relate to issuance of process taking cognizance of offences based on the complaint. Be it noted that as per the definition under Section 2(d) CrPC, "complaint" does not include a police report. Those cases do not relate to taking of cognizance upon a police report under Section 190(1)(b) CrPC. Those cases relate to taking cognizance of offences based on the complaint. In fact, it was also observed in ***Mehmood Ul Rehman v. Khazir Mohammad Tunda32,*** (at SCC p. 430, para 21) that "under Section 190(1)(b) CrPC, the Magistrate has the advantage of a police report; but under Section 190(1)(a) CrPC, he has only a complaint before him. Hence, the Code specifies that "a complaint of facts which constitutes an offence".

19...The procedure for taking cognizance upon complaint has been provided under Chapter XV -- Complaints to Magistrates under Sections 200 to 203 CrPC. A complaint filed before the Magistrate may be dismissed under Section 203 CrPC if the Magistrate is of the opinion that there is no sufficient ground for proceeding and in every such case, he shall briefly record his reasons for so doing. If a complaint is not dismissed under Section 203 CrPC, the Magistrate issues process under Section 204 CrPC. Section 204 CrPC is in a separate chapter i.e. Chapter XVI -- Commencement of Proceedings before Magistrates. A combined reading of Sections 203 and 204 CrPC shows that for dismissal of a complaint, reasons should be recorded. The procedure for trial of warrant cases is provided in Chapter XIX -- Trial of Warrant Cases by the Magistrates. Chapter XIX deals with two types of cases -- A-Cases instituted on a police report and B-Cases instituted otherwise than on police report. In the present case, cognizance has been taken on the basis of police report.

20. In a case instituted on a police report, in warrant cases, under Section 239 CrPC, upon considering the police report and the documents filed along with it under Section 173 CrPC, the Magistrate after

affording opportunity of hearing to both the accused and the prosecution, shall discharge the accused, if the Magistrate considers the charge against the accused to be groundless and record his reasons for so doing. Then comes Chapter XIX-C -- Conclusion of trial -- the Magistrate to render final judgment under Section 248 CrPC considering the various provisions and pointing out the three stages of the case. Observing that there is no requirement of recording reasons for issuance of process under Section 204 CrPC, in ***Raj Kumar Agarwal v. State of U.P.33,*** B.K. Rathi, J. the learned Single Judge of the Allahabad High Court held as under: (SCC OnLine All paras 8-9)

"8. ...As such there are three stages of a case. The first is under Section 204 CrPC at the time of issue of process, the second is under Section 239 CrPC before framing of the charge and the third is after recording the entire evidence of the prosecution and the defence. The question is whether the Magistrate is required to scrutinise the evidence at all the three stages and record reasons of his satisfaction. If this view is taken, it will make speedy disposal a dream. In my opinion the consideration of merits and evidence at all the three stages is different. At the stage of issue of process under Section 204 CrPC detailed enquiry regarding the merit and demerit of the cases is not required. The fact that after investigation of the case, the police has submitted the charge-sheet, may be considered as sufficient ground for proceeding at the stage of issue of process under Section 204 CrPC however subject to the condition that at this stage the Magistrate should examine whether the complaint is barred under any law,... At the stage of Section 204 CrPC if the complaint is not found barred under any law, the evidence is not required to be considered nor are the reasons required to be recorded. At the stage of charge under Section 239 or 240 CrPC the evidence may be considered very briefly, though at that stage also, the Magistrate is not required to meticulously examine and to evaluate the evidence and to record detailed reasons.

9. A bare reading of Sections 203 and 204 CrPC shows that Section 203 CrPC requires that reasons should be recorded for the dismissal of the complaint. Contrary to it, there is no such requirement under Section 204 CrPC. Therefore, the order for issue of process in this case without recording reasons, does not suffer from any illegality."

(emphasis supplied)

We fully endorse the above view taken by the learned Judge.

21. In para 21 of ***Mehmood Ul Rehman v. Khazir Mohammad Tunda32,*** this Court has made a fine distinction between taking cognizance based upon charge-sheet filed by the police under Section 190(1)(b) CrPC and a private complaint under Section 190(1)(a) CrPC and held as under: (SCC p. 430)

"21. Under Section 190(1)(b) CrPC, the Magistrate has the advantage of a police report and under Section 190(1)(c) CrPC, he has the information or knowledge of commission of an offence. But under Section 190(1)(a) CrPC, he has only a complaint before him. The Code hence specifies that "a complaint of facts which constitute such offence". Therefore, if the

complaint, on the face of it, does not disclose the commission of any offence, the Magistrate shall not take cognizance under Section 190(1)(a) CrPC. The complaint is simply to be rejected."

22. In summoning the accused, it is not necessary for the Magistrate to examine the merits and demerits of the case and whether the materials collected is adequate for supporting the conviction. The court is not required to evaluate the evidence and its merits. The standard to be adopted for summoning the accused under Section 204 CrPC is not the same at the time of framing the charge. For issuance of summons under Section 204 CrPC, the expression used is "there is sufficient ground for proceeding..."; whereas for framing the charges, the expression used in Sections 240 and 246 IPC is "there is ground for presuming that the accused has committed an offence...". At the stage of taking cognizance of the offence based upon a police report and for issuance of summons under Section 204 CrPC, detailed enquiry regarding the merits and demerits of the case is not required. The fact that after investigation of the case, the police has filed charge-sheet along with the materials thereon may be considered as sufficient ground for proceeding for issuance of summons under Section 204 CrPC.

23. Insofar as taking cognizance based on the police report is concerned, the Magistrate has the advantage of the charge-sheet, statement of witnesses and other evidence collected by the police during the investigation. Investigating officer/SHO collects the necessary evidence during the investigation conducted in compliance with the provisions of the Criminal Procedure Code and in accordance with the rules of investigation. Evidence and materials so collected are sifted at the level of the investigating officer and thereafter, charge-sheet was filed. In appropriate cases, opinion of the Public Prosecutor is also obtained before filing the charge-sheet. The court thus has the advantage of the police report along with the materials placed before it by the police. Under Section 190(1)(b) CrPC, where the Magistrate has taken cognizance of an offence upon a police report and the Magistrate is satisfied that there is sufficient ground for proceeding, the Magistrate directs issuance of process. In case of taking cognizance of an offence based upon the police report, the Magistrate is not required to record reasons for issuing the process. In cases instituted on a police report, the Magistrate is only required to pass an order issuing summons to the accused. Such an order of issuing summons to the accused is based upon subject to satisfaction of the Magistrate considering the police report and other documents and satisfying himself that there is sufficient ground for proceeding against the accused. In a case based upon the police report, at the stage of issuing the summons to the accused, the Magistrate is not required to record any reason..."

(emphasis supplied)

30. The matter may be examined from another perspective, as to whether the order taking cognizance, if held to be irregular, can be said to have occasioned failure of justice or to have vitiated the proceedings. Chapter XXXV of the Code is in respect of irregular proceedings. The provisions contained under Section 460, 461 and 465, under Chapter XXXV, which are relevant for ensuing discussion, are being extracted below.

"460. Irregularities which do not vitiate proceedings.-If any Magistrate not empowered by law to do any of the following things, namely:-

(a) to issue a search-warrant under section 94;

(b) to order, under section 155, the police to investigate an offence;

(c) to hold an inquest under section 176;

(d) to issue process under section 187, for the apprehension of a person within his local jurisdiction who has committed an offence outside the limits of such jurisdiction;

(e) to take cognizance of an offence under clause (a) or clause (b) of sub-section (1) of section 190;

(f) to make over a case under sub-section (2) of section 192;

(g) to tender a pardon under section 306;

(h) to recall a case and try it himself under section 410; or

(i) to sell property under section 458 or section 459, erroneously in good faith does that thing, his proceedings shall not be set aside merely on the ground of his not being so empowered.

461.Irregularities which vitiate proceedings.- If any Magistrate, not being empowered by law in this behalf, does any of the following things, namely:-

(a) attaches and sells property under section 83;

(b) issues a search-warrant for a document, parcel or other thing in the custody of a postal or telegraph authority;

(c) demands security to keep the peace;

(d) demands security for good behavior;

(e) discharges a person lawfully bound to be of good behavior;

(f) cancels a bond to keep the peace;

(g) makes an order for maintenance;

(h) makes an order under section 133 as to a local nuisance;

(i) prohibits, under section 143, the repetition or continuance of a public nuisance;

(j) makes an order under Part C or Part D of Chapter X;

(k) takes cognizance of an offence under clause (c) of sub-section (1) of section 190;

(l) tries an offender;

(m) tries an offender summarily;

(n) passes a sentence, under section 325, on proceedings recorded by another Magistrate;

(o) decides an appeal;

(p) calls, under section 397, for proceedings; or

(q) revises an order passed under section 446, his proceedings shall be void.

465.Finding or sentence when reversible by reason of error, omission or 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."

31. Section 460 pertains to irregularities which do not vitiate proceedings, whereas Section 461 is in respect of irregularities which vitiate proceedings. Clause (e) of Section 460 refers to taking cognizance of an offence under clause (a) or clause (b) of sub-section (1) of Section 190. Clause (a) of sub-section (1) of Section 190 refers to receipt of a complaint of facts which constitute an offence and clause (b) refers to a police report of the facts. Therefore, in a case where a Magistrate, who is not empowered by law, takes cognizance of an offence either under clause (a) or clause (b) of sub-section (1) of Section 190, even erroneously, the proceedings will not be held to be vitiated. It is only in a case, where a Magistrate, who is not empowered, takes cognizance of an offence under Section 190 (1) (c), upon information received from a person other than a police officer, or upon his own knowledge, the act of taking cognizance can be held to vitiate proceedings in view of clause (k) of Section 461 of the Code.

32. The question as to whether an order issuing summons could be held to be vitiated on the ground that it did not contain reasons was also examined in the decision of **Nupur Talwar vs. Central Bureau of Investigation and another32** and taking into consideration the provisions under Section 461 of the Code, which expressly delineates irregularities in procedure which would vitiate proceedings, it was held that since orders passed under Section 204 do not find mention under Section 461, the said orders could not be faulted on the ground that they did not contain reasons.

33. Section 465 of the Code embodies the principle that the finding, sentence or order passed by the court of competent jurisdiction would not be reversible on account of any error, omission or irregularity unless the same has occasioned a "failure of justice". In determining as to whether there has been any failure of justice, sub-section (2) of Section 465 provides that regard would be had to the fact whether the objection regarding the irregularity could and should have been raised at an earlier stage in the proceedings.

Section 465 relates to proceedings before trial or any inquiry, and since cognizance is pre-trial or inquiry stage, any irregularity of a cognizance order would be covered under the provision.

34. The object of provisions contained under Chapter XXXV of the Code has been subject matter of consideration in a recent decision of the Supreme Court in **Pradeep S. Wodeyar Vs. The State of Karnataka34**, wherein it has been held that the purpose of these provisions is to prevent irregularities, that do not go to the root of the case, from delaying the proceedings. Taking notice of a growing tendency on part of the accused using delaying tactics by seeking to challenge every interlocutory order with a view to prolong the proceedings and prevent the commencement or conclusion of the trial, and referring to the earlier decisions in **A.R.Antulay vs Ramdas Sriniwas Nayak And Another35** and **Santhosh De Vs. Archana Guha36,** it has been observed as follows :-

"44. The overarching purpose of Chapter XXXV CrPC, as is evident from a reading of Sections 460 to 466, is to prevent irregularities that do not go to the root of the case from delaying the proceedings. Sections 462-464 lay down specific irregularities which would not vitiate the proceedings. Section 465 on the other hand is a broad residuary provision that covers all irregularities that are not covered by the above provisions. This is evident from the initial words of Section 465, namely, "Subject to the provisions hereinabove contained". Therefore, irregular proceedings that are not covered under Sections 461-464 could be covered under Section 465. It is also evident that the theme of "failure of justice', uniformly guides all the provisions in the Chapter. There is no indication in Section 465 and in Sections 462-464 that the provisions only apply to orders of conviction or acquittal. All the provisions use the words "finding, sentence or order". Though one of the major causes of judicial delay is the delay caused from the commencement of the trial to its conclusion, there is no denying that delay is also predominantly caused in the pre-trial stage. Every interlocutory order is challenged and is on appeal till the Supreme Court, on grounds of minor irregularities that do not go to the root of the case. The object of Chapter XXXV of the CrPC is not only to prevent the delay in the conclusion of proceedings after the trial has commenced or concluded, but also to curb the delay at the pre-trial stage. It has been recognized by a multitude of judgments of this Court that the accused often uses delaying tactics to prolong the proceedings and prevent the commencement or conclusion of the trial. The object of Chapter XXXV is to further the constitutionally recognized principle of speedy trial. This was highlighted by Justice Jeevan Reddy while writing for a two judge Bench in **Santhosh De v. Archana Guha** where the learned judge observed:

"15. The facts of this case impel us to say how easy it has become today to delay the trial of criminal cases. An accused so minded can stall the proceedings for decades together, if he has the means to do so. Any and every single interlocutory order is challenged in the superior Courts and the superior Courts, we are pained to say, are falling prey to their stratagems. We expect the superior Courts to resist all such attempts. Unless a grave

illegality is committed, the superior Courts should not interfere. They should allow the Court which is seized of the matter to go on with it. There is always an appellate Court to correct the errors. One should keep in mind the principle behind Section 465 Cr. P.C. That any and every irregularity or infraction of a procedural provision cannot constitute a ground for interference by a superior Court unless such irregularity or infraction has caused irreparable prejudice to the party and requires to be corrected at that stage itself, because such frequent interference by superior Court at the interlocutory stages tends to defeat the ends of Justice instead of serving those ends. It should not be that a man with enough means is able to keep the law at bay. That would mean the failure of the very system."

45. Section 465 would also be applicable to challenges to interlocutory orders such as a cognizance order or summons order on the ground of irregularity of procedure. This interpretation is supported by sub-section (2) to Section 465 which states that while determining if the irregularity has occasioned a failure of justice, the Court shall have regard to whether the objection could or should have been raised at an earlier stage in the proceeding. Therefore, the very fact that the statute provides that the Court is to consider if the objection could have been raised earlier, without any specific mention of the stage of the trial, indicates that the provision covers challenges raised at any stage. The Court according to sub-Section (2) is to determine if the objection was raised at the earliest."

35. Having regard to the foregoing discussion, it would be seen that cognizance of offence is the first and foremost step towards trial. The Code has not defined or specifically explained the expression "taking cognizance of an offence". However, it has been consistently held in various judicial pronouncements that cognizance takes place at a point when a Magistrate first takes judicial notice of an offence, whether on a complaint, or on a police report, or upon information of a person other than a police officer. Cognizance does not involve any formal action or indeed action of any kind but occurs as soon as a Magistrate applies his mind to the suspected commission of an offence.

36. "Cognizance" has been held to merely mean "become aware of" and when used with reference to a court or a Judge, it connotes "to take notice of judicially". It indicates the point when a court or a Magistrate takes judicial notice of an offence with a view to initiating proceedings in respect of such offence said to have been committed by someone. "Taking cognizance" does not involve any formal action and it occurs as soon as a Magistrate applies his mind to the suspected commission of an offence.

37. The expression "taking cognizance" has been held to be of an indefinite import, and a consistent view has been taken that it was neither practical nor desirable to precisely define as to what is meant by "taking cognizance". The question as to whether the Magistrate has taken cognizance of an offence would depend upon the circumstances of the particular case, including the mode in which the action is sought to be instituted and the nature of preliminary action.

38. It is well settled that before a Magistrate can be said to have been taken cognizance of an offence, it is imperative

that he must have taken notice of the accusations and applied his mind to the allegations made in the complaint or in the police report or the information received from a source other than a police report, as the case may be, and the material filed therewith. It is only when the Magistrate applies his mind and is satisfied that the allegations, if proved, would constitute an offence and decides to initiate proceedings against the alleged offender, that it can be stated that he has taken cognizance of the offence.

39. The term "cognizance" though not statutorily defined, yet judicial pronouncements give it a definite meaning and connotation and broadly it can be held to mean "taking judicial notice" by a competent court of a cause or matter presented before it so as to decide whether there is basis for initiating proceedings for judicial determination.

40. Since cognizance is taken prior to commencement of criminal proceedings, taking of cognizance would thus be a sine qua non or condition precedent for holding a valid trial. Cognizance is taken of an offence and not of an offender. The question as to whether a Magistrate has taken cognizance of an offence would therefore depend on the facts and circumstances of each case and no rule of universal application can be laid down as to when a Magistrate can be said to have taken cognizance.

41. The scope of consideration by the court at this stage would be as to whether material produced before court *prima facie* discloses commission of offence and a detailed enquiry and sifting of evidence is not to be undertaken at this stage. The issuance of process is at a subsequent 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.

42. The guilt or innocence of the accused is to be determined in the trial, and therefore, at the stage of cognizance, the court, need not undertake an elaborate enquiry in sifting and weighing the material, nor is it necessary to delve deep into the various aspects; all that the court has to consider is whether the material on record *prima facie* discloses commission of an offence and nothing further need be enquired into at this stage.

43. The court can take into consideration not only the police report but also on other materials on record, and it would not be required to pass a reasoned order. It has been consistently held that there is no legal requirement that the Magistrate should pass a speaking order indicating reasons, at the stage of taking cognizance. A detailed order may be required to be passed by the Magistrate for culminating the proceedings but the same would be quite unnecessary at the various interlocutory stages, such as issuing process, remanding the accused to custody, framing of charges and passing over to next stages in the trial.

44. At a stage where it is to be decided as to whether process should be issued, the Magistrate would not be required to enter into a detailed discussion on merits or demerits of the case and it would suffice if the evidence led by the complainant in support of the allegations is taken into consideration. In determining the question whether any process is to be issued or not, what the Magistrate has to be

satisfied is whether there is sufficient ground for proceeding and not whether there is sufficient ground for conviction. Whether the evidence can be held adequate for supporting the conviction can be determined only at the trial and not at the stage of issuing process, where the Magistrate is to be mainly concerned with the allegations made in the complaint or the evidence led in support of the same and he is only to be *prima faci*e satisfied whether there are sufficient grounds for proceeding against the accused; at this stage, the Magistrate would therefore not be required to record reasons.

45. There being no legal requirement under sub-section (1) of Section 204 of the Code to record reasons at the stage of issuance of process, the question whether the reasons assigned by the Magistrate while issuing process, are good or bad, sufficient or insufficient, would not be required to be examined in a challenge raised against the order; all that may be seen whether there was material before the Magistrate to take a view that there was sufficient ground for proceeding against the persons to whom processes had been issued under Section 204.

46. A distinction may be drawn between taking cognizance based upon charge-sheet filed by the police under Section 190 (1) (b) of the Code and taking cognizance based on a complaint under Section 190 (1) (a). Under Section 190 (1) (b), a police report and the documents filed along with it are placed before the Magistrate whereas under Section 190 (1) (a), he has only a complaint before him. Therefore, insofar as taking cognizance based on a police report is concerned, the Magistrate would have the advantage of the charge-sheet, statement of witnesses and other evidence collected by the police during the investigation.

47. In such cases, the investigating officer collects the necessary evidence during the investigation and the evidence and materials so collected are sifted at the level of the investigating officer and thereafter charge-sheet is filed. The court has thus the advantage of the police report along with the materials placed before it by the police. Under Section 190 (1) (b), where the Magistrate takes cognizance of an offence upon a police report and is satisfied that there is sufficient ground for proceeding, the Magistrate directs issuance of process. Such an order being based upon consideration of the police report and other documents, the Magistrate would not be required to meticulously examine and to evaluate the evidence and to record detailed reasons. The fact that after investigation of the case, the police has filed a charge-sheet along with the material thereon, may be considered as sufficient ground for proceeding for issuance of summons under Section 204 of the Code.

48. It may therefore be concluded that in the absence of any legal requirement for the Magistrate to have given detailed reasons in an order taking cognizance and issuing process the same cannot be held to be vitiated only on the ground that the order is not a reasoned order.

49. Keeping in mind the principle enunciated under Section 465 of the Code, challenges to interlocutory orders such as a cognizance order or a summons order by raising a plea of irregularity or infraction of a procedural provision may not constitute a ground for interference by a superior court unless such irregularity or infraction has caused irreparable prejudice and has

thereby occasioned a failure of justice -- the Court would have to keep in mind that challenges to interlocutory orders that do not go to the root of the case are a major cause for delay in the trial of criminal cases.

50. Coming to the decisions relied on behalf of the applicant to contend that cognizance order passed by the Magistrate does not reflect application of mind, in the case of **Pepsi Foods Ltd. v. Special Judicial Magistrate1** the proceedings were initiated by the institution of a complaint under the Prevention of Food Adulteration Act, 1964 and upon issuance of the summoning orders an application under Section 482 of the Code was filed seeking quashing of the summoning order and also the proceedings. In the light of the aforesaid background, it was observed that a Magistrate taking cognizance of an offence on a complaint is required to examine upon oath the complainant and the witnesses and also that the order of the Magistrate summoning the accused upon a complaint must reflect application of mind.

51. The proceedings in the case of **Fakhruddin Ahmad Vs. State of Utaranchal2** were also initiated with the lodging of a complaint upon which a direction was made by the Magistrate for investigation and upon a police report submitted pursuant thereto cognizance was taken. It was held that since the cognizance order was not placed before the Court, it could not be seen whether the Magistrate had applied his mind while taking cognizance and in view thereof the matter was remanded back to the High Court for deciding the Section 482 application afresh. It may be noticed that there is no observation in the decision in the case of **Fakhruddin Ahmad** that cognizance order based on a police report is required to contain detailed reasons.

52. As regards the decision in the case of **Ankit Vs. State of U.P. and another3** it is seen that in the aforesaid decision, the Court has duly taken note of the pronouncements in the case of **Deputy Chief Controller Import and Export vs. Roshan Lal Agrawal28, U.P. Pollution Control Board vs. Mohan Meakins and others6, and Kanti Bhadra Shah and another Vs. The State of West Bengal7**, on the legal proposition that the Magistrate is not required to pass a detailed and reasoned order at the time of taking cognizance on a charge-sheet; however, in the facts of the case, the Court took the view that since the summoning order had been issued by filling up the blanks on a printed proforma the same could not be sustained.

53. The other decision relied upon by the applicant is the case of **Vineet Agarwal and others Vs. State of U.P. and another4** wherein the summoning order had been assailed by contending that the same had been passed on a printed proforma and following the decision in the case of **Ankit** (supra), the summoning order was set aside.

54. In the present case, it is not the contention on behalf of the applicant that the order of cognizance has been issued on a printed proforma and therefore the decision in the case of **Ankit** and **Vineet Agarwal** (supra) would be distinguishable on facts.

55. The other contention sought to be raised on behalf of the application to assail

the cognizance order and the proceedings, on the ground that the weapon used in the commission of offence could not be described to be a "dangerous weapon" so as to constitute an offence under Section 324 IPC, would be a question of fact to be examined on the basis of evidence and the same cannot be seen at this stage of proceedings.

56. The facts of the present case indicate that pursuant to the registration of the FIR dated 09.11.2020, the matter was investigated and a police report under Section 173 of the Code was submitted. The Magistrate having the advantage of police report and material submitted along with the same has taken cognizance in exercise of powers under Section 190 (1) (b) and the order taking cognizance clearly states that the Magistrate had perused the charge-sheet, the case diary and the materials which had been submitted along with the same and on the basis thereof had held that there was sufficient material to take cognizance and to register the case. The order of cognizance having thereafter been passed by the Magistrate after having advantage of perusing the police report and the materials therewith, the same therefore cannot be assailed only on the ground that it does not give detailed reasons.

57. Having regard to the aforestated, this Court is not inclined to exercise its inherent jurisdiction under Section 482 CrPC in the facts of the case.

58. The application thus fails and is dismissed accordingly.

(2022)01ILR A400
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.12.2021
BEFORE

THE HON'BLE SANJAY KUMAR PACHORI, J.

Application U/S 482 Cr.P.C. No.15360 of 2021

Prateek Shukla ...Applicant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicant:
Sri Sanjeev Kumar Shukla, Sri Hemant Kumar Sharma, Sri Prem Prakash Yadav(Senior Adv.), Sri Saghir Ahmad

Counsel for the Opposite Parties:
A.G.A., Sri Nirbhay Singh, Sri M.D. Shah

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power -Indian Penal Code, 1860 - Sections 302,307 & 504 , Criminal Law (Amendment) Act ,1932 - Section 7 - when an application for *default bail* is filed, the merits of the matter are not to be gone into - It is the duty and responsibility of a court on coming to know that the accused person before it is entitled to "*default bail*" to at least apprise him or her of the *indefeasible right* - while computing the period under Section 167(2), the day on which accused was remanded to judicial custody has to be excluded and the day on which challan/charge-sheet is filed in the court has to be included.(Para -17,18)

(B) Criminal Law - The Code of criminal procedure, 1973 - Section 167(2) - indefeasible right cannot be exercised after the charge-sheet has been submitted and cognizance has been taken because in that event the remand of the accused concerned including one who is alleged to have committed an offence is not under Section 167(2) of the Code but under other provisions of the Code. (Para - 21)

Applicant moved an application for default bail under Section 167 (2) read with Section 209 of Cr.P.C. - ground - charge sheet not filled within 90 days - application rejected by magistrate - instant application filed to set aside

order passed by magistrate - release the applicant under section 167(2) of the code .(Para -1 to 5)

HELD:-Magistrate was justified in its conclusion arrived through the order impugned that the charge-sheet has been filed within time and rightly rejected the application. Therefore, there is no infringement of Section 167(2) of the Code.(Para - 24)

Application u/s 482 Cr.P.C. dismissed. (E-7)

List of Cases cited:-

1. Rakesh Kumar Paul Vs St. of Assam, (2017) 15 SCC 67 (Three-Judge)

2. Bikramjit Singh Vs St. of Punj., (2020) 10 SCC 616 (Three-Judge)

3. M. Ravindran Vs Intelligence Officer, Directorate of Revenue Intelligence, (2021) SCC 485 (Three-Judge)

4. Sanjay Dutt Vs St. Through CBI (STF) Bombay, (1994) 5 SCC 410

5. Yadav Singh Vs St. of U.P. & 2 Ors. in Application U/S 482 No. - 31498 of 2018 was decided on 11.09.2018 by the Division Bench of this Court

6. Rajendra Singh Yadav @ Raju Jahreela Vs St. of U.P. in Criminal Misc. Bail Application No.- 24132 of 2021 was decided on 16.07.2021 by the Coordinate Bench of this Court

7. Sanjay Dutt Vs St. Through CBI, Bombay, (1994) 5 SCC 410.

8. Uday Mohanlal Acharya Vs St. of Mah., (2001) 5 SCC 453

9. Bikramjit Singh Vs St. of Punj., (2020) 10 SCC 616

10. Rakesh Kumar Paul Vs St. of Assam, (2017) 15 SCC 67

11. Chaganti Satyanarayana Vs St. of A. P., (1986) 3 SCC 141

12. CBI Vs Anupam J. Kulkarni, (1992) 3 SCC 141

13. St. of Mohd. Vs Ashraft Bhat, (1996) 1 SCC 432

14. St. of Mah. Vs Bharati Chandmal Verma, (2002) 2 SCC 121

15. St. of M.P. Vs Rustam,1995 Supp (3) SCC 221

16. Pragyna Singh Thakur Vs St. of Mah., (2011) 10 SCC 445

17. U.O.I. Vs Thamisharasi, (1995) 4 SCC 190

18. M. Ravindran Vs Directorate of Revenue Intelligence, (2021) 2 SCC 485

19. U.O.I. through CBI Vs Nirala Yadav, (2014) 9 SCC 457

20. Rakesh Kumar Paul Vs St. of Assam, (2017) 15 SCC 67

21. Ravi Prakash Singh Vs St. of Bihar, (2015) 8 SCC 340

22. M. Ravindran Vs The Intelligence Officer, Directorate of Revenue Intelligence, (2021) 2 SCC 485

23. S. Kasi Vs St., (2021) 12 SCC 1

24. M. Ravindran Vs The Intelligence Officer, Directorate of Revenue Intelligence, (2021) 2 SCC 485

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

1. The instant application under Section 482 of the Code of Criminal Procedure (in short "Cr.P.C.") has been filed for quashing the impugned order

dated 13.7.2021 passed by Chief Judicial Magistrate, Allahabad, whereby the said court rejected the application under Section 167(2) of Cr.P.C. and enlarge on bail to the applicant under Sections 302, 307, 504 of The Indian Penal Code (hereinafter referred to "IPC") and Section 7 Criminal Law Amendment Act, under Section 167(2) of Cr.P.C.

2. T he applicant has filed an application for release on default bail on 7.7.2021 under proviso to Section 167(2) of Cr.P.C. before the Chief Judicial Magistrate, Allahabad, alleging that non-filing of charge-sheet within 90 days, the applicant/accused to be released on bail under Sections 302, 307, 504 under proviso to Section 167(2) of Cr.P.C.

BRIEF FACTS OF THE CASE:

3. The Prosecution case, in brief is that the First Information Report dated 15.02.2021, has been registered against the applicant under Section 302, 307, 504 of IPC and Section 7 of the Criminal Law (Amendment) Act, 1932 stating therein that on 15.02.2021, at about 12:00 noon, applicant came by his motorcycle bearing registration no. U.P. - 70 FC 3683 (Bajaj Pulsar Blue and Black) to the betel shop of the first informant, which had been opened by the son of the first informant Shobhit @ Bholu at 10:00 A.M. and he was working at his shop, which is situated at Bajrang crossing Allahpur, Police Station - George Town, District Prayagraj. All of sudden, the applicant abuses his son, when his son Shobhit @ Bholu, Satyam, and Raju Kesarwani, who were present there obstructed the applicant, then the applicant shot fired by his revolver to his son and the fired shot hit on his stomach and the second fire made by the applicant hit Satyam and he has also injured, after that, the applicant fled away from the incident place after firing in the air. Raju Kesarwani informed the first informant, the first informant took Shobhit and Satyam to the Swarup Rani Nehru Hospital, Prayagraj and on the way, Shobhit @ Bholu has died and the treatment of Satyam is going on.

4. The applicant Prateek Shukla was produced before the Chief Judicial Magistrate, Allahabad on 16.2.2021 in connection with Crime No. 60 of 2021 registered at P.S. George Town, Prayagraj, relating to the offences punishable under Sections 302, 307, 504 I.P.C., and Section 7 of the Criminal Law (Amendment) Act. He was remanded to judicial custody till 17.5.2021. His remand was extended under Section 167 of the Code from time to time, and the last remand under the said provision was granted till 17.5.2021. On 17.5.2021, Police Report under Section 173(2) of the Code had been submitted by the Investigating Officer before the concerned Magistrate and cognizance has been taken by the concerned Magistrate. On 7.7.2021, the applicant moved an application under Section 167 (2) read with Section 209 of Cr.P.C. for setting aside the order dated 17.5.2021 before the Chief Judicial Magistrate, Allahabad, and seeking bail on the ground that he was entitled to be released on bail under Section 167(2) of the Code.

5. On 13.7.2021, the aforesaid application has been rejected by the Chief Judicial Magistrate and the case was committed to the Court of Sessions Judge, which is pending in the court of Additional Sessions Judge Court No. 16 Allahabad. Hence, the instant application has been filed to set aside the order dated 13.7.2021 passed by the Chief Judicial Magistrate and

release the applicant under Section 167(2) of the Code.

6. Heard, Sri Prem Prakash Yadav, learned Senior Counsel assisted by Sri Hemant Kumar Srivastava for the applicant, learned counsel for the opp. party no. 2 Sri Nirbhay Singh and Sri Manoj Kumar Dwivedi learned A.G.A. for the State and perused the material on record.

SUBMISSIONS OF THE PARTIES:

7. Learned counsel for the applicant submits that the charge-sheet has been submitted on 17.05.2021 by the Investigating Officer after the expiry of 90 days and the investigation could not be completed in time. It has been further submitted that the period of 90 days for filing of charge-sheet was completed on 16.5.2021 on the next day i.e. 17.5.2021 the charge-sheet was filed before the concerned Magistrate. The cognizance order dated 17.5.2021 has been passed by the concerned Magistrate without considering the provision of Section 167(2) of Cr.P.C.. The concerned Magistrate illegally condoned one day delay under Section 471 of Cr.P.C. The judicial custody/remand of the applicant after 16.5.2021 is illegal.

8. Learned counsel for the applicant further submitted that the cognizance order dated 17.5.2021 has been passed without considering the provision of Section 167(2) of Cr.P.C. which is beyond his jurisdiction and also in violation of Article 21 of the Constitution of India and rejected the application of the applicant dated 7.7.2021 vide order dated 13.7.2021 and wrongly calculated the time and condoned of one day delay under Section 471 of Cr.P.C. illegally. The judicial custody/remand of the applicant after 17.5.2021 is illegal. According to the learned counsel for the applicant, the expression "shall be released on bail" in the proviso to sub-section (2) of Section 167 of the Code not only confers an indefeasible right on the accused but also casts duty/obligation on the Magistrate, since the Magistrate will not be entitled to remand the accused any further. In support of his submission he has placed reliance upon the following judgments of the Apex Court as well as This Court:

1. Rakesh Kumar Paul v. State of Assam, (2017) 15 SCC 67 (Three-Judge).

2. Bikramjit Singh v. State of Punjab, (2020) 10 SCC 616 (Three-Judge).

3. M. Ravindran v. Intelligence Officer, Directorate of Revenue Intelligence, (2021) SCC 485 (Three-Judge).

4. Sanjay Dutt v. State Through CBI (STF) Bombay, (1994) 5 SCC 410.

5. Yadav Singh v. State of U.P. And 2 Others in Application U/S 482 No. - 31498 of 2018 was decided on 11.09.2018 by the Division Bench of this Court.

6. Rajendra Singh Yadav @ Raju Jahreela v. State of U.P. in Criminal Misc. Bail Application No.- 24132 of 2021 was decided on 16.07.2021 by the Coordinate Bench of this Court.

9. Learned A.G.A. has vehemently opposed the prayer of the applicant and submitted that on 16.05.2021 was Sunday, the court was closed due to Covid -19

pandemic therefore the charge sheet has been submitted by the investigating officer before the concerned Magistrate on 17.5.2021, the charge-sheet has been submitted within 90 days, the concerned Magistrate has rightly refused the bail application under Section 167(2) of Cr.P.C. In support of his submission learned A.G.A. has placed reliance upon the Apex Court judgment in the case of *Sanjay Dutt v. State Through CBI, Bombay, (1994) 5 SCC 410.*

10. Admittedly, in the present case the applicant is taken into judicial custody on 16.2.2021 by the Chief Judicial Magistrate. On 17.5.2021, Police Report under Section 173(2) of the Code has been submitted by the investigating officer before the concerned Magistrate, and cognizance has been taken. On 7.7.2021, the applicant moved an application under Section 167(2) of Cr.P.C. for set-aside the order dated 17.5.2021 before the Chief Judicial Magistrate, Allahabad and seeking bail under Section 167(2) of the Code.

11. Thus the foremost questions to be decided in the present case are:

(a) Whether the charge sheet dated 17.5.2021 has been filed by the investigating officer against the applicant after the prescribed period of ninety days?

(b) Whether the applicant filed an application for grant of default bail on expiry of the period of ninety days before a charge-sheet is filed?

12. The Code of Criminal Procedure deals with the investigation of offence by the police under Chapter XII. Section 167(2) Cr.P.C. under Chapter XII. It will be useful to refer the section 167(2) of Cr.P.C., which provides:

"Section 167. Procedure when investigation cannot be completed in twenty-four hours.- (1) Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by section 57, and there are grounds for believing that the accusation or information is well founded, the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of sub-inspector, shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate.

(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction:

Provided that,-

(a) the Magistrate may authorise the detention of the accused person, otherwise than in custody of the police, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding,-

(i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;

(ii) sixty days, where the investigation relates to any other offence, and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this sub-section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter;

(b) no Magistrate shall authorise detention of the accused in custody of the police under this section unless the accused is produced before him in person for the first time and subsequently every time till the accused remains in the custody of the police, but the Magistrate may extend further detention in judicial custody on production of the accused either in person or through the medium of electronic video linkage;

(c) no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorise detention in the custody of the police.

Explanation I.- For the avoidance of doubts, it is hereby declared that, notwithstanding the expiry of the period specified in paragraph (a), the accused shall be detained in custody so long as he does not furnish bail.

Explanation II.- If any question arises whether an accused person was produced before the Magistrate as required under clause (b), the production of the accused person may be proved by his signature on the order authorising detention or by the order certified by the Magistrate as to production of the accused person through the medium of electronic video linkage, as the case may be.

Provided further that in case of a woman under eighteen years of age, the detention shall be authorised to be in the custody of a remand home or recognised social institution."

(Sub- Sections 2A, 3, 4, 5 and 6, Sub-clauses (b) and (c) of the proviso are not relevant now and hence they are not mentioned)

13. The proviso (a) (i) to sub-section (2) of Section 167 of the Code provides that the Magistrate shall not authorise the detention of an accused in custody in which the investigation relates to the offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years and if the investigation is not completed within ninety days, the accused shall be entitled to be released on bail. Proviso (a) further provides that the accused person shall be released on bail if he is prepared to and does furnish bail. There cannot be any dispute that on expiry of the period indicated in the proviso (a) to sub-section (2) of Section 167 of the Code the accused has to be released on bail if he is prepared to and does furnish the bail.

14. The Constitution Bench of the Supreme Court explained the meaning of the expression "indefeasible right" of the accused and considered the scope of Section 167(2) of the Code in **Sanjay Dutt v. State through CBI, Bombay, (1994) 5**

SCC 410, has observed as under: [SCC p. 442 - 444 para 48, 53, 53(2)(b)]

"48. We have no doubt that the common stance before us of the nature of indefeasible right of the accused to be released on bail by virtue of Section 20(4)(bb) is based on a correct reading of the principle indicated in that decision. The indefeasible right accruing to the accused in such a situation is enforceable only prior to the filing of the challan and it does not survive or remain enforceable on the challan being filed, if already not availed of. Once the challan has been filed, the question of grant of bail has to be considered and decided only with reference to the merits of the case under the provisions relating to grant of bail to an accused after the filing of the challan. The custody of the accused after the challan has been filed is not governed by Section 167 but different provisions of the Code of Criminal Procedure. If that right had accrued to the accused but it remained unenforced till the filing of the challan, then there is no question of its enforcement thereafter since it is extinguished the moment challan is filed because Section 167 CrPC ceases to apply. The Division Bench also indicated that if there be such an application of the accused for release on bail and also a prayer for extension of time to complete the investigation according to the proviso in Section 20(4)(bb), both of them should be considered together. It is obvious that no bail can be given even in such a case unless the prayer for extension of the period is rejected. In short, the grant of bail in such a situation is also subject to refusal of the prayer for extension of time, if such a prayer is made. If the accused applies for bail under this provision on expiry of the period of 180 days or the extended period, as the case may be, then he has to be released on bail forthwith. The accused, so released on bail may be arrested and committed to custody according to the provisions of the Code of Criminal Procedure. It is settled by Constitution Bench decisions that a petition seeking the writ of habeas corpus on the ground of absence of a valid order of remand or detention of the accused, has to be dismissed, if on the date of return of the rule, the custody or detention is on the basis of a valid order. (See Naranjan Singh Nathawan v. State of Punjab1, Ram Narayan Singh v. State of Delhi2 and A.K. Gopalan v. Government of India3)

53. As a result of the above discussion, our answers to the three questions of law referred for our decision are as under:

53.2(b).The "indefeasible right" of the accused to be released on bail in accordance with Section 20(4)(bb) of The TADA Act read with Section 167(2) of the Code of Criminal Procedure in default of completion of the investigation and filing of the challan within the time allowed, as held in Hitendra Vishnu Thakur4 is a right which enures to, and is enforceable by the accused only from the time of default till the filing of the challan and it does not survive or remain enforceable on the challan being filed. If the accused applies for bail under this provision on expiry of the period of 180 days or the extended period, as the case may be, then he has to be released on bail forthwith. The accused, so released on bail may be arrested and committed to custody according to the provisions of the Code of Criminal Procedure. The right of the accused to be released on bail after filing of the challan, notwithstanding the default in filing it within the time allowed, is governed from

the time of filing of the challan only by the provisions relating to the grant of bail applicable at that stage."

(Emphasis added)

15. Majority opinion of a three Judge Bench of the Supreme Court in the case of **Uday Mohanlal Acharya v. State of Maharashtra, (2001) 5 SCC 453** by observing thus: (SCC p. 469 para 13)

"13.....A conspectus of the aforesaid decisions of this Court unequivocally indicates that an indefeasible right accrues to the accused on the failure of the prosecution to file the challan within the period specified under sub-section (2) of Section 167 and right can be availed of by the accused if he is prepared to offer the bail and abide by the terms and conditions of the bail, necessarily, therefore, an order of the court has to be passed. It is also further clear that the indefeasible right does not survive or remain enforceable on the challan being filed, if already not availed of, as has been held by the Constitution Bench in Sanjay Dutt case5. The crucial question that arises for consideration, therefore, is what is the true meaning of the expression "if already not availed of"? Does it mean that an accused files an application for bail and offers his willingness for being released on bail or does it mean that a bail order must be passed, the accused must furnish the bail and get him released on bail? In our considered opinion it would be more in consonance with the legislative mandate to hold that an accused must be held to have availed of his indefeasible right, the moment he files an application for being released on bail and offers to abide by the terms and conditions of bail. To interpret the expression "availed of" to mean actually being released on bail after furnishing the necessary bail required would cause great injustice to the accused and would defeat the very purpose of the proviso to Section 167(2) of the Criminal Procedure Code and further would make an illegal custody to be legal, inasmuch as after the expiry of the stipulated period the Magistrate had no further jurisdiction to remand and such custody of the accused is without any valid order of remand. That apart, when an accused files an application for bail indicating his right to be released as no challan had been filed within the specified period, there is no discretion left in the Magistrate and the only thing he is required to find out is whether the specified period under the statute has elapsed or not, and whether a challan has been filed or not. If the expression "availed of" is interpreted to mean that the accused must factually be released on bail, then in a given case where the Magistrate illegally refuses to pass an order notwithstanding the maximum period stipulated in Section 167 had expired, and yet no challan had been filed then the accused could only move to the higher forum and while the matter remains pending in the higher forum for consideration, if the prosecution files a charge-sheet then also the so-called right accruing to the accused because of inaction on the part of the investigating agency would get frustrated. Since the legislature has given its mandate it would be the bounden duty of the court to enforce the same and it would not be in the interest of justice to negate the same by interpreting the expression "if not availed of" in a manner which is capable of being abused by the prosecution. A two-Judge Bench decision of this Court in State of M. P. v. Rustom6 setting aside the order of grant of

bail by the High Court on a conclusion that on the date of the order the prosecution had already submitted a police report and, therefore, the right stood extinguished, in our considered opinion, does not express the correct position in law of the expression "if already not availed of" used by the Constitution Bench in Sanjay Dutt7. We would be failing in our duty if we do not notice the decisions mentioned by the Constitution Bench in Sanjay Dutt case which decisions according to the learned counsel, appearing for the State, clinch the issue.....

.....Personal liberty is one of the cherished objects of the Indian Constitution and deprivation of the same can only be in accordance with law and in conformity with the provisions thereof, as stipulated under Article 21 of the Constitution. When the law provides that the Magistrate could authorise the detention of the accused in custody up to a maximum period as indicated in the proviso to sub-section (2) of Section 167, any further detention beyond the period without filing of a challan by the investigating agency would be a subterfuge and would not be in accordance with law and in conformity with the provisions of the Criminal Procedure Code, and as such, could be violative of Article 21 of the Constitution. There is no provision in the Criminal Procedure Code authoring detention of an accused in custody after the expiry of the period indicated in proviso to sub-section (2) of Section 167 excepting the contingency indicated in Explanation I, namely, if the accused does not furnish the bail. It is in this sense it can be stated that if after expiry of the period, an application for being released on bail is filed, and the accused offers to furnish the bail and thereby avail of his indefeasible right and then an order of bail is passed on certain terms and conditions but the accused fails to furnish the bail, and at that point of time a challan is filed, then possibly it can be said that the right of the accused stood extinguished. But so long as the accused files an application and indicates in the application to offer bail on being released by appropriate orders of the court then the right of the accused on being released on bail cannot be frustrated on the off chance of the Magistrate not being available and the matter not being moved, or that the Magistrate erroneously refuses to pass an order and the matter is moved to the higher forum and a challan is filed in interregnum. This is the only way how a balance can be struck between the so called indefeasible right of the accused on failure on the part of the prosecution to file a challan within the specified period and the interest of the society, at large, in lawfully preventing an accused from being released on bail on account of inaction on the part of the prosecuting agency. On the aforesaid premises, we would record our conclusions as follows:

1. Under sub-section (2) of Section 167, a Magistrate before whom an accused is produced while the police is investigating into the offence can authorise detention of the accused in such custody as the Magistrate thinks fit for a term not exceeding 15 days on the whole.

2. Under the proviso to the aforesaid sub-section (2) of Section 167, the Magistrate may authorise detention of the accused otherwise than in the custody of police for a total period not exceeding 90 days where the investigation relates to offence punishable with death, imprisonment for life or imprisonment for a term of not less than 10 years, and 60 days

where the investigation relates to any other offence.

3. On the expiry of the said period of 90 days or 60 days, as the case may be, an indefeasible right accrues in favour of the accused for being released on bail on account of default by the investigating agency in the completion of the investigation within the period prescribed and the accused is entitled to be released on bail, if he is prepared to and furnishes the bail as directed by the Magistrate.

4. When an application for bail is filed by an accused for enforcement of his indefeasible right alleged to have been accrued in his favour on account of default on the part of the investigating agency in completion of the investigation within the specified period, the Magistrate/court must dispose of it forthwith, on being satisfied that in fact the accused has been in custody for the period of 90 days or 60 days, as specified and no charge-sheet has been filed by the investigating agency. Such prompt action on the part of the Magistrate/court will not enable the prosecution to frustrate the object of the Act and the legislative mandate of an accused being released on bail on account of the default on the part of the investigating agency in completing the investigation within the period stipulated.

5. If the accused is unable to furnish the bail as directed by the Magistrate, then on a conjoint reading of Explanation I and the proviso to sub-section (2) of Section 167, the continued custody of the accused even beyond the specified period in para (a) will not be unauthorised, and therefore, if during that period the investigation is complete and the charge-sheet is filed then the so-called indefeasible right of the accused would stand extinguished.

6. The expression "if not already availed of" used by this Court in Sanjay Dutt case must be understood to mean when the accused files an application and is prepared to offer bail on being directed. In other words, on expiry of the period specified in para (a) of the proviso to sub-section (2) of Section 167 if the accused files an application for bail and offers also to furnish the bail on being directed, then it has to be held that the accused has availed of his indefeasible right even though the court has not considered the said application and has not indicated the terms and conditions of bail, and the accused has not furnished the same."

(Emphasis added)

16. In the decision rendered by three-Judge Bench of the Supreme Court in the case of **Bikramjit Singh v. State of Punjab, (2020) 10 SCC 616**, after extensively referring to **Rakesh Kumar Paul v. State of Assam8**, majority opinion of a three Judge Bench it is held as under: (SCC p. 648-51, para 33, 36, 37)

"33. In a fairly recent judgment reported as Rakesh Kumar Paul v. State of Assam9, a three-Judge Bench of this Court referred to the earlier decisions of this Court and went one step further. It was held by the majority judgment of Madan B. Lokur, J. and Deepak Gupta, J. that even an oral application for grant of default bail would suffice, and so long as such application is made before the charge-sheet is filed by the police, default bail must be

granted. This was stated in Lokur, J.'s judgment as follows: (SCC pp. 98-99 and 101-102, paras 37-41,45-47 & 49)

"37. This Court had occasion to review the entire case law on the subject in Union of India v. Nirala Yadav10. In that decision, reference was made to Uday Mohanlal Acharaya v. State of Maharashtra11 and the conclusion arrived at in that decision. We are concerned with Conclusion (3) which reads as follows: (Nirala Yadav case, SCC p. 472, para 24)

'24..."13. (3) On the expiry of the said period of 90 days or 60 days, as the case may be, an indefeasible right accrues in favour of the accused for being released on bail on account of default by the investigating agency in the completion of the investigation within the period prescribed and the accused is entitled to be released on bail, if he is prepared to and furnishes the bail as directed by Magistrate." (Uday Mohanlal case12, SCC, p. 473, para 13)

38. This Court also dealt with the decision rendered in Sanjay Dutt13 and noted that the principle laid down by Constitution Bench is to the effect that if the charge-sheet is not filed and the right for "default bail" has ripened into the status of indefeasibility, it cannot be frustrated by the prosecution on any pretext. The accused can avail his liberty by filing an application stating that the statutory period for filing the charge-sheet or challan has expired and the same has not yet been filed and therefore the indefeasible right has accrued in his or her favour and further the accused is prepared to furnish the bail bond.

39. This Court also noted that apart from the possibility of the prosecution frustrating the indefeasible right, there are occasions when even the court frustrates the indefeasible right. Reference was made to Mohd. Iqbal Madar Sheikh v. State of Maharashtra14 wherein it was observed that some courts keep the application for "default bail" pending for some days so that in the meantime a charge-sheet is submitted. While such a practice both on the part of the prosecution as well as some courts must be very strongly and vehemently discouraged, we reiterate that no subterfuge should be resorted to, to defeat the indefeasible right of the accused for "default bail" during the interregnum when the statutory period for filing the charge-sheet of challan expires and the submission of the charge-sheet or challan in court.

Procedure for obtaining default bail

40. In the present case, it was also argued by the learned counsel for the State that the petitioner did not apply for "default bail" on or after 4.1.2017 till 24.1.2017 on which date his indefeasible right got extinguished on the filing of the charge-sheet. Strictly speaking, this is correct since the petitioner applied for regular bail on 11.1.2017 in the Gauhati High Court -he made no specific application for grant of "default bail". However, the application for regular bail filed by the accused on 11.1.2017 did advert to the statutory period for filing a charge-sheet having expired and that perhaps no charge-sheet had in fact being filed. In any event, this issue was argued by the learned counsel for the petitioner in the High Court and it was considered but not accepted by the High Court. The High

Court15 did not reject the submission on the ground of maintainability but on merits. Therefore it is not as if the petitioner did not make any application for default bail - such an application was definitely made (if not in writing) then at least orally before the High Court. In our opinion, in matters of personal liberty; we can not and should not be too technical and must lean in favour of personal liberty. Consequently, whether the accused makes a written application for "default bail" or an oral application for "default bail" is on no consequence. The court concerned must deal with such an application by considering the statutory requirements, namely, whether the statutory period for filing a charge-sheet or challan has expired, whether the charge-sheet or challan has been filed and whether the accused is prepared to and does furnish bail.

41. We take this view, keeping in mind that in matters of personal liberty and Article 21 of the Constitution, it is not always advisable to be formalistic or technical. The history of the personal liberty jurisprudence of this Court and other constitutional courts includes petitions for a writ of habeas corpus and for other writs being entertained even on the basis of a letter addressed to the Chief Justice or the Court.

Application of the law to the petitioner

45. On 11.1.2017 Rakesh Kumar Paul v. State of Assam16, when the High Court dismissed the application for bail filed by the petitioner, he had an indefeasible right to the grant of "default bail" since the statutory period of 60 days for filing a charge-sheet had expired, no charge-sheet or challan had been filed against him (it was filed only on 24.1.2017) and the petitioner had orally applied for "default bail". Under these circumstances, the only course open to the High Court on 11.1.2017 was to enquire from the petitioner whether he was prepared to furnish bail and if so then to grant him "default bail" on reasonable conditions. Unfortunately, this was completely overlooked by the High Court.

46. It was submitted that as of today, a charge-sheet having been filed against the petitioner, he is not entitled to "default bail" but must apply for regular bail - the "default bail" chapter being now closed. We cannot agree for the simple reason that we are concerned with the interregnum between 4.1.2017 and 24.1.2017 when no charge-sheet had been filed, during which period he had availed of his indefeasible right of "default bail". It would have been another matter altogether if the petitioner had not applied for "default bail" for whatever reason during this interregnum. There could be a situation (however rare) where an accused is not prepared to be bailed out perhaps for his personal security since he or she might be facing some threat outside the correction home or for any other reason. But then in such an event, the accused voluntarily gives up the indefeasible right for default bail and having forfeited that right the accused cannot, after the charge-sheet or challan has been filed, claim a resuscitation of the indefeasible right. But that it is not the case insofar as the petitioner is concerned, since he did not give up his indefeasible right for "default bail" during the interregnum between 4.1.2017 and 24.1.2017 as is evident from the decision of the High Court

rendered on 11.1.2017. On the contrary, he had availed of his right to "default bail" which could not have been defeated on 11.1.2017 and which we are today compelled to acknowledge and enforce.

47. Consequently, we are of the opinion that the petitioner had satisfied all the requirement of obtaining "default bail" which is that on 11.1.2017 he had put in more than 60 days in custody pending investigations into an alleged offence not punishable with imprisonment for a minimum period of 10 years, no charge-sheet had been filed against him and he was prepared to furnish bail for his release, as such, he ought to have been released by the High Court on reasonable terms and conditions of bail.

Conclusion

49. The petitioner is held entitled to the grant of "default bail" on the facts and in the circumstances of this case. The trial Judge should release the petitioner on "default bail" on such terms and conditions as may be reasonable. However, we make it clear that this does not prohibit or otherwise prevent the arrest or re-arrest of the petitioner on cogent grounds in respect of the subject charge and upon arrest or re-arrest, the petitioner is entitled to petition for grant of regular bail which application should be considered on its own merit. We also make it clear that this will not impact on the arrest of the petitioner in any other case."

36. A conspectus of the aforesaid decisions would show that so long as an application for grant of default bail is made on expiry of the period of 90 days (which application need not even be in writing) before a charge-sheet is filed, the right to default bail becomes complete. It is of no moment that the criminal court in question either does not dispose of such application before the charge-sheet is filed or disposes of such application wrongly before such charge-sheet is filed. So long as an application has been made for default bail on expiry of the stated period before time is further extended to the maximum period of 180 days, default bail, being an indefeasible right of the accused under the first proviso to Section 167(2), kicks in and must be granted.

37. On the facts of the present case, the High Court was wholly incorrect in stating that once the challan was presented by the prosecution on 25.3.2019 as an application was filed by the appellant on 26.3.2019, the appellant is not entitled to default bail. ... We must not forget that we are dealing with the personal liberty of an accused under a statute which imposes drastic punishments. The right of default bail, as has been correctly held by the judgments of this Court, are not mere statutory rights under the first proviso to Section 167(2) of the Code, but is part of the procedure established by law under Article 21 of the Constitution of India, which is, therefore, a fundamental right granted to an accused person to be released on bail once the conditions of the first proviso to Section 167(2) are fulfilled."

17. The relevant date of counting 90 days or 60 days for filing the charge-sheet is the date of the first order of remand and not the date of arrest. The period of ninety days or sixty days has to be computed from the date of detention as per the orders of the Magistrate and not from the date of arrest by the police. (Vide: **Chaganti Satyanarayana v. State of A. P.17, CBI v.**

Anupam J. Kulkarni18, State of Mohd. Ashraft Bhat19, State of Maharashtra v. Bharati Chandmal Verma20, State of M.P. v. Rustam21 and Pragyna Singh Thakur v. State of Maharashtra22). It is well settled that when an application for default bail is filed, the merits of the matter are not to be gone into. (Vide: **Union of India v. Thamisharasi23 and M. Ravindran v. Directorate of Revenue Intelligence24)**. It is the duty and responsibility of a court on coming to know that the accused person before it is entitled to "default bail" to at least apprise him or her of the indefeasible right. (Vide: **Union of India through CBI v. Nirala Yadav25 and Rakesh Kumar Paul v. State of Assam26).**

18. The Supreme Court in a catena of judgments has ruled that while computing the period under Section 167(2), the day on which accused was remanded to judicial custody has to be excluded and the day on which challan/charge-sheet is filed in the court has to be included. (Vide: **Chaganti Satyanarayana** (supra), **State of M.P. v. Rustam (supra), Ravi Prakash Singh v. State of Bihar27 and M. Ravindran v. The Intelligence Officer, Directorate of Revenue Intelligence28).** The indefeasible right to default bail under Section 167(2) is an integral part of the right to personal liberty under Article 21, and the said right to bail cannot be suspended even during a pandemic situation as is prevailing currently. (Vide: **S. Kasi v. State29).**

19. In reference to the aforesaid subject, it can be said that the law has been settled by three-Judge Bench of the Supreme Court on 26.10.2020 in the recent decision of case of **M. Ravindran** (supra) while considering two points; (a) Whether the indefeasible right accruing to the appellant under Section 167(2) Cr.P.C. gets extinguished by subsequent filing of an additional complaint by the investigating agency; (b) Whether the Court should take into consideration the time of filing of the application for bail, based on default of the investigating agency or the time of disposal of the application for bail while answering (a).

20. In **M. Ravindran v. The Intelligence Officer, Directorate of Revenue Intelligence, (2021) 2 SCC 485**, the Supreme Court after referring various judgments in case of *Uday Mohanlal Acharya v. State of Maharashtra30, Rakesh Kumar Paul v. State of Assam31, S. Kashi v. State through the Inspector32, Sanjay Dutt v. State33, Hitendra Vishnu Thakur v. State of Maharashtra34, Mohd. Iqbal Madar Sheikh v. State of Maharashtra35, Bipin Shantilal Panchal v. State of Gujarat36, State v. Mohd. Ashraft Bhat37, Attef Nasir Mulla v. State of Maharashtra38, Mustaq Ahmed Mohammed Isak v. State of Maharashtra39, Sayed Mohd. Ahmed Kazmi v. State (NCT of Delhi)40, Union of India v. Nirala Yadav41, Pragyna Singh Thakur v. State of Maharashtra42, Bikramjit Singh v. State of Punjab43, has observed as under*: (SCC p. 517-18, para 24, 24.1, 24.2, 25, 25.1, 25.2, 25.3, 25.4)

"24. In the present case, admittedly the appellant-accused had exercised his option to obtain bail by filing the application at 10.30 a.m. on the 181st day of his arrest i.e. immediately after the court opened, on 1.2.2019. It is not in dispute that the Public Prosecutor had not filed any application seeking extension of time to investigate into the crime prior to

31.1.2019 or prior to 10.30 a.m. on 1.2.2019. The Public Prosecutor participated in the arguments on the bail application till 4.25 p.m. on the day it was filed. It was only thereafter that the additional complaint came to be lodged against the appellant. Therefore, applying the aforementioned principles, the appellant-accused was deemed to have availed of his indefeasible right to bail, the moment he filed an application for being released on bail and offered to abide by the terms and conditions of the bail order i.e. at 10.30 a.m. on 1.2.2019. He was entitled to be released on bail notwithstanding the subsequent filing of an additional complaint.

24.1. It is clear that in the case on hand, the State/the investigating agency has, in order to defeat the indefeasible right of the accused to be released on bail, filed an additional complaint before the court concerned subsequent to the conclusion of the arguments of the appellant on the bail application. If such a practice is allowed, the right under Section 167(2) would be rendered nugatory as the investigating officers could drag their heels till the time the accused exercises his right and conveniently file an additional complaint including the name of the accused as soon as the application for bail is taken up for disposal. Such complaint may be on flimsy grounds or motivated merely to keep the accused detained in custody, though we refrain from commenting on the merits of the additional complaint in the present case. Irrespective of the seriousness of the offence and the reliability of the evidence available, filing additional complaints merely to circumvent the application for default bail is, in our view, an improper strategy. Hence, in our considered opinion, the High Court was not justified in setting aside the judgment and order of the trial court releasing the accused on default bail.

24.2. We also find that the High Court has wrongly entered into merits of the matter while coming to the conclusion. The reasons assigned and the conclusions arrived at by the High Court are unacceptable.

25. Therefore, in conclusion:

25.1. Once the accused files an application for bail under the proviso to Section 167(2) he is deemed to have "availed of" or enforced his right to be released on default bail, accruing after expiry of the stipulated time-limit for investigation. Thus, if the accused applies for bail under Section 167(2) CrPC read with Section 36-A(4), NDPS Act upon expiry of 180 days or the extended period, as the case may be, the court must release him on bail forthwith without any unnecessary delay after getting necessary information from the Public Prosecutor, as mentioned supra. Such prompt action will restrict the prosecution from frustrating the legislative mandate to release the accused on bail in case of default by the investigating agency.

25.2. The right to be released on default bail continues to remain enforceable if the accused has applied for such bail, notwithstanding pendency of the bail application; or subsequent filing of the charge-sheet or a report seeking extension of time by the prosecution before the court; or filing of the charge-sheet during the interregnum when challenge to the rejection of the bail application is pending before a higher court.

25.3. However, where the accused fails to apply for default bail when the right accrues to him, and subsequently a charge-sheet, additional complaint or a report seeking extension of time is preferred before the Magistrate, the right to default bail would be extinguished. The Magistrate would be at liberty to take cognizance of the case or grant further time for completion of the investigation, as the case may be, though the accused may still be released on bail under other provisions of the CrPC.

25.4. Notwithstanding the order of default bail passed by the court, by virtue of Explanation I to Section 167(2), the actual release of the accused from custody is contingent on the directions passed by the competent court granting bail. If the accused fails to furnish bail and/or comply with the terms and conditions of the bail order within the time stipulated by the court, his continued detention in custody is valid."

21. On expiry of the period indicated in the proviso to sub-section (2) of Section 167 of Cr.P.C. the accused has to be released on bail if he is prepared to and does furnish the bail but such furnishing of bail has to be in accordance with the order passed by the Magistrate. It is now settled that indefeasible right cannot be exercised after the charge-sheet has been submitted and cognizance has been taken because in that event the remand of the accused concerned including one who is alleged to have committed an offence is not under Section 167(2) of the Code but under other provisions of the Code.

DISCUSSION:

22. Coming to the facts of the instant case, I find that it has not been disputed by the applicant that the applicant was remanded to judicial custody on 16.2.2021 and the charge-sheet has been filed before the Chief Judicial Magistrate on 17.5.2021. In the present case the mandatory period of 90 days is prescribed for filing of charge-sheet under proviso (a) to Section 167(2) of the Code. After excluding the date of the first remand i.e. 16.2.2021 and including the date of filing of the charge-sheet 17.5.2021, 90 days time limit was completed on 17.5.2021. This is made clear by the calculation of days as per Gregorian calender as under:

February 2021 (from 17.2.2021 to 28.2.2021)	12 days
March 2021	31 days
April 2021	30 days
May 2021 (17.5.2021)	17 days
Total	90 days

23. Keeping in mind the position of law, as above, and applying the same to the fact and circumstances of the present case, it appears that prescribed period under para (a) of the proviso to sub-section (2) of Section 167 of the Code the period of ninety days for completing the investigation was to expire on 17.5.2021 and the investigating officer has filed the charge-sheet (challan/police report) on 17.5.2021 before the conclusion of 90 days stipulated time before the Chief Judicial Magistrate. Cognizance has also been taken on 17.5.2021 by the concerned Magistrate. Thereafter on 7.7.2021, the accused filed an application for being released on bail and offered to furnish the default bail. As such

now it is not open to the applicant to claim bail under proviso (a) to Section 167(2) of the Code and he is custody on the basis of orders of remand passed under other provisions of the Code and at this stage proviso (a) to Section 167(2) shall not be applicable. Formulated questions are decided in negative.

24. The Magistrate, however, without excluding the day of the first remand reached the conclusion that the charge-sheet has been submitted within 90 days of the first remand as provided under proviso (a) of Section 167(2) of the Code. Therefore, if all these aspects are kept in view, I am of the considered view that in the present facts, the Chief Judicial Magistrate, Allahabad was justified in its conclusion arrived through the order dated 13.7.2021 impugned herein that the charge-sheet has been filed within time and rightly rejected the application. Therefore, there is no infringement of Section 167(2) of the Code.

25. The result of the above discussion, I do not find any merits in the instant application under Section 482 of the Code and the same is liable to be dismissed. Therefore, the application is **dismissed**.

(2022)01ILR A416
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.12.2021

BEFORE

THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Application U/S 482 Cr.P.C. No. 17371 of 2020

Mahendra Kumar Chaudhary & Ors. ...Applicants

Versus

State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Amit Kumar Singh, Sri S.N. Mishra, Sri S.P. Pandey, Sri Balram Mishra

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

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power - Sections 154,155(2),156,173(2),190,200, 202 & 205 Section 2(d) - Complaint - Section 2(d) Explanation - A report made by a police officer in a case which discloses, after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be the complainant - Indian Penal Code, 1860 - Section 323,504 –

Proceedings initiated with registration of an NCR - relating to non-cognizable offence - investigation carried out by police - pursuant to an order of the Magistrate under Section 155(2) of the Code - police report under Section 173(2) disclosing non-cognizable offence - cognizance taken by the Magistrate - Application for quashing entire proceeding.

HELD:-In view of the set of facts, the same would not be covered within the purview of the explanation to Section 2(d) to bring it within the ambit of the term "complaint". Magistrate has rightly taken cognizance.(Para - 47)

Application u/s 482 Cr.P.C. dismissed. (E-7)

List of Cases cited:-

1. Ghanshyam Dubey @ Litile & ors. Vs St. of U.P. & anr., 2013 (4) ADJ 474

2. Dr. Rakesh Kumar Sharma Vs St. of U.P. & anr., 2007 (9) ADJ 478

3. Alok Kumar Shukla Vs St. of U.P. & anr., Application u/s 482 Cr.P.C No. 42698 of 2013, decided on 26.11.2013

4. Keshab Lal Thakur Vs St. of Bihar, (1995) 11 SCC 55

5. Emperor Vs Ghulam Hussain, AIR 1925 Lahore 237

6. Jagdeo Panday & anr. Vs N.C. Hill, Assist. Superintendent of Police, Myitkyina,AIR 1938 Rangoon 257

7. Emperor Vs Babulal Munnilal, AIR 1936 Nagpur 86

8. Bholanath Das & ors. Vs Emperor, 28 CWN 490

9. Hatimali & anr. Vs The Crown, AIR (37) 1950 Nagpur 38

10. St. of Rajasthan Vs Mahmood Ghasi Musalman & anr., AIR 1962 RAJASTHAN 1

11. Mithilesh Kumari & anr Vs Prem Behari Khare, (1989) 2 SCC 95

12. S.Sundaram Pillai Vs V.R.Pattabiraman & ors., (1995) 1 SCC 591

13. Burmah Shell Oil Storage & Distributing Co. of India Ltd. Vs CTO, AIR 1961 SC 315

14. Bihta Cooperative Development Cane Marketing Union Ltd. Vs Bank of Bihar, AIR 1967 SC 389

15. Hiralal Rattanlal Vs St. of U.P., (1973) 1 SCC 216

16. Dattatraya Govind Mahajan Vs St. of Mah., (1977) 2 SCC 548

17. H.N. Rishbud & ors. Vs St. of Delhi, AIR 1955 SC 196

(Delivered by Hon'ble Dr. Yogendra Kumar Srivastava, J.)

1. The present case brings to the fore the legal conundrum relating to issues seemingly circumambient the interpretation of the provisions under Section 2(d) of the Code of Criminal Procedure, 19731 and the explanation appended to the section.

2. Heard Sri S.N. Mishra alongwith Sri Amit Kumar Singh, learned counsel for the applicants and Sri Vinod Kant, learned Additional Advocate General along with Sri Pankaj Saxena, learned Additional Government Advocate-I appearing for the State-opposite party.

3. The present application under Section 482 of the Code has been filed seeking to quash the entire proceedings of Criminal Case No. 3412 of 2020 (State Vs. Mahendra Kumar Chaudhary and others), arising out of N.C.R. No. 75 of 2019, under Sections 323, 504 of the Indian Penal Code, 18602, Police Station Bakhira, District Sant Kabir Nagar including charge sheet dated 30.09.2019 as well as cognizance order dated 29.07.2020 passed by learned Judicial Magistrate, Sant Kabir Nagar.

4. As per facts of the case, pleaded in the application, proceedings of the Criminal Case No.3412 of 2020 (State Vs. Mahendra Kumar Chaudhary and Others) were initiated with the registration of NCR No. 75 of 2019, under Sections 323 and 504 IPC at Police Station Bakhira, District Sant Kabir Nagar.

5. Learned Additional Advocate General has taken instructions which indicate that an order under Section 155(2) of the Code was passed by the Magistrate directing investigation and pursuant thereto a "police report" under Section 173(2) of the Code dated 29.07.2019 was placed before the Magistrate upon which cognizance was taken on the same date.

6. The principal submission, which is sought to be raised to seek quashing of the proceedings, is that the complaint having been made in respect of non-cognizable offence and the police report also having been submitted with regard to non-cognizable offence, in view of the explanation to Section 2(d) of the Code, the police report shall be deemed to be a complaint and the case would be required to be proceeded with as a complaint case. In support of his submissions learned counsel places reliance upon the judgments in the cases of **Ghanshyam Dubey @ Litile And Others vs. State of U.P. and Another3, Dr. Rakesh Kumar Sharma vs. State of U.P. and Another4 and Alok Kumar Shukla vs. State of U.P. and Another5.**

7. Learned Additional Advocate General has controverted the aforesaid contention by submitting that the explanation to Section 2(d) of the Code would come into play only in a situation where to begin with the complaint which was lodged was in respect of a cognizable offence but after investigation the police report which was submitted disclosed a non-cognizable offence. He submits that in the present case where the proceedings were initiated pursuant to registration of an NCR in respect of non-cognizable offence, and the same was investigated upon an order passed by the Magistrate under Section 155(2) of the Code and the police report subsequent thereto disclosed non-cognizable offence, the explanation under Section 2(d) of the Code would not be attracted. To support his contention, learned Additional Advocate General has placed reliance upon the judgment of the Supreme Court in the case of **Keshab Lal Thakur vs. State of Bihar6.**

8. It has further been pointed out that looking at the nature of the offence disclosed in the police report, the case which is to be tried would be a summons case and the procedure prescribed for the same would be as per Chapter XX of the Code, wherein there is no distinction, with regard to manner in which the trial is to proceed, between cases instituted on a police report and those instituted otherwise than on a police report i.e. a complaint. It is accordingly, submitted that the present case being a summons case there would be no material change in the procedure of trial and as such the applicant cannot be said to have been prejudiced by the order of cognizance passed by the Magistrate.

9. As regards the judgment in the case of **Ghansyam Dubey alias Litile (supra)**, it is submitted that the decision having been passed without considering authoritative pronouncement in the case of **Keshab Lal Thakur** (supra) and also the relevant statutory provisions, the same cannot be said to be a conclusive authority on the point.

10. In order to appreciate the rival contentions, the relevant provisions under the Code may be adverted to.

"**2. Definitions.**--In this Code, unless the context otherwise requires,--

(c) "cognizable offence" means an offence for which, and "cognizable case" means a case in which, a police officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without warrant;

(d) "complaint" means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report.

Explanation.--A report made by a police officer in a case which discloses, after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be the complainant;

(h) "investigation" includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorised by a Magistrate in this behalf;

(l) "non-cognizable offence" means an offence for which, and "non-cognizable case" means a case in which, a police officer has no authority to arrest without warrant;

(n) "offence" means any act or omission made punishable by any law for the time being in force and includes any act in respect of which a complaint may be made under section 20 of the Cattle-Trespass Act, 1871 (1 of 1871);

(o) "officer in charge of a police station" includes, when the officer in charge of the police station is absent from the station-house or unable from illness or other cause to perform his duties, the police officer present at the station-house who is next in rank to such officer and is above the rank of constable or, when the State Government so directs, any other police officer so present;

(r) "police report" means a report forwarded by a police officer to a Magistrate under sub-section (2) of section 173;

(w) "summons-case" means a case relating to an offence, and not being a warrant-case;

(x) "warrant-case" means a case relating to an offence punishable with death, imprisonment for life or imprisonment for a term exceeding two years;

155. Information as to non-cognizable cases and investigation of such cases.--(1) When information is given to an officer in charge of a police station of the commission within the limits of such station of a non-cognizable offence, he shall enter or cause to be entered the substance of the information in a book to be kept by such officer in such form as the State Government may prescribe in this behalf, and refer the informant to the Magistrate.

(2) No police officer shall investigate a non-cognizable case without the order of a Magistrate having power to try such case or commit the case for trial.

(3) Any police officer receiving such order may exercise the same powers in respect of the investigation (except the power to arrest without warrant) as an officer in charge of a police station may exercise in a cognizable case.

(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.

173. Report of police officer on completion of investigation.--(1) Every investigation under this Chapter shall be completed without unnecessary delay.

(1A) The investigation in relation to an offence under Sections 376, 376A, 376AB, 376B, 376C, 376D, 376DA, 376DB or 376E of the Indian Penal Code (45 of 1860) shall be completed within two months from the date on which the information was recorded by the officer in charge of the police station.

(2) (i) As soon as it is completed, the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government, stating--

(a) the names of the parties;

(b) the nature of the information;

(c) the names of the persons who appear to be acquainted with the circumstances of the case;

(d) whether any offence appears to have been committed and, if so, by whom;

(e) whether the accused has been arrested;

(f) whether he has been released on his bond and, if so, whether with or without sureties;

(g) whether he has been forwarded in custody under section 170;

(h) whether the report of medical examination of the woman has been attached where investigation relates to an offence under sections 376, 376A, 376AB, 376B, 376C, 376D, 376DA, 376DB or section 376E of the Indian Penal Code (45 of 1860).

(ii) The officer shall also communicate, in such manner as may be prescribed by the State Government, the action taken by him, to the person, if any, by whom the information relating to the commission of the offence was first given.

(3) Where a superior officer of police has been appointed under section 158, the report shall, in any case in which the State Government by general or special order so directs, be submitted through that officer, and he may, pending the orders of the Magistrate, direct the officer in charge of the police station to make further investigation.

(4) Whenever it appears from a report forwarded under this section that the accused has been released on his bond, the Magistrate shall make such order for the discharge of such bond or otherwise as he thinks fit.

(5) When such report is in respect of a case to which section 170 applies, the police officer shall forward to the Magistrate along with the report--

(a) all documents or relevant extracts thereof on which the prosecution proposes to rely other than those already sent to the Magistrate during investigation;

(b) the statements recorded under section 161 of all the persons whom the prosecution proposes to examine as its witnesses.

(6) If the police officer is of opinion that any part of any such statement is not relevant to the subject-matter of the proceedings or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interest, he shall indicate that part of the statement and append a note requesting the Magistrate to exclude that part from the copies to be granted to the accused and stating his reasons for making such request.

(7) Where the police officer investigating the case finds it convenient so to do, he may furnish to the accused copies of all or any of the documents referred to in sub-section (5).

(8) Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of sub-sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-section (2).

190. Cognizance of offences by Magistrates.--(1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub-section (2), may take cognizance of any offence--

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a police report of such facts;

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub-section (1) of such offences as are within his competence to inquire into or try.

200. Examination of complainant.--A Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate:

Provided that, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses--

(a) if a public servant acting or purporting to act in the discharge of his official duties or a Court has made the complaint; or

(b) if the Magistrate makes over the case for inquiry or trial to another Magistrate under section 192:

Provided further that if the Magistrate makes over the case to another Magistrate under section 192 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them.

202. Postponement of issue of process.--(1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him under section 192, may, if he thinks fit, and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding:

Provided that no such direction for investigation shall be made--

(a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Sessions; or

(b) where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath under section 200.

(2) In an inquiry under sub-section (1), the Magistrate may, if he thinks fit, take evidence of witness on oath:

Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.

(3) If an investigation under sub-section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Code on an officer in charge of a police station except the power to arrest without warrant.

205. Magistrate may dispense with personal attendance of accused.--(1) Whenever a Magistrate issues a summons, he may, if he sees reason so to do, dispense with the personal attendance of the accused and permit him to appear by his pleader.

(2) But the Magistrate inquiring into or trying the case may, in his discretion, at any stage of the proceedings, direct the personal attendance of the accused, and, if necessary, enforce such attendance in the manner hereinbefore provided."

11. The corresponding provisions contained under the old Code i.e. Criminal Procedure Code, 18987, which are also required to be referred to, are as follows:-

"4. Definitions. - (I) In this Code the following words and expressions have the following meanings, unless a different intention appears from the subject or context : --

(h) "Complaint" - "complaint" means the allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person whether known or unknown, has committed an offence, but it does not include the report of a police officer:

154. Information in cognizable cases. - Every information relating to the commission of a cognizable offence if given orally to an officer in charge of a police-station, shall be reduced to writing by him or under his direction, and he read over to the informant; and every such

information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the Local Government may prescribe in this behalf.

155. Information in non-cognizable cases. - (1) When information is given to an officer in charge of a police-station of the commission within the limits of such station of a non-cognizable offence, he shall enter in a book to be kept as aforesaid the substance of such information and refer the informant to the Magistrate.

(2) No police-officer shall investigate a non-cognizable case without the order of a Magistrate of the first or second class having power to try such case or commit the same for trial, or of a Presidency Magistrate.

(3) Any police-officer receiving such order may exercise the same powers in respect of the investigation (except the power to arrest without warrant) as an officer in charge of a police-station may exercise in a cognizable case.

156. Investigation into cognizable cases. - (1) Any officer in charge of a police-station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XV relating to the place of inquiry or trial.

(2) No proceeding of a police-officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.

(3) Any Magistrate empowered under Section 190 may order such an investigation as above-mentioned.

173. Report of police-officer. - (1) Every investigation under this Chapter shall be completed without unnecessary delay, and, as soon as it is completed, the officer in charge of the police-station shall-

(a) forward to a Magistrate empowered to take cognizance of the offence on a police-report, a report in the form prescribed by the Local Government, setting forth the names of the parties, the nature of the information and the names of the persons who appear to be acquainted with the circumstances of the case, and stating whether the accused (if arrested) has been forwarded in custody, or has been released on his bond, and, if so, whether with or without sureties, and

(b) communicate, in such manner as may be prescribed by the Local Government, the action taken by him to the person, if any, by whom the information relating to the commission of the offence was first given.

(2) Where a superior officer of police has been appointed under Section 158, the report shall, in any cases in which the Local Government by general or special order so directs, be submitted through that

officer, and he may, pending the orders of the Magistrate, direct the officer in charge of the police-station to make further investigation.

(3) Whenever it appears from a report forwarded under this section that the accused has been released on his bond, the Magistrate shall make such order for the discharge of such bond or otherwise as he thinks fit.

(4) A copy of any report forwarded under this section shall, on application, be furnished to the accused before the commencement of the inquiry or trial :

Provided that the same shall be paid for unless the Magistrate for some special reason thinks fit to furnish it free of cost.

190. Cognizance of offences by Magistrates. - (1) Except as hereinafter provided, any Presidency Magistrate, District Magistrate or Sub-divisional Magistrate, and any other Magistrate specially empowered in this behalf, may take cognizance of any offence -

(a) upon receiving a complaint of facts which constitute such offence :

(b) upon a report in writing of such facts made by any police-officer;

(c) upon information received from any person other than a police-officer, or upon his own knowledge or suspicion, that such offence has been committed.

(2) The Local Government, or the District Magistrate subject to the general or special orders of the Local Government, may empower any Magistrate to take cognizance under sub-section (1), clause (a) or clause (b), of offences for which he may try or commit for trial.

(3) The Local Government may empower any Magistrate of the first or second class to take cognizance under sub-section (1), clause (c), of offences for which he may try or commit for trial."

12. The provisions relating to information to the police and their powers to investigate are contained under Chapter XII of the Code of Criminal Procedure, 1973. Section 154 of the Code provides for the manner of giving information to an officer in-charge of the police station relating to commission of a cognizable offence, and the manner in which the same is to be reduced in writing and entered in a book maintained for the purpose. Section 155 of the Code relates to giving of information as to non-cognizable cases and investigation of such cases. Sub-section (1) thereof, provides that when information is given to an officer in-charge of a police station of the commission within the limits of such station of a non-cognizable offence, he shall enter it in the prescribed book and refer the informant to the Magistrate. Sub-section (2) states that no police officer shall investigate a non-cognizable case without the order of a Magistrate having power to try such cases or commit the case for trial. As per sub-section (3), any police officer receiving such order may exercise the same powers in respect of the investigation as an officer in charge of a police station may exercise in a cognizable case, except the power to arrest without warrant.

13. In terms of Section 156(1) of the Code, any officer in-charge of a police station may investigate any cognizable

offence, without the order of a Magistrate. Sub-section (3) of Section 156 provides that any Magistrate empowered under Section 190 may order an investigation.

14. Section 173 of the Code, as per terms of sub-section (1) and sub-section (2) thereof, lays down that every investigation under Chapter XII shall be completed without unnecessary delay and on completion the officer in charge of the police station shall forward to the Magistrate empowered to take cognizance of the offence on a police report, a report in the prescribed form setting forth the required particulars.

15. Section 190 of the Code relates to cognizance of offences by Magistrates and falls under Chapter XIV, which is in respect of conditions requisite for initiation of proceedings. Section 190 of the Code lays down that the concerned Magistrate may take cognizance of any offence in three contingencies, namely; (a) upon receiving a complaint of facts which constitute such offence, (b) upon a police report of such facts, and (c) upon information received from any person other than a police officer or upon his own knowledge, that such offence has been committed.

16. Now referring to the provisions under 1898 Code (old Code), Section 190 of the old Code contemplates cognizance of offences being taken by Magistrates in three contingencies, namely; (a) upon receiving a complaint of facts which constitute such offence, (b) upon a report in writing of such facts by any police officer, and (c) upon information received from any person other than a police officer, or upon his own knowledge or suspicion, that such offence has been committed.

17. The power to take cognizance under Section 190(1)(b) of the old Code could be attracted only upon a report in writing of any police officer under Section 173 of the said Code. The report under Section 173 could follow either upon investigation by a competent police officer into a cognizable offence or investigation by a competent police officer into a non-cognizable offence made under an order of the Magistrate as contemplated under Section 155(2) of the old Code. Such a report would not be held to be a complaint having been excluded as per terms of Section 4(1)(h) of the old Code. A report by the police following an investigation into a non-cognizable case made without the order of a Magistrate, could not be treated as a valid report by the police officer for the purposes of Section 173 or Section 190(1)(b) of the old Code; however, it could be treated as a complaint for the purposes of Section 190(1)(a) of the old Code, leaving it open to the Magistrate to take cognizance thereupon. It was also open to the Magistrate to decline to take cognizance or to order fresh investigation, depending on the facts and circumstances of the particular case.

18. A comparison of the provisions under the old Code and the Code, as it presently stands, would go to show that Sections 154, 155, 156, 173 and 190 of the Code are more or less, the same as the corresponding provisions of the old Code, except that Section 190(1)(b) refers to "a police report" and not a "report of the police officer". The old Code does not define "a police report" or " a report of the

police officer"; Section 2(r) of the new Code defines a "police report" as a report forwarded by a police officer to a Magistrate under sub-section (2) of Section 173. Section 2(d) of the new Code defines a "complaint" in a manner which is as same in the old Code except that it excludes "a police report' instead of excluding the "report of the police officer' as in the old Code. In addition, an explanation has been added to the definition of "complaint" which states that a report made by a police officer in case which discloses, after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be the complainant.

19. In order to appreciate the aforementioned changes, a comparative overview of the relevant sections may be shown in a tabular form:-

Criminal Procedure Code, 1898 (the old Code)	**Criminal Procedure Code, 1973 (the Code)**
Section 4(1)(h)- "complaint" means the allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person whether known or unknown, has committed an offence, but it does not include ***the report of a police officer.***	Section 2(d)- "complaint" means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a ***police report.***
	Explanation.- - A report made by a police officer in a case which discloses, after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be the complainant;
	-- ***Section 2(r) — "police report" means a report forwarded by a police officer to a Magistrate under sub-section (2) of Section 173;***
Section 190(1)(b) — upon a ***report in writing of such facts made by any police-officer;***	Section 190(1)(b) — upon a ***police report of such facts;***

20. Under the old Code, in some cases, it was held that "report of a police officer" as was the expression used, and excluded from the definition of the term "complaint", under the old Section 4(1)(h), meant report in a cognizable offence and the report in a non-cognizable offence would be treated as a complaint. (See **Emperor v. Ghulam Hussain8, Jagdeo Panday and Another v. N.C. Hill, Assist. Superintendent of Police, Myitkyina9)**

21. The contrary view taken in some cases was that the expression "complaint" excludes police report whether in a cognizable or non-cognizable offence. (See **Emperor v. Babulal Munnilal10, Bholanath Das and Others v. Emperor11, Hatimali and Another v. The Crown12, State of Rajasthan v. Mahmood Ghasi Musalman and Another13).**

22. Essentially there was a conflict in the decisions on two points: (i) whether report of a police officer in a non-cognizable case investigated without the order of a Magistrate as required by Section 155(2) would fall under the old Section 190(1)(b); (ii) whether definition of "complaint" under Section 4(1)(h) applied to a police report.

23. **The Law Commission** in its **41st Report14**, in order to resolve the conflict recommended that the definition should make it clear that the report made by police on an unauthorised investigation of a non-cognizable case is a complaint and accordingly, in the definition of "complaint", the words "a police report", were to be substituted for "report by a police officer" and the following explanation was proposed to be inserted.

"Explanation.- A report made by a police officer in a non-cognizable case investigated without conforming to the provisions of sub-section (2) of section 155 shall be deemed to be a complaint."

24. The definition of "police report" was also proposed to be inserted vide Section 2(r). Further, under Section 190(1)(b), the words "police report of such facts" were to be substituted for "report in writing of such facts made by a police officer" with the object of limiting it to a report under Section 173; leaving other kinds of reports by a police officer to be treated as complaint. (41st Report, pp. 9-10, 102-103)

25. The relevant extracts from the Law Commission Report are as follows:-

"1.26 (v). The definition of "complaint" in clause (h) was discussed in detail in the previous Report15. In view of the conflicting decisions and uncertainty in regard to this definition and the connected provisions in sections 173, 190, 207A and 251A of the Code, the Commission recommended that the definition should make it clear that the report made by the police on an unauthorized investigation of a non-cognizable case is a complaint. We agree with this recommendation and propose to substitute for the words "the report of a police officer" in clause (h) the words "a police report". A definition of police report will have to be added in this section.

1.27 (ii) As indicated in the previous paragraph, sub-para. (v), a clause will be necessary defining "police report" as follows: --

"(rr) 'police report' means a report by a police officer to a Magistrate under sub-section (1) of section 173."

xxx

15.72. The group of sections, from section 190 to section 199B, describes the methods by which, and the limitations subject to which, various Criminal Courts are entitled to take cognizance of offences.

Section 190 first mentions the classes of Magistrates entitled to take cognizance, and then says that cognizance may be taken--

"(a) upon receiving a complaint of acts which constitute such offence;

(b) upon a report in writing of such facts made by any police officer;

(c) upon information received from any person other than a police officer or upon his own knowledge or suspicion that such offence has been committed."

15.73. Clause (c) is of limited practical importance as resort to it is not had in many cases. Leaving that alone, and speaking broadly, the cases fall into two categories: --

(1) those started on complaint; and

(2) those started on a police-report.

A "complaint" is defined in section 4(1) (h) as not including the "report of a police officer". It seems to us, however, that there is no practical advantage in distinguishing a case started on a complaint from a case started on "the report of a police officer" which is not given under section 173. In Chapter XXI of the Code, where two different procedures are laid down for the trial of two different kinds of cases, the point of distinction is whether the case was instituted on a "police report" or not, and the expression "the report of a police officer" is not used. The same is the case in Chapter XVIII.

15.74. At first sight, of course, the difference in meaning between a "police report" and the "report of a police officer" may seem slight, but authoritative decisions show that the expression "police report", which was in fact the expression used in clause (b) of section 190(1) before 1923, has a technical connotation, limited to a report made by an investigating officer under section 173 of the Code. Such an investigation can only be of a cognizable offence, or if made into a non-cognizable offence, it must be with the permission of a Magistrate required by section 155. We, therefore, consider it important that Magistrates should be readily able to distinguish a case instituted on a "police report" from any other kind of case; and to facilitate this, we propose, that the expression "police report" should be clearly defined in the Code itself, and the definition should follow the judicial decisions, limiting it to a report made under section 173. For the same reasons, we propose that clause (b) of section 190, sub-section (1) should mention only a "police report", leaving other kinds of reports by a police officer to be treated as complaints. We have already proposed the necessary verbal alteration in the definition of "complaint" now contained in section 4.

15.75. These proposals, we hope, will do away with the controversy whether the present wording of section 190(1) (b) does or does not include a report made regarding a non-cognizable offence investigated by a police officer without the orders of a Magistrate, which on occasions has arisen. At the same time, there will be a clear-cut division between cases properly investigated by the police and others, and the distinction between cases instituted on a police report and other cases will be easy to make."

26. The Joint Committee while approving the recommendation of the Law Commission, in order to clarify the intention that the report will be deemed to be a complaint only if the offence is discovered after investigation by the police to be a non-cognizable one, redrafted the explanation, as is in the present form.

27. It would be apposite to state that the Law Commission Report may be referred to as an internal aid to a statutory construction to ascertain the legislative intent behind the provision, particularly in a situation where a particular enactment or amendment is the result of the recommendation of the Law Commission of India, as held in **Mithilesh Kumari & Anr vs Prem Behari Khare16**.

28. Section 2(d) alongwith explanation, as it finds place under the new Code, is as follows:-

"(d) "complaint" means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report.

Explanation.--A report made by a police officer in a case which discloses, after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be the complainant;"

29. The legislative changes, referred to above, made it clear that under the new Code, the "police report" i.e. the report forwarded by a police officer to a Magistrate under Section 173(2), cannot be treated as a complaint.

30. The ambiguity created by the decisions rendered in the context of the old Code, wherein a view was taken that the report of a police officer in a non-cognizable offence following any investigation made without an order of the Magistrate could be treated as a complaint for the purposes of Section 190(1) (a) and Section 4(1) (h), stood removed. The legislative changes brought in the definition of "complaint" and the insertion of the explanation made it clear that the report made by a police officer will be deemed to be a complaint only if the offence is discovered, after investigation by the police, to be a non-cognizable one. The explanation clearly states that a report by a police officer in a case which discloses, after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be a complainant.

31. The intent, purpose and effect of an Explanation appended to a statutory provision was considered in **S.Sundaram Pillai Vs. V.R.Pattabiraman and others17**. It was held that the Explanation is meant to explain or clarify certain ambiguities in the provision. Referring to earlier decisions in **Burmah Shell Oil Storage and Distributing Co. of India Ltd. v. CTO,18 Bihta Cooperative Development Cane Marketing Union Ltd. v. Bank of Bihar19, Hiralal Rattanlal Vs. State of U.P.20, Dattatraya Govind Mahajan v. State of Maharashtra21** and also the principles laid down in **Sarathi in Interpretation of Statutes, Swarup in Legislation and**

Interpretation and Bindra in Interpretation of Statutes (5th Edn.), the object of Explanation to a statutory provision was elaborated.

"46...It is now well settled that an Explanation added to a statutory provision is not a substantive provision in any sense of the term but as the plain meaning of the word itself shows it is merely meant to explain or clarify certain ambiguities which may have crept in the statutory provision. Sarathi in Interpretation of Statutes while dwelling on the various aspects of an Explanation observes as follows:

(a) The object of an Explanation is to understand the Act in the light of the explanation.

(b) It does not ordinarily enlarge the scope of the original section which it explains, but only makes the meaning clear beyond dispute.

(p. 329)

47. Swarup in *Legislation and Interpretation* very aptly sums up the scope and effect of an Explanation thus:

"Sometimes an Explanation is appended to stress upon a particular thing which ordinarily would not appear clearly from the provisions of the section. The proper function of an Explanation is to make plain or elucidate what is enacted in the substantive provision and not to add or subtract from it. Thus an Explanation does not either restrict or extend the enacting part; it does not enlarge or narrow down the scope of the original section that it is supposed to explain.... The Explanation must be interpreted according to its own tenor; that it is meant to explain and not vice versa." (pp. 297-98)

48. Bindra in *Interpretation of Statutes* (5th Edn.) at p. 67 states thus:

"An Explanation does not enlarge the scope of the original section that it is supposed to explain. It is axiomatic that an Explanation only explains and does not expand or add to the scope of the original section... The purpose of an Explanation is, however, not to limit the scope of the main provision.... The construction of the Explanation must depend upon its terms, and no theory of its purpose can be entertained unless it is to be inferred from the language used. An "Explanation' must be interpreted according to its own tenor."

49. The principles laid down by the aforesaid authors are fully supported by various authorities of this Court. To quote only a few, in *Burmah Shell Oil Storage and Distributing Co. of India Ltd. v. CTO* [(1961) 1 SCR 902 : AIR 1961 SC 315 : (1960) 11 STC 764] a Constitution Bench decision, Hidayatullah, J. speaking for the Court, observed thus:

"Now, the Explanation must be interpreted according to its own tenor, and it is meant to explain clause (1)(fl) of the Article and not vice versa. It is an error to explain the Explanation with the aid of the Article, because this reverses their roles."

50. In *Bihta Cooperative Development Cane Marketing Union Ltd. v. Bank of Bihar* [(1967) 1 SCR 848 : AIR 1967 SC 389 : 37 Com Cas 98] this Court observed thus:

"The Explanation must be read so as to harmonise with and clear up any ambiguity in the main section. It should not be so construed as to widen the ambit of the section."

51. In *Hiralal Rattanlal case* [(1973) 1 SCC 216 : 1973 SCC (Tax) 307] this Court observed thus: [SCC para 25, p. 225: SCC (Tax) p. 316]

"On the basis of the language of the Explanation this Court held that it did not widen the scope of clause (c). But from what has been said in the case, it is clear that if on a true reading of an Explanation it appears that it has widened the scope of the main section, effect be given to legislative intent notwithstanding the fact that the Legislature named that provision as an Explanation."

52. In *Dattatraya Govind Mahajan v. State of Maharashtra* [(1977) 2 SCR 790 : (1977) 2 SCC 548 : AIR 1977 SC 915] Bhagwati, J. observed thus: (SCC p. 563, para 9)

"It is true that the orthodox function of an Explanation is to explain the meaning and effect of the main provision to which it is an Explanation and to clear up any doubt or ambiguity in it.... Therefore, even though the provision in question has been called an Explanation, we must construe it according to its plain language and not on any a priori considerations."

53. Thus, from a conspectus of the authorities referred to above, it is manifest that the object of an Explanation to a statutory provision is--

"(a) to explain the meaning and intendment of the Act itself,

(b) where there is any obscurity or vagueness in the main enactment, to clarify the same so as to make it consistent with the dominant object which it seems to subserve,

(c) to provide an additional support to the dominant object of the Act in order to make it meaningful and purposeful,

(d) an Explanation cannot in any way interfere with or change the enactment or any part thereof but where some gap is left which is relevant for the purpose of the Explanation, in order to suppress the mischief and advance the object of the Act it can help or assist the Court in interpreting the true purport and intendment of the enactment, and

(e) it cannot, however, take away a statutory right with which any person under a statute has been clothed or set at naught the working of an Act by becoming an hindrance in the interpretation of the same."

(emphasis supplied)

32. The provisions contained under Section 2(d) alongwith the explanation, under the new Code, fell for consideration in **Keshab Lal Thakur Vs. State of Bihar** (supra). It related to a case, registered on a report under Section 31 of the Representation of People Act, 1950, where on completion of investigation a report in final form was submitted praying for discharge on the ground that offence was non-cognizable one. Taking note of the fact that the offence was non-cognizable and the police was not entitled to investigate in the absence of any order under Section 155 (2), and the Magistrate could not have

taken cognizance upon such report, the proceedings were quashed.

33. On the scope of the explanation to Section 2(d), it was observed that the explanation would be available only in a case where the police initiates investigation into a cognizable offence but ultimately finds that only a non-cognizable offence has been made out.

34. The decision in the case of **Ghanshyam Dubey alias Litile** (supra), which is sought to be relied upon on behalf of the applicants having been rendered without taking notice of the binding precedent in the case of Keshab Lal Thakur (supra) and also the statutory scheme referred to above, and in the absence of consideration of the issues raised herein, the same cannot be held to be a conclusive authority on the point.

35. In the case of **Dr. Rakesh Kumar Sharma** (supra) a report was originally lodged under Section 307 of the Penal Code (a cognizable offence) and upon investigation the police report disclosed a non-cognizable offence under section 504. It was in these set of facts that the police report was held to be a complaint in view of the explanation to Section 2(d).

36. The decision in **Alok Kumar Shukla** (supra) was in a case where the police report was submitted unauthorisedly in a non-cognizable offence without any order of the Magistrate under section 155 (2) Cr.P.C.; accordingly, the same was held to be a complaint as per the explanation of Section 2(d).

37. The aforementioned decisions in the cases of **Dr. Rakesh Kumar Sharma** and **Alok Kumar Shukla** would, therefore, be distinguishable on facts.

38. The three cases referred to above, namely the cases of **Ghanshyam Dubey alias Litile** (supra), **Dr. Rakesh Kumar Sharma** (supra) and **Alok Kumar Sharma** (supra) bring to the fore three situations :

Case I. *where the police report has been submitted following investigation in a non-cognizable case without conforming to the provisions of sub-section (2) of Section 155;*

Case II. *where the police investigates a case relating to a cognizable offence, which discloses, after investigation, the commission of a non-cognizable offence;*

Case III*. where a non-cognizable offence is reported and upon an order by the Magistrate under sub-section (2) of Section 155, the same is investigated, and the police report which is submitted also discloses non-cognizable offence.*

39. Taking the above cases to be illustrative, the three alternative situations which would emerge are :

39.1. In ***Case I*** where the police report has been submitted following investigation in a non-cognizable case without conforming to the provisions of sub-section (2) of Section 155, the same would be deemed to be a complaint.

39.2. In ***Case II*** where the police investigates a case relating to a cognizable offence, which discloses, after investigation, the commission of a non-cognizable offence, the same would also be

deemed to be a complaint by virtue of the explanation to Section 2 (d).

39.3. In ***Case II***I where a non-cognizable offence is reported and upon an order by the Magistrate under sub-section (2) of Section 155, the same is investigated and the police report, which is submitted, also discloses non-cognizable offence, the same would not be covered within the purview of the explanation to Section 2 (d) to bring it within the ambit of the term 'complaint'.

40. It would therefore follow as a legal proposition that in case where commission of a non-cognizable offence alone is alleged, at the commencement of the investigation, cannot and does not, fall within the scope of the explanation, so as to bring it within the purview of a "complaint". The explanation takes within its sweep only a case, where at the stage of commencement of the investigation commission of a cognizable offence is alleged or where it is doubtful as to whether it relates to a cognizable or a non-cognizable offence, and the investigation discloses only the commission of a non-cognizable offence; other categories, stand excluded by necessary implication.

41. The effect of a police officer investigating a case and laying the report without authority or jurisdiction to do so, and the question as to whether proceedings can be held to be vitiated upon a defect in investigation or the same can be held to be a mere irregularity was subject matter of consideration in **H.N. Rishbud and others Vs. State of Delhi22,** and it was held that a defect or illegality in investigation, however serious, has no direct bearing on the competence or the procedure relating to cognizance or trial. The relevant observations made in this regard are being extracted below :-

"9. The question then requires to be considered whether and to what extent the trial which follows such investigation is vitiated. Now, trial follows cognizance and cognizance is preceded by investigation. This is undoubtedly the basic scheme of the Code in respect of cognizable cases. But it does not necessarily follow that an invalid investigation nullifies the cognizance or trial based thereon. Here we are not concerned with the effect of the breach of a mandatory provision regulating the competence or procedure of the Court as regards cognizance or trial. It is only with reference to such a breach that the question as to whether it constitutes an illegality vitiating the proceedings or a mere irregularity arises.

A defect or illegality in investigation, however serious, has no direct bearing on the competence or the procedure relating to cognizance or trial. No doubt a police report which results from an investigation is provided in Section 190, CrPC as the material on which cognizance is taken. But it cannot be maintained that a valid and legal police report is the foundation of the jurisdiction of the Court to take cognizance. Section 190, CrPC is one out of a group of sections under the heading "Conditions requisite for initiation of proceedings". The language of this section is in marked contrast with that of the other sections of the group under the same heading, i.e. Sections 193 and 195 to 199.

These latter sections regulate the competence of the Court and bar its

jurisdiction in certain cases excepting in compliance therewith. But Section 190 does not. While no doubt, in one sense, Clauses (a), (b) and (c) of Section 190(1) are conditions requisite for taking of cognizance, it is not possible to say that cognizance on an invalid police report is prohibited and is therefore a nullity. Such an invalid report may still fall either under Clause (a) or (b) of Section 190(1), (whether it is the one or the other we need not pause to consider) and in any case cognizance so taken is only in the nature of error in a proceeding antecedent to the trial. To such a situation Section 537, CrPC which is in the following terms is attracted :

"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during trial or in any enquiry or other proceedings under this Code, unless such error, omission or irregularity, has in fact occasioned a failure of justice."

If, therefore, cognizance is in fact taken, on a police report vitiated by the breach of a mandatory provision relating to investigation, there can be no doubt that the result of the trial which follows it cannot be set aside unless the illegality in the investigation can be shown to have brought about a miscarriage of justice. That an illegality committed in the course of investigation does not affect the competence and the jurisdiction of the Court for trial is well settled as appears from the cases in-'Prabhu v. Emperor', AIR 1944 PC 73 (C) and 'Lumbhardar Zutshi v. The King', AIR 1950 PC 26 (D).

...We are, therefore, clearly, also, of the opinion that where the cognizance of the case has in fact been taken and the case has proceeded to termination, the invalidity of the precedent investigation does not vitiate the result, unless miscarriage of justice has been caused thereby."

42. It was thereafter held in the case of **H.N. Rishbud (supra)** that when the breach of such a mandatory provision is brought to the knowledge of the Court at a sufficiently early stage, the Court, while not declining cognizance, will have to take the necessary steps to get the illegality cured and the defect rectified. It was observed as follows:-

"10. It does not follow, however, that the invalidity of the investigation is to be completely ignored by the Court during trial. When the breach of such a mandatory provision is brought to the knowledge of the Court at a sufficiently early stage, the Court, while not declining cognizance, will have to take the necessary steps to get the illegality cured and the defect rectified, by ordering such reinvestigation as the circumstances of an individual case may call for.

Such a course is not altogether outside the contemplation of the scheme of the Code as appears from section 202 under which a Magistrate taking cognizance on a complaint can order investigation by the police. ... When the attention of the Court is called to such an illegality at a very early stage it would not be fair to the accused not to obviate the prejudice that may have been caused thereby, by appropriate orders, at that stage but to leave him to the ultimate

remedy of waiting till the conclusion of the trial and of discharging the somewhat difficult burden under section 537, CrPC of making out that such an error has in fact occasioned a failure of justice. ...

In our opinion, therefore, when such a breach is brought to the notice of the Court at an early stage of the trial the Court will have to consider the nature and extent of the violation and pass appropriate orders for such reinvestigation as may be called for, wholly or partly, and by such officer as it considers appropriate..."

43. It would be interesting to consider as to whether in situations where the report made by the police officer having been held to be covered by the explanation to Section 2(d) and accordingly having been deemed to be a complaint, the cognizance taken by the Magistrate can be assailed on the ground that the procedure as required in the case of a private complaint as per the provisions under Sections 200 and 202 has not been followed. The question would be whether on a complaint, in such cases, the issuance of process under Section 204 and the summoning of the accused could have been made by the Magistrate upon taking cognizance under section 190(1)(a) without following the procedure under Section 200 relating to examination of the complainant.

44. For ease of reference Section 200 of the Code is being extracted below:-

"200. Examination of complainant.- A Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate:

Provided that, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses-

(a) if a public servant acting or-purporting to act in the discharge of his official duties or a Court has made the complaint; or

(b) if the Magistrate makes over the case for inquiry or trial to another Magistrate under section 192:

Provided further that if the Magistrate makes over the case to another Magistrate under section 192 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them."

45. Clause (a) of the first proviso to Section 200 of the Code provides that when the complaint is made in writing by a public servant acting or purporting to act in the discharge of his official duties, the Magistrate need not examine the complainant and the witnesses before proceeding with the matter and issuing process. Therefore, in a case where a report made by a police officer is held to be a complaint by virtue of the explanation to Section 2(d) and the Magistrate proceeds to take cognizance thereon under Section 190(1)(a), treating it to be a complaint, and proceeds to issue process without following the procedure of examining the complainant under Section 200 and the witnesses under Section 202, the issuance of process or the summons cannot be held to be vitiated.

46. Moreover, in the facts of the present case looking at the nature of the offence disclosed in the police report, the case which is to be tried would be a summons case and the procedure prescribed for the same would be as per Chapter XX of the Code, wherein there is no distinction with regard to the manner in which the trial is to proceed between cases instituted on a police report and those instituted otherwise than on a police report i.e. a complaint. Accordingly, there would be no material change in the procedure of trial and as such the applicant cannot be said to have been prejudiced by the order of cognizance by the Magistrate, for this reason also.

47. In the case at hand, the proceedings were initiated with the registration of an NCR relating to non-cognizable offence and the investigation was carried out by the police pursuant to an order of the Magistrate under Section 155(2) of the Code and thereafter a police report under Section 173(2) also disclosing non-cognizable offence was placed whereupon cognizance was taken by the Magistrate. In view of the foregoing discussion, these set of facts would correspond to ***Case III,*** as referred to in paragraph 39 and accordingly, the same would not be covered within the purview of the explanation to Section 2(d) to bring it within the ambit of the term "complaint". The cognizance taken by the Magistrate, therefore, cannot be faulted with.

48. This court is, therefore, not inclined to exercise its inherent jurisdiction under Section 482 of the Code in the facts of the present case.

48. The application thus, fails and is accordingly, **dismissed.**

(2022)01ILR A436
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.01.2022

BEFORE

THE HON'BLE ASHUTOSH SRIVASTVA, J.

Application U/S 482 Cr.P.C. No.23667 of 2008

Bhupinder Singh & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Komal Khare, Sri Somesh Khare

Counsel for the Opposite Parties:
G.A., Sri A.P. Tiwari, Sri S.S. Tripathi

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power - Section 200,202 - Indian Penal Code, 1860 - Section 383 - Extortion, Section 386 - Extortion by putting a person in fear of death or grievous hurt , section 506 - Punishment for criminal intimidation .

Complaint against applicants and two armed unknown persons - allegation - applicants asked complainant to sign certain blank papers - for the purpose of compromising proceedings - refusal - applicants pulled gun on the wife of complainant - applicants summoned to face trial - applicants approached Court for quashing the entire proceedings.(Para - 2 to 6)

HELD:- Continuation of the criminal proceedings against the applicants is an abuse of process of the Court and ends of justice requires that the said proceedings be quashed . Entire criminal proceedings quashed. (Para - 22)

Application u/s 482 Cr.P.C. allowed. (E-7)

List of Cases cited:-

1. St. of Hary. & ors. Vs Bhajan Lal & ors., 1992 Supp (1) SCC 335

2. St. of A.P. Vs Golconda Linga Swamy & anr., (2004) 6 SCC 522

3. Zandu Pharmaceutical Works Ltd. Vs Mohd. Sharaful Haque, 2005(1) SCC 122

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

1. Heard Sri Somesh Khare, learned counsel for the applicants and Sri A.P. Tiwari, learned counsel representing the Opposite Party No.2. Learned A.G.A. appears on behalf of the State.

2. The instant application under Section 482 Cr.P.C. has been filed seeking quashing of the proceedings of Criminal Complaint Case No.4859 of 2002 (Deepchand Vs. Bhupendra and others) (renumbered as 91 of 2007) under Sections 506, 386 I.P.C., P.S. Turkpatti, District Kushinagar, instituted by the Opposite Party No.2 against the applicants and pending before the court of the learned 2nd Additional Civil Judge (Jr. Division)/Judicial Magistrate, Kasaya, Kushinagar.

3. Briefly stated the facts sworn of unnecessary details are that the Opposite Party No.2, Deep Chand Singh, who was employed as a Workman/Assistant Operator in the establishment of the applicants namely K & T Chemicals Pvt. Ltd., Rampur, Doraha, District Ludhiana, lodged a Criminal Complaint on 07.01.2002 before the Chief Judicial Magistrate, Kasaya, District Kushinagar, against the applicants and two armed unknown persons alleging inter-alia that on 16.12.2001 at about 12:00 noon the applicants who are the Manager, Director and Managing Director of K & T Chemicals Pvt. Ltd., Rampur Doraha Ludhiana along with two gunmen came in a Car and asked the complainant to sign certain blank papers. On asking of the complainant to sign certain blank papers the applicants informed him that the papers would be used for the purpose of filing compromise in the case lodged by him against the company in the Tribunal and for withdrawing the same. On the refusal of the complainant the applicants got annoyed and pulled the gun on the wife of the complainant and threatened to abduct her and his child and kill them. The Opposite Party No.2 further stated in the complaint that he had worked in the Company in the capacity of Assistant Operator and on 16.17.2000 night about 2:30 am he lost both his eyes during the course of working and he has lodged a case for compensation in the Labour Tribunal Ludhiana which is pending. The complainant out of fear put his signatures on all five pages. The incident was witnessed by the wife of the complainant, Madan Singh son of late Sitaram Singh and Ram Niwas son of Vijay Bahadur. The applicants left after threatening the family of the complainant. The FIR was not registered despite all efforts and finally the complaint has been lodged with the prayer that the applicants be summoned and punished.

4. The learned Judicial Magistrate, Kasaya, Kushinagar after considering the statements of the Complainant/Opposite Party No.2 and witnesses recorded under Sections 200 and 202 Cr.P.C. and other materials on record dismissed the complaint vide order dated 22.02.2002 being of the view that no ground to prosecute the applicants under Sections 386 and 506 IPC was made out as admittedly both eyesight of the complainant was lost and from the statement of PW-1 and PW-2 the identity of the accused applicants, who were alleged to have visited the complainant, could not be established.

5. The order dated 22.10.2002 of the Judicial Magistrate, Kasaya Kushinagar was carried in Revision before the District and Sessions Judge (FTC) Ist, Kushinagar being Criminal Revision No.61 of 2003. The Revisional Court set aside the order dated 22.10.2002 of the Judicial Magistrate rejecting the complaint being of the view that the learned Magistrate failed in his legal duty to test the statement of the complainant as also the witnesses PW-1 and PW-2 by asking questions. The Revisional Court observed that offence under Sections 386, 506 I.P.C. was made out against the applicants. The Judicial Magistrate was directed to rehear the complainant and pass appropriate orders. The learned Magistrate vide his order dated 13.02.2007 in compliance of the order of the Revisional Court holding that offence under Sections 386 and 506 I.P.C. was made out against the applicants summoned the applicants to face the trial.

6. The applicants in the aforesaid circumstances have approached this Court for quashing the entire proceedings of the complaint case.

7. The Opposite Party No.2, Deep Chand Singh/Complainant has put in appearance and filed his counter affidavit though Sri A.P. Tiwari, Advocate. The application under Section 482 Cr.P.C. is opposed on the ground that the Opposite Party No.2/Complainant lost both of his eyes in an accident in the factory premises during the course of employment on 16/17.08.2000 at 2:30 A.M. and the reconciliation before the D.L.C. failed and the dispute was referred to the Labour Tribunal and since the complainant had lost both his eyes and became helpless and by forcible taking the signatures of the complainant on blank papers the applicants misused the same and got the case before the Labour Tribunal dismissed as withdrawn.

8. The learned Magistrate did not properly appreciate the averments made in the complaint and statements under Sections 200 & 202 Cr.P.C. and the order rejecting the complaint was rightly set aside by the Revisional Court. After remand, the learned Magistrate is well within his powers to summon the applicants to face the trial. There is no illegality in the order of the learned Magistrate and no interference is called for and the application under Section 482 Cr.P.C. being devoid of merits warrants dismissal.

9. It is submitted by the learned counsel for the applicants that the unfortunate incident which resulted in the loss of both eyesight of the Opposite Party No.2, took place on account of the negligent attitude of the Opposite Party No.2. While working in the chemical factory the workmen are required to put on safety glasses along with safety spectacles which the Opposite Party No.2 did not do. The applicants being sympathetic to the Opposite Party No.2 look him to various eye specialists but efforts to restore his eyesight were in vein. He submits that the incident at the factory took place on 17.08.2000. The alleged occurrence takes place as per version of the complaint of the Opposite Party No.2 on 16.12.2001. The complaint is stated to have been lodged on 07.01.2002. The proceedings before the Labour Court, Ludhiana is stated to have been lodged on 27.08.2002 after about seven months and decided on 01.06.2005 as is evident from Annexure-9 to the affidavit filed in support of the Application under Section 482 Cr.P.C. If the statements

under Sections 200 and 202 Cr.P.C. along with allegations in the complaint are presumed to be true, the alleged obtaining of blank signatures by the applicants for the purpose of compromising the proceedings before the Labour Court, Ludhiana falls flat inasmuch as on the date of the incident, no proceedings before the Labour Court were pending. He submits that the filing of the complaint by the Opposite Party No.2 is nothing, but an abuse of the process of the Court and hence, the entire proceedings are liable to be quashed.

10. He further submits that no offence under Sections 386, 506 IPC is made out against the applicants and learned Magistrate has committed grave error in summoning the applicants to face the trial under the aforesaid sections.

11. The submissions of the learned counsel for the applicants may be summed up as under:

(1) No offence under Sections 386 and 506 IPC can be said to be made out from the allegations made under the complaint.

(2) The complainant has prima facie failed to demonstrate that the elements of Section 383 IPC are available to maintain the criminal complaint.

(3) The Courts below i.e. the learned Magistrate as also the Revisional Court failed in its duty to ascertain that all elements provided for in Section 383 IPC were available and attracted in order to maintain the criminal complaint.

12. In order to appreciate the submissions of the learned counsel for the applicants, it would be apt to consider the provisions of Sections 386 & 506 IPC. Section 386 IPC provides for punishment for extortion by putting a person in fear of death or grievous hurt. What would constitute extortion is provided under Section 383 of the Indian Penal Code, which reads as under:

*"**383. Extortion.** - Whoever intentionally puts any person in fear of any injury to that person, or to any other, and thereby dishonestly induces the person so put in fear to deliver to any person any property or valuable security, or anything signed or sealed which may be converted into a valuable security, commits "extortion"."*

13. A bare perusal of the aforementioned provision would demonstrate that the following ingredients would constitute the offence.

1. The accused must put any person in fear of injury to that person or any other person.

2. The putting of a person in such fear must be intentional.

3. The accused must thereby induce the person so put in fear to deliver to any person, any property, valuable security or anything signed or sealed which may be converted into a valuable security.

4. Such inducement must be done dishonestly.

14. Section 386 IPC reads as under:

"386. Extortion by putting a person in fear of death or grievous hurt. -

Whoever commits extortion by putting any person in fear of death or of grievous hurt to that person tor to any other, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

15. It would also be appropriate to understand the words "Valuable and Security" appearing in Section 383 IPC.

16. The term "Valuable as defined in Blacks' Law Dictionary means-Worth a good price, having financial as market value. The term "Security" as defined in the Dictionary means:-

*1. Collateral given or pledged to guarantee the fulfillment of an obligations; esp. the assurance that a creditor will be repaid (sus. With interest) any money or credit extended to a debtor. 2. A person who is bound by some type of guarantee; SURETY. 3. The stat of being secure, esp. from danger or attack. 4. An instrument that evidences the holder's ownership right to firm (e.g. a stock), the holder's creditor relationship with a firm or Government (e.g. a bond). *A security indicates an interest based on an investment in a common enterprise. Under an important statutory definition, a security is any interest or instrument relating to finances, including a note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in a profit sharing agreement, collateral trust certificate, reorganization certificate or subscription, transferable share, investment contract, voting trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase any of these things. A security also includes any put, call, straddle, option, or privilege on any security, certificate of deposit, group or index of securities, or any such device entered into on a national securities exchange, relating to foreign currency. 15 USCA {77b(1) Cf. SHARE(2); stock (4).*

17. Now, having regard to the facts and circumstances of the case, the Court is of the opinion that no case under Section 386 IPC can be said to be made out against the applicants from the allegations set out in the criminal complaint lodged against them. The reasons for the same are as under:-

(1) The blank papers allegedly got signed by the applicants from the complainant were never converted into a valuable security. The said blank papers were never used before the Presiding Officer, Labour Court, Ludhiana. There is no allegation in this regard in the complaint or in the statements recorded under Sections 200 and 202 Cr.P.C.

(2) The records reveal that the case before the Labour Court, Ludhiana is Reference No.1396 was got instituted on 27.08.2002 much after the lodging of the complaint on 07.01.2002. On the date of institution of the complainant i.e. on 07.01.2002 there was no proceedings pending before the Labour Court, Ludhiana, where the signed papers could be utilized. Moreover, the proceedings before the Labour Court, Ludhiana were not pressed on the statement of the authorized representative of the workman/ Opposite Party No.2 to the effect that he does not press the reference for the time being on account of technical error i.e. wrong name

of the opposite party and he reserved the right to file fresh dispute after rectifying the error. The reference was answered accordingly with observation that the workman will be at liberty to file fresh dispute after rectifying the error if he so desired vide order dated 02.06.2005 which has been filed on record by the applicants.

(3) The Opposite Party No.2/Complainant has miserably failed to demonstrate that ingredients of Section 383 IPC are available in the complaint so instituted so as to warrant criminal prosecution of the applicants under Section 386 IPC.

(4) The factum that after withdrawal of the case before the Labour Court, Ludhiana no fresh claim was instituted despite liberty having been granted to the Opposite Party No.2 goes a long way in establishing the falsity of the case against the applicants. The criminal complaint against the applicants can safely be said to have been instituted maliciously with ulterior motive and as such is frivolous, vexatious or oppressive and is an abuse of the process of the Court.

(5) The allegations in the complaint regarding criminal intimidation at the instance of the applicants have been made only to add colour to the complaint. The alleged occurrence of the incident appears to be improbable in the wake of the allegations set out in the complaint. No offence under Section 506 IPC can be said to be made out against the applicants.

19. The Apex Court in the case of ***State of Haryana and others Vs. Bhajan Lal and others,*** reported in ***1992 Supp (1) SCC 335*** held as under:-

"102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1)The Code of Criminal Procedure 1973; Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2)The Code of Criminal Procedure 1973; Section 155 (2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any

offence and make out a case against the accused.

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

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

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

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

20. The law laid down in the case of Bhajan Lal (Supra) was reiterated in the case of ***State of Andhra Pradesh Vs. Golconda Linga Swamy and another (2004) 6 SCC 522*** wherein the Apex Court has observed as under:-

"5. Exercise of power under Section 482 of the Code in a case of this nature is the exception and not the rule. The Section does not confer any new powers on the High Court. It only saves the inherent power which the Court possessed before the enactment of the Code. It envisages three circumstances under which the inherent jurisdiction may be exercised, namely, (i) to give effect to an order under the Code, (ii) to prevent abuse of the process of court, and (iii) to otherwise secure the ends of justice. It is neither possible nor desirable to lay down any inflexible rule which would govern the exercise of inherent jurisdiction. No legislative enactment dealing with procedure can provide for all cases that may possibly arise. Courts, therefore, have inherent powers apart from express provisions of law which are necessary for proper discharge of functions and duties imposed upon them by law. That is the doctrine which finds expression in the Section which merely recognizes and preserves inherent powers of the High Courts. All courts, whether civil or criminal possess, in the absence of any express provision, as inherent in their constitution, all such powers as are necessary to do the right and to undo a wrong in course of administration of justice on the principle quando lex aliquid alique concedit, conceditur et id sine quo res ipsa esse non potest (when the law gives a person anything it gives him that without which it cannot exist). While exercising powers under the Section, the Court does not function as a court of appeal or revision. Inherent jurisdiction under the Section though wide has 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. It is to be exercised ex debito justitiae to do real and substantial justice for the administration of which alone courts exist.

Authority of the court exists for advancement of justice and if any attempt is made to abuse that authority so as to produce injustice, the court has power to prevent such abuse. It would be an abuse of process of the court to allow any action which would result in injustice and prevent promotion of justice. In exercises of the powers court would be justified to quash any proceeding if it finds that initiation or continuance of it amounts to abuse of the process of court or quashing of these proceedings would otherwise serve the ends of justice. When no offence is disclosed by the complaint, the court may examine the question of fact. When a complaint is sought to be quashed, it is permissible to look into the materials to assess what the complainant has alleged and whether any offence is made out even if the allegations are accepted in toto.

6. In R.P. Kapur v. State of Punjab (AIR 1960 SC 866), this Court summarized some categories of cases where inherent power can and should be exercised to quash the proceedings:(AIR p.869, para 6).

(i) where it manifestly appears that there is a legal bar against the institution or continuance e.g. want of sanction;

(ii) where the allegations in the first information report or complaint taken at its face value and accepted in their entirety do not constitute the offence alleged;

(iii) where the allegations constitute an offence, but there is no legal evidence adduced or the evidence adduced clearly or manifestly fails to prove the charge.

7. In dealing with the last category, it is important to bear in mind the distinction between a case where there is no legal evidence or where there is evidence which is clearly inconsistent with the accusations made, and a case where there is legal evidence which, on appreciation, may or may not support the accusations. When exercising jurisdiction under Section 482 of the Code, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable appreciation of it accusation would not be sustained. That is the function of the trial Judge. Judicial process no doubt should not be an instrument of oppression, or, needless harassment. Court should be circumspect and judicious in exercising discretion and should take all relevant facts and circumstances into consideration before issuing process, lest it would be an instrument in the hands of a private complainant to unleash vendetta to harass any person needlessly. At the same time the Section is not an instrument handed over to an accused to short-circuit a prosecution and bring about its sudden death. The scope of exercise of power under Section 482 of the Code and the categories of cases where the High Court may exercise its power under it relating to cognizable offences to prevent abuse of process of any court or otherwise to secure the ends of justice were set out in some detail by this Court in State of Haryana v. Bhajan Lal (1992 Supp (1) SCC 335) A note of caution was, however, added that the power should be exercised sparingly and that too in rarest of rare cases. The illustrative categories indicated by this Court are as follows: (SCC pp.378-79 para 102)

"(1) Where the allegations made in the first information report or the complaint, even if they are taken at their

face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

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

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

(4) Where the allegations in the F.I.R. 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 S. 155(2) of the Code.

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

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

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

8. As noted above, the powers possessed by the High Court under Section 482 of the Code are very wide and the very plenitude of the power requires great caution in its exercise. Court must be careful to see that its decision in exercise of this power is based on sound principles. The inherent power should not be exercised to stifle a legitimate prosecution. High Court being the highest Court of a State should normally refrain from giving a prima facie decision in a case where the entire facts are incomplete and hazy, more so when the evidence has not been collected and produced before the Court and the issues involved, whether factual or legal, are of magnitude and cannot be seen in their true perspective without sufficient material. Of course, no hard and fast rule can be laid down in regard to cases in which the High Court will exercise its extraordinary jurisdiction of quashing the proceeding at any stage. (See : The Janata Dal etc. v. H.S. Chowdhary and others, etc. (AIR 1993 SC 892), Dr. Raghubir Saran v. State of Bihar and another (AIR 1964 SC 1)). It would not be proper for the High Court to analyse the case of the complainant in the light of all probabilities in order to determine whether a conviction would be sustainable and on such premises, arrive at a conclusion that the proceedings are to be quashed. It would be erroneous to assess the material before it and conclude that the complaint cannot be proceeded with. In proceeding instituted on complaint, exercise of the inherent powers to quash

the proceedings is called for only in a case where the complaint does not disclose any offence or is frivolous, vexatious or oppressive. If the allegations set out in the complaint do not constitute the offence of which cognizance has been taken by the Magistrate, it is open to the High Court to quash the same in exercise of the inherent powers under Section 482 of the Code. It is not, however, necessary that there should be meticulous analysis of the case before the trial to find out whether the case would end in conviction or acquittal. The complaint/F.I.R. has to be read as a whole. If it appears that on consideration of the allegations in the light of the statement made on oath of the complainant or disclosed in the F.I.R. that the ingredients of the offence or offences are disclosed and there is no material to show that the complaint/F.I.R. is mala fide, frivolous or vexatious, in that event there would be no justification for interference by the High Court. When an information is lodged at the police station and an offence is registered, then the mala fides of the informant would be of secondary importance. It is the material collected during the investigation and evidence led in Court which decides the fate of the accused person. The allegations of mala fides against the informant are of no consequence and cannot by itself be the basis for quashing the proceeding. (See : Mrs. Dhanalakshmi v. R. Prasanna Kumar and others (AIR 1990 SC 494), State of Bihar and another v. P. P. Sharma, I.A.S. and another (1992 Suppl (1) SCC 222), Rupan Deol Bajaj (Mrs.) and another v. Kanwar Pal Singh Gill and another (1995 (6) SCC 194), State of Kerala and others v. O.C. Kuttan and others (1999 (2) SCC 651), State of U.P. v. O. P. Sharma (1996 (7) SCC 705), Rashmi Kumar (Smt.) v. Mahesh Kumar Bhada (1997 (2) SCC 397), Satvinder Kaur v. State (Govt. of NCT of Delhi) and another (1999 (8) SCC 728), Rajesh Bajaj v. State NCT of Delhi and others AIR 1999 SC 1216), State of Karnataka v. M. Devendrappa and another (2002 (3) SCC 89)."

21. Yet again the Apex Court in the case of ***Zandu Pharmaceutical Works Ltd. Vs. Mohd. Sharaful Haque,*** reported in ***2005(1) SCC 122*** observed as under:-

"11. The scope of exercise of power under Section 482 of the Code and the categories of cases where the High Court may exercise its power under it relating to cognizable offences to prevent abuse of process of any court or otherwise to secure the ends of justice were set out in some detail by this Court in State of Haryana v. Bhajan Lal (1992 Supp (1) 335). A note of caution was, however, added that the power should be exercised sparingly and that too in rarest of rare cases. The illustrative categories indicated by this Court are as follows: (SCC pp.378-79, para 102)

"102(1) Where the allegations made in the first information report or the complaint, even if they are taken at their value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

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

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

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

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

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

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

As noted above, the powers possessed by the High Court under Section 482 of the Code are very wide and the very plenitude of the power requires great caution in its exercise. Court must be careful to see that its decision in exercise of this power is based on sound principles. The inherent power should not be exercised to stifle a legitimate prosecution. The High Court being the highest court of a State should normally refrain from giving a prima facie decision in a case where the entire facts are incomplete and hazy, more so when the evidence has not been collected and produced before the Court and the issues involved, whether factual or legal, are of magnitude and cannot be seen in their true perspective without sufficient material. Of course, no hard-and-fast rule can be laid down in regard to cases in which the High Court will exercise its extraordinary jurisdiction of quashing the proceeding at any stage. (See: Janata Dal v. H.S. Chowdhary (1992 (4) SCC 305), and Raghubir Saran (Dr.) v. State of Bihar (AIR 1964 SC 1). It would not be proper for the High Court to analyse the case of the complainant in the light of all probabilities in order to determine whether a conviction would be sustainable and on such premises arrive at a conclusion that the proceedings are to be quashed. It would be erroneous to assess the material before it and conclude that the complaint cannot be proceeded with. In a proceeding instituted on complaint, exercise of the inherent powers to quash the proceedings is called for only in a case where the complaint does not disclose any offence or is frivolous, vexatious or oppressive. If the allegations set out in the complaint do not constitute the offence of which cognizance has been taken by the Magistrate, it is open to the High Court to quash the same in exercise of the inherent powers under Section 482 of the Code. It is not, however, necessary that there should be meticulous analysis of the case before the trial to find out whether the case would end in conviction or acquittal. The complaint has to be read as a whole. If

it appears that on consideration of the allegations in the light of the statement made on oath of the complainant that the ingredients of the offence or offences are disclosed and there is no material to show that the complaint is mala fide, frivolous or vexatious, in that event there would be no justification for interference by the High Court. When an information is lodged at the police station and an offence is registered, then the mala fides of the informant would be of secondary importance. It is the material collected during the investigation and evidence led in court which decides the fate of the accused person. The allegations of mala fides against the informant are of no consequence and cannot by themselves be the basis for quashing the proceedings. (See: Dhanalakshmi vs. R. Prasanna Kumar (1990 Supp SCC 686), State of Bihar v. P.P. Sharma (AIR 1996 SC 309), Rupan Deol Bajaj v. Kanwar Pal Singh Gill (1995 (6) SCC 194), State of Kerala v. O.C. Kuttan (AIR 1999 SC 1044), State of U.P. v. O.P. Sharma (1996 (7) SCC 705), Rashmi Kumar v. Mahesh Kumar Bhada (1997 (2) SCC 397), Satvinder Kaur v. State (Govt. of NCT of Delhi) (AIR 1996 SC 2983) and Rajesh Bajaj v. State NCT of Delhi."

22. In view of the above, and for the reasons stated above, the Court is of the considered opinion that the continuation of the criminal proceedings against the applicants is an abuse of process of the Court and ends of justice requires that the said proceedings be quashed.

23. Consequently, invoking the inherent powers under Section 482 Cr.P.C., the entire criminal proceedings of Complaint Case No.4859 of 2002 (Deep Chand Vs. Bhupendra & others) (Renumbered as 91 of 2007) under Sections 506, 386 IPC, Police Station Turkpatti, District Kushinagar pending before the 2nd Additional Civil Judge (Jr. Division)/ Judicial magistrate, Kasaya, Kushinagar is hereby quashed.

24. The application stands **allowed.**

(2022)01ILR A447
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 10.01.2022

BEFORE

THE HON'BLE RAMESH SINHA, J.

Criminal Appeal No. 423 of 1995

Lot Prasad ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
I.B. Singh, Janardhan Singh

Counsel for the Respondent:
G.A., Kapil Kumar Bhargava, Neeraj Kumar Tiwari, S.K. Singh Kalhans, Shikha Srivastava, Vijat Kr. Tiwari

Criminal Law – Indian Penal Code, 1860 – Section 302/34 - Session Judge acquitted three co-accused-convicted Appellant u/s 302/34 IPC-Ante –mortem injuries shows injuries of laathi and danda have not been found on the person of deceased as alleged in the FIR-no attempt made by the informant & ors. family member-to save the deceased-cast doubt upon prosecution case-enmity on record-possibility of false implication cannot be ruled out. All other co-accused acquitted giving benefit of doubt-Appellant entitled for benefit of doubt.

Appeal allowed. (E-9)

(Delivered by Hon'ble Ramesh Sinha, J.)

(A)
BACKGROUND/INTRODUCTION

(1) Four persons, namely, **Sadhu Prasad, Talluqdar, Lot Prasad (the appellant), and Shital**, were tried by the Sessions Judge, Gonda in Sessions Trial No. 73 of 1992: State Vs. Sadhu Prasad and others, arising out of Case Crime No. 145 of 1990, under Section 302/34 of the Indian Penal Code, 1860 (hereinafter referred to as " I.P.C. "), Police Station Wazirganj, District Gonda.

(2) Vide judgment and order dated 20.07.1995, the Sessions Judge, Gonda acquitted accused Sadhu Prasad, Talluqdar and Shital from the charge of murder levelled against them, however, convicted the accused/appellant Lot Prasad under Section 302/34 I.P.C. and sentenced him to undergo life imprisonment. Against the aforesaid order of conviction and sentence dated 20.07.1995, accused/appellant **Lot Prasad** has filed the instant appeal before this Hon'ble High Court.

(3) The instant appeal then came up for hearing before a Division Bench comprising Hon'ble Satyendra Singh Chauhan and Hon'ble Virendra Kumar-II, J.J. (as they then were). After hearing of the instant appeal, vide separate judgment and order dated 09.08.2017, Hon'ble Satyendra Singh Chauhan, J (as he then was) was of the opinion that appellant Lot Prasad was liable to be acquitted from the charges levelled against him under Section 302/34 I.P.C. by giving him the benefit of doubt and, as such allowed the criminal appeal, and set-aside the judgment and order dated 20.07.1995 passed by the Sessions Judge, Gonda and acquitted him from the charges levelled against him, whereas Hon'ble Virendra Kumar-II, J. (as he then was) was of the opinion that the appellant/Lot Prasad was rightly convicted for the offence under Section 302 I.P.C., however, since co-accused persons were acquitted by the trial Court for offence punishable under Section 302 read with Section 34 I.P.C., hence mention of Section 34 in the impugned judgment is not so material and accordingly, dismissed the instant appeal.

(4) In view of aforesaid difference of opinion, the Division Bench has formulated following points of difference vide separate order dated 09.08.2017 and directed the office to place the record of the instant criminal appeal before Hon'ble the Chief Justice under Chapter VIII Rule 3 of the Allahabad High Court Rules for nomination of Bench :-

"(1) Whether the witnesses were in a position to identify the accused persons in the moon light from the distance as indicated by them in their statements.

(2) Whether the incident took place at the alleged time in view of the fact that pasty material was found in the stomach, which could not have been possible at 5:30 a.m. in the morning.

(3) Whether the conduct of the accused as contemplated under Section 8 of the Evidence Act requires consideration.

(4) Whether the prosecution has come out with true version of the incident.

(5) Whether the enmity on record was enough to implicate the appellant in accordance with law.

(6) Whether the appellant could have committed the offence single handedly.

(7) Whether the injuries tally with the manner of assault as alleged by the prosecution.

(8) Whether the case was improved after the postmortem report was received.

(9) Whether the initial case setup in the FIR was wholly changed in the statement recorded under Section 161 Cr.P.C. and in the Court.

(10) Whether PW-1 and PW-4 have stated the correct facts and whether there is contradiction in their statements."

(5) Subsequently, the aforesaid Division Bench of this Court has recalled the aforesaid points of consideration vide order dated 30.01.2018 in the manner as stated hereinbelow :-

"Heard learned counsel for the appellant and learned AGA.

Attention of the Court has been drawn towards Chapter VIII Rule 3 of the Rules of the Court and Section 392 of Cr.P.C.

We have gone through both the provisions and we find that the portion of the order dated 09.08.2017 by means of which, points for consideration were framed, requires to be recalled. Accordingly, the said portion of the order dated 09.08.2017, indicating the points for consideration is recalled. The order passed on merit will remain as it is.

In view of difference of opinion between the members of the Bench, let the papers of this appeal be placed before Hon'ble the Chief Justice for nomination of Bench."

(6) The record further shows that vide order dated 06.03.2018, the Hon'ble the Chief Justice nominated the instant appeal to Hon'ble Vikram Nath, J. (as he then was). Thereafter, on appointment of Hon'ble Vikram Nath, J. as Chief Justice of Gujrat High Court, Hon'ble the Chief Justice, vide order dated 16.09.2019, nominated the instant criminal appeal to Hon'ble Rekha Dikshit, J. (as she then was). After retirement of Hon'ble Rekha Dikshit, J., Hon'ble the Acting Chief Justice, vide order dated 19.08.2021, nominated the instant appeal to me. In this backdrop, the instant appeal has now been placed before this Court under Section 392 of the Code of Criminal Procedure, 1973 (in short, **"Cr.P.C**.").

(7) As stated here-in-above, the instant criminal appeal has been filed by the accused/appellant, **Lot Prasad**, against the judgment and order dated 20.07.1995 passed by the Sessions Judge, Gonda in Sessions Trial No. 73 of 1992, convicting him for the offence under Section 302 read with Section 34 I.P.C. and sentencing him to undergo a rigorous imprisonment for life.

(B) FACTS

(8) Shorn off unnecessary details the facts of the case are as under :-

The informant Jagdish (P.W.1) son of Ram Tej, is the resident of Niyamatpur. A civil case was going-on

between the informant Jagdish (P.W.1) and co-villager Sadhu Prasad Pandey (accused) in respect of a land, which was lying barren. A day before yesterday from the date of incident i.e. on 30.11.1990, the said land was got ploughed by a tractor by the brother of the informant, namely, Jai Prakash (deceased), whereupon Sadhu Prasad (accused) son of Ram Bihari, resident of Niyamatpur stopped him from ploughing the field and after threatening him, went away from there.

(9) In the morning of 01.11.1990, at about 5:30 a.m., accused Sadhu Prasad, Talluqdar, accused/appellant Lot Prasad son of Ram Bihari and Sheetal (accused) son of Bachhu, resident of the same village, armed with lathi and danda, came at the door of the informant Jagdish (P.W.1) and started assaulting the brother of informant, namely, Jay Prakash (deceased) and while assaulting him, he was dragged to the groove. On hearing the alarm raised by the brother of the informant Jay Prakash (deceased), informant Jagdish (P.W.1) and his brother Ambika and his family members ran to save him, whereupon the accused persons ran away. The informant Jagdish (P.W.1) saw his brother Jay Prakash (deceased) lying injured. He took his brother Jay Prakash (deceased) to Wazeerganj Hospital, however, on the way, his brother Jay Prakash (deceased) died. P.W.1 Jagdish (informant) has further stated that apart from him, other persons of the village, namely, Hira son of Aafat, Ram Deen son of Shankar and other persons also saw the accused persons assaulting his brother Jay Prakash (deceased).

(10) The informant P.W.1-Jagdish himself wrote down the F.I.R. (Ext. Ka.1), put his signature thereron and along with it reached to the Police Station Wazeerganj, District Gonda at a distance of 9 Km. and at about 12:15 p.m on the date of incident i.e. on 01.11.1990 handed over the handwritten report (Ext. Ka 1) to P.W.3-H.C. Ram Narain Yadav.

(11) The evidence of P.W.3-H.C. Ram Narain Yadav shows that on 01.11.1990, he was posted as Head Moharrir at Police Station Wazeerganj, Gonda and at about 12:15 p.m., informant Jagdish (P.W.1) had lodged the written report of the case, on the basis of which, he prepared a chik F.I.R. (Ext. Ka.3) and made its entry in the general diary and registered a case, bearing Case Crime No. 145 of 1990, under Section 302/34 I.P.C against accused persons Sadhu Prasad, Taluqdar, Lot Prasad and Shitla and the entry made in the general diary is Exhibit Ka.4.

In cross-examination, P.W.3-H.C. Ram Narain Yadav deposed before the trial Court that police station Wazeerganj is situated 2.7 kms away from Gonda in Gonda-Faizabad State Highway and from there, 24 hours conveyance is available and truck, bus etc. are plying. He had sent special report of the case at about 13:30 hours through Constable Mahendra Yadav by making an entry of it in GD Report No. 23 and except this, he had not given any work to Constable Mahendra Yadav. However, Constable Mahendra Yadav did not return on 01.11.1990 after serving the special report.. He further deposed that he could not say that Constable Mahendra Yadav returned on 02.11.1990 at 18:05 hours by the GD Entry No. 33 because the G.D. of 02.11.1990 was not with him. He denied the suggestion that special report was sent in the morning of 02.11.1990 and to strengthen the case, he showed the departure of Constable Mahendra Yadav on 01.11.1990. He further deposed that the

corpse of the deceased Jay Prakash was not brought to the police station. He denied the suggestion that the corpse of the deceased Jay Prakash was lying, whole night at the police station and also all the documents of the case were belatedly prepared on 1/2.11.90 and the same was detained and also the F.I.R. was also made ante-time.

(12) The investigation of the case was conducted by P.W.5-S.I. Shri Mahendra Nath Sharma, who, in his examination-in-chief, has deposed before the trial Court that he was posted as Station House Officer, Wazeerganj between 01.11.1990 to 15.11.1990 and in his presence, the written report of the case was lodged by P.W.1-Jagdish on 01.11.1990 at about 12:15 p.m. at police station. After lodging the case, he started to conduct the investigation on the date itself and on the very same day, he, after taking police force, reached at the place of occurrence at 13:50 hours and prepared panchayatnama of the dead body of the deceased Jai Prakash (Ext. Ka. 2) , which was lying beneath the trees of Aamla and Imali situated nearby the groove of the house of the deceased at Niyamatpur. Thereafter, the deadbody of the deceased Jai Prakash was sealed and prepared photo lash (Ext. Ka.6), challan lash (Ext. Ka. 5), letters to the authorities (Ex-Ka-7 to Ka-8) and memo of recovery (Ext. Ka.9) for conducting postmortem of the dead body and handed over the dead body of the deceased Jay Prakash and other documents to Constable Ram Khelawan, with a direction to deliver it to mortuary, doctor and police line. Thereafter, he recorded the statement of informant P.W.1-Jagdish and on his pointing out, he inspected the place of occurrence and prepared the site-plan (Ext. Ka.10). He further deposed that blood stained was found on the earth near the dead body, from where he collected blood stained earth and empty earth and kept it in separate containers under recovery memo (Ext. Ka. 11).

(13) P.W.5 S.I. Mahendra Nath Sharma has further deposed that on the date of incident i.e. on 01.11.1990, he also searched the accused persons but he did not get them. He stayed at the place of occurrence in the night. On 02.11.1990, he recorded the statements of family members of the informant Jagish Prasad, namely, Ambika, Poonam and other persons. He also searched the accused persons but he did not get them. He was staying at the place of occurrence. On 03.11.1990, the Circle Officer also came at the place of occurrence and inspected the place of occurrence. On 03.11.1990, he arrested accused Taluqdar and took him to jail. On 04.11.1990, he recorded the statements of other witnesses of the incident. He also searched other accused persons but they were all absconding from their respective houses. On 07.11.1990, he came to know that accused Shital had surrendered before the Court. Similarly, he came to know that accused/appellant Lot Prasad had surrendered before the Court on 12.11.1990 and accused Sadhu surrendered before the Court on 15.11.1990. On 15.11.1990, after completion of investigation, he submitted charge-sheet (Ext. Ka. 12) against the accused persons.

In cross-examination, P.W.5 S.I. Mahendra Nath Shrama has deposed that maximum witnesses of the case belong to the house of deceased and on 01.11.1990, when he reached on the spot, the witnesses were in the village. On 01.11.1990, he did not record the statement of other witnesses except the informant Jagdish Prasad

(P.W.1) because they were all in grief because of the murder in their family. But as without recording the statement of the informant, no action was possible, therefore, his statement was recorded immediately after reaching there. He denied the suggestion that on 01.11.1990, he did not record the statement of any witnesses and on 02.11.1990, after receipt of post-mortem report, he wrote the statement of the witnesses on its own.

(14) P.W.5 SI Mahendra Nath Sharma has further deposed that he did not find any means to transport the dead body, therefore, deadbody was sent from the spot by loading on cot. He further deposed that he could not tell that who else had gone with the corpse other than Constable Ram Khilawan. He had a Government Jeep at the spot but as the dead body could not be transported in it, therefore, he could not use it for transporting the corpse. He further deposed that he could not tell whether Constable Ram Khilawan took the deadbody from the cot to where and whether he had used any conveyance to take the deadbody to Gonda. There is no entry in the case diary that the deadbody was transported by cot from the spot. He denied the suggestion that the deadbody of the deceased was transported to mortuary with undue delay and to hide this, it is said that the deadbody of the deceased was taken by cot from the spot. He further stated that he did not write as to when the deadbody reached the mortuary. He did not record the statement of Constable Ram Khilawan during investigation. After returning, Constable Ram Khilawan did not give information that on account of some unavoidable circumstances, the deadbody of the deceased had reached the mortuary with delay. He denied the suggestion that to hide the delay in reaching the deadbody of the deceased to the mortuary, he did not record the statement of Ram Khilawan. He denied the suggestion that on 01.11.1990, the deadbody of the deceased was brought from the village to police station Wajirganj and the deadbody was lying at police station in the night and it was sent from police station to mortuary in the morning and in the meantime, F.I.R. and other documents were prepared. He further stated that he did not record the statement of people near the place of occurrence, namely, Wayu, Dayaram and Mohan Katiram. He further stated that he found the mark of dragging of the deceased from the door of the deceased to the place of occurrence at the door of deceased but it could not find at the grove. He did not make any endorsement to this effect in the case diary. He did not find any blood stain at the passage of dragging. He did not find the blood stain at the place where the dead body was found.

(15) Going backwards, the post-mortem on the dead body of deceased Jai Prakash was conducted on 02.11.1990, at 4:05 p.m. by Dr. P.K. Srivastava (P.W. 6), who, found on his person ante-mortem injuries, enumerated hereinafter :--

"1. Contused swelling on the Rt side of forehead extending upto Rt. temporal region in an area of 11 cm x 8 cm having few abrasions just above the Rt ear.

2. Contusion on the left upper lid in an area of 4½ cm x 2 ½ cm.

3. Swelling with deformity on the left forearm just above the left wrist, Radius and ulna fractured on the left side.

4. Deep contusion present on the left of the side

chest, lower part, in an area of 5 cm x 5 cm.

The cause of death spelt out in the autopsy report of the deceased person was shock and haemorrhage as a result of ante-mortem injuries which he had suffered.

(16) It is significant to mention that in his deposition before the trial Court, Dr. P.K. Srivastava (P.W. 6) has reiterated the said cause of death and also stated therein that on 02.11.1990, he was posted as Medical Officer at District Hospital, Gonda and on the date itself, at about 04:05 p.m., he conducted the post-mortem of the deceased Jai Prakash. The body of the deceased was sent by Station House Officer, Police Station Wajirganj, district Gonda, which was identified by C.P. 438 H.C. Ram Khilawan, Police Station Wajirganj, District Gonda. He further deposed that at that time, blood-soaked fluid was flowing from the nose of the deceased. On the internal examination of the deceased, it was found that ribs 4, 5, 6 and 7 of the left side of the chest was broken; pleura and left lung were torn; ½ litre of blood was present in thoracic cavity; deep contusion was present on the head; right side of temporal bone was broken; the brain was torn and congested; foods in the gross of six ounces of pulp was in the stomach; some small pulp was present in the small intestine; spleen and kidney was pale; and galbladder was blank. He also deposed that ante-mortem injuries sustained by the deceased were sufficient in the ordinary course to cause his death. Injury No.4 could not be attributed to mounting pressure upon chest of deceased and hitting him by lathi and dumb. Injuries no. 1, 2 and 3 could be attributable to lathi. It is possible that the deceased died six hours after taking food and the deceased could have taken slight food. The deceased could have died on 01.11.1990 at 09:10 a.m. It is not possible to tell the exact time of death of the deceased.

In his cross-examination, Dr. P.K. Srivastava (P.W. 6) has stated that he received the document relating to the post-mortem as well as copy of the F.I.R. on 02.11.1990 at 01:00 p.m. It is not necessary to have weapon for causing the injury no.4. He further states that injury no.4 could be attributable by pressing knee. Except injury no.2, all the remaining injuries are dangerous to life. Injuries no. 2 and 4 could be attributable by falling big wooden boat. If the deceased have been transported after the injuries, it is possible to oozing blood from nose.

(17) The case was committed to the Court of Sessions in the usual manner where the appellant and other accused persons were charged on counts mentioned in paragraph 1. They pleaded not guilty to the charges and claimed to be tried. Their defence was of denial.

(18) During trial, in all, the prosecution examined seven witnesses i.e. informant Jagdish Prasad (P.W. 1), who is the brother of the deceased and lodged F.I.R. of the incident, P.W.2 Heera, who is the independent witness, P.W.3-Constable Ram Narain, who is the writer of the chik F.I.R., P.W.4 Kamlesh alias Poonam, who is the daughter of the informant and eye-witness, P.W.5 S.I. Mahendra Nath Sharma, who is the Investigating Officer of the case, P.W.6 Dr. P.K. Srivastava, who has conducted the post-mortem of the deceased Jai Prakash and P.W.7 Constable

Ram Khilawan, who had taken the deadbody of the deceased for post-mortam. From the side of defence, five witnesses were examined i.e. D.W.1 Aadalat, who is the owner of the tractor, D.W.2 Shree and D.W.3-Gayan Singh, who is the co-villager, D.W.4- Lalit Prasad, who is the Petition Clerk in the officer of District Magistrate, Gonda and D.W.5 Jagnath, who is the co-villager.

(19) I would first like to deal with the evidence of informant Jagdish Prasad (P.W. 1). P.W.1 Jagdish Prasad, in his examination-in-chief, has narrated the facts enumerated in the F.I.R. and further stated that deceased Jai Prakash was his younger brother. Ram Lagan Pandey was the elder brother of his father, who died on 16.06.1978. Ram Lagan Pandey did not marry. In village Niyamatpur, Ram Lagan Pandey was having the land of 01 acre 78 dismil, which was situated 15-20 paces of eastern side of his house. After the death of Ram Lagan Pandey, his father Ram Tej has filed a mutation case for mutation of the land belonging to late Ram Lagan Pandey in his favour in the year 1978, against which accused Sadhu Prasad has filed a caveat to the effect that he had purchased the land from Ram Lagan. On this caveat, the mutation case of his father was rejected by the Tehsildar and mutation of the aforesaid land was made in favour of Sadhoo (accused), against which, his father had filed an appeal before the S.D.M., Lucknow and at the time of murder of Jai Prakash (deceased), the said appeal was going on. He further deposed that his father Ram Tej had also filed/claimed in respect of mutation of Sadhu (accused) before the Munsif in the year 1978 but as Sadhu (accused) was not present before the Munsif, hence the said case was decreed *ex parte*. After 4-5 months, Sadhu (accused) and others filed recall application, which was rejected in the year 1979. In the meantime, his father Ram Tej died. Thereafter, he and his brothers had filed applications for substitution in the appeal as well as in Munsifi, which was allowed. Thereafter, Sadhu (accused) and others had raised objection that the case would not be maintainable before the Munsif but the Munsif did not pay any heed to the objection, however, the revision or appeal filed by Sadhu (accused) was allowed, against which, he and others went to High Court, where the litigation was going on.

(20) P.W.1-Jagdish has further deposed that his brother Jai Prakash, prior to two days ago from the date of murder, ploughed the land in dispute by tractor and at that time, Sadhu (accused) and Lot Prasad (accused) came and asked his brother Jai Prakash not to plough the land in dispute and told him that forcefully farming the land is not a good thing. On this objection, the amount of land that was left to be ploughed was not ploughed and the tractor was taken away by the owner of the tractor. He further stated that accused Shital was the witness of the said mutation which was stated to be made through Ram Lagan Pandey by Sadhu (accused). He further deposed before the trial Court that on 01.11.1990, at about 5:30 a.m., he was sleeping inside his house. His brother Jai Prakash (deceased) was sleeping in the thatch in front of his house. On hearing the noise, he got from his sleep and he recognized the voice of Jai Prakash and came outside the house and saw that four accused Sadhu, Taluqdar, Lot Prasad (the appellant) and Sheetal were assaulting his brother Jai Prakash (deceased) with fists, lathi and danda and further by assaulting him, they dragged his brother Jai Prakash (deceased) towards East-South direction.

He further deposed that where they brought his brother, was the barren groove. On his hue and cry and on gathering of witnesses, the accused slammed his brother Jai Prakash under a tree and accused Lot Prasad climbed on the chest of Jai Prakash (deceased) and assaulted him with fists and lathi. He further deposed that Shital (accused) gave a lathi blow upon Jai Prakash on his wrist and other two accused were standing there and when persons gathered there, then, accused fled away from the scene of occurrence assuming that Jai Prakash had died. Thereafter, he went nearer to Jai Prakash and saw that blood was oozing out from his nose and mouth, which was on earth and wrist of the deceased was broken. He also stated that on hearing hue and cry, apart from him, the wife of the deceased Shakuntla Devi, his wife Gangotri Devi, his daughters Poonam, his mother and his brother Ambika also came out from the house. He stated that Ambika had now died. In addition to him, other villagers, namely, Hari, Ramdin, Ram Sahaj, Ram Ujagar and others also came there. He further stated that the place where his brother was murdered by slamming was 5-10 steps away from his house. He stated that after seeing his brother Jai Prakash in injured condition, he was taken away by him on charpai (bed) to Wazirganj Hospital and while they were taking away Jai Prakash and had reached one kilometre in South direction from his house, his brother succumbed to injuries near the village Niyamatpur. He also stated that after the death of his brother Jai Prakash, they had taken the body of the deceased Jai Prakash to his house and after leaving the deadbody of Jai Prakash at his house, he went to lodge the report at Police Station Wazirganj, where he submitted the written report (Ext. Ka.1). He further stated that he had given the written report and copy of the chik report was taken by him. He further stated that at the police station, he also met the Inspector, who took him at his house by Jeep. At his house, the Inspector saw the deadbody of his brother and prepared pachayatnama in the presence of witnesses. He also got the Inspector inspected the place of occurrence.

(21) P.W.1-Jagdish, in his cross-examination, has deposed before the trial Court that Ram Lagan was not his real uncle but he was the cousin of his father. Saliq had two sons, namely, Jag Prasad and Prithi. The son of Jag Prasad was Ram Lagan Pandey, whereas the son of Prithi was his father Ram Tej. The father of accused is Bariyu, however, he did not know the name of the father of Bariyu. He stated that he is a Panchayat Adhikari and during the day when the incident happened, he was posted in Belsar Block, which is situated of a distance of 17 Kms. from Gonda Headquarter to the road of Gonda-Tarabganj road. He denied the suggestion that the death of Ram Lagan Pandey was wrongly entered as 16.06.1978 by exerting pressure upon the Panchayat Adhikari of Wazirganj. He also deposed that the eye sight of his brother Ambika was weak and was suffering from night-blindness, however, he listened the sound very well. In the morning and the night of the date of the incident, Jai Prakash (deceased) and Ambika were sleeping outside the house in a thatch. When he came out from his house on listening the noise, there was no daylight but there was moonlight and the light was enough. When his eye fell on Jay Prakash (deceased), he saw that the accused persons by holding hands of him were brought him. At that time, he was at the distance of 20-25 paces. He further stated

that accused had brought his brother Jay Prakash (deceased) by pushing and beating him but his brother Jay Prakash (deceased) was not brought by dragging. He further deposed that in the report (Ext. Ka.1), he wrote that his brother was brought by the accused persons by dragging, which means that he was brought by pushing. He further stated that to drag and hold the cksjk is called dragging. If any person has been brought forcefully, it is called dragging. He further deposed that when the accused persons brought his brother towards grove, then, he has no courage to immediately go behind them but he stood in his door and tried to gather people together by making noise by running a little bit by hiding himself. After 3-4 minutes when Hari and other persons were gathered there, then, he went towards the direction of accused persons. He and other persons of his village went towards accused by empty handed and no lathi and danda was in their hands. When they reached near to Jai Prakash, he was lying on the ground and he saw the accused persons were running from there. He also stated that the place where Jai Prakash was brought by the accused persons, was seen from his door from where he raised alarm when accused persons brought his brother. He further stated that he had not written in the Ext. Ka. 1 separately that any accused climbed on the chest of Jai Prakash and pressed. He had also not written in the report that accused Shital assaulted with danda and hand of Jai Prakash was broken. He denied that he had not seen the incident and also the murder of his brother Jai Prakash was came in the knowledge of him on 01.11.1990 in the afternoon. He further stated that he brought his brother in injured state by keeping him on cot for Wazirganj Hospital from the place of occurrence but he did not remember as to whether any bedsheet or bed was laid on the cot or not. When Jai Prakash was put on the cot, then, blood from his nose and mouth was stopped and Jai Prakash died when they reached Virahmatpur. He also stated that when they brought Jai Prakash by putting him on cot for Wazirganj, none of the villager were found by them. He also stated that he brought Jai Prakash from Niyamatpur at about 06:00 A.M. and reached at Virahmatpur at 7:00-7:15 a.m. He further stated that the deadbody of the Jai Prakash was brought from Virahmatpur to Niyamatpur because his relatives would see him as if they brought the deadbody of Jai Prakash to Police Station, it was sent for post-mortem and it was not given to him.

(22) P.W.1, in his cross-examination, has further stated that at the time when Jai Prakash was brought from Niyamatpur, they were five persons. Because his brother was no more, therefore, on account of sorrow, they did not think that one of the person would go to lodge the report. He further deposed that they returned on bringing the deadbody of his brother at Niyamatpur at 07:30 p.m. and thereafter, 4-5 minute, he stayed at Niyamatpur and thereafter, he proceeded for police station. In the meanwhile, he wrote the report for giving it to the police. He went from Niyamatpur to police station by foot. The distance from Niyamatpur to police station is 8-9 kms. and he did not go with the paved road because he apprehended that accused persons would not met him in the way of paved road and he went through village by foot. On account of fear, he went along by hiding himself and he did not carry any weapon for his safety. About four hours was taken by him to reach Police Station Wazirganj because he used to stop from place to place and look ahead that as to whether the accused or his companion

was there in the way or not. On account of fear, he did not think appropriate to take anyone along with him because peoples told that if he consume the time, then, the accused would falsely implicate him in the murder. He reached at the police station at about 10:15 and at that time, Inspector was not present there. However, when the report was lodged and copy of the chik FIR was given to him, then, the Inspector reached at the police station and met him. At 10:15 a.m., the Inspector talked to him and thereafter, Inspector brought him through Jeep at the place of occurrence. He further stated that the Inspector did not record his statement at the police station. He had reached at Niyamapur at about one hour or forty-five minutes because the Inspector, in the way, stopped in some places and made enquiry from the peoples in respect of this murder. They were reaching at Niyamatpur at about 02:00 p.m.

(23) P.W.2-Hira, who is the resident of the deceased Jai Prakash and informant, deposed before the trial Court that Jai Prakash was his village and he known to him. The murder took place in the grove situated outskirt of the village and near to the house of Jagdish. The murder took place at about 05:00-05:30 a.m. His house is situated about 60 paces in the western direction from the house of Jagdish. Alarm was raised and thereafter, he and other persons reached there by running. He saw that Jai Prakash was lying in the groove in a unconscious and injured state. He did not see anyone to assault Jai Prakash. He was known to accused Sadhu, Taluqdar, Lot and Shital and they were neither present there nor he saw them running.

(24) P.W.2-Hari was declared, at this stage, hostile by the prosecution and the trial Court permitted the learned D.G.C. (Criminal) to cross-examine him. In his cross-examination, P.W.2-Hari has stated that the Inspector had not made any enquiry in respect of the incident. The trial Court has recorded that on scribing the statement recorded by the Inspector under Section 161 Cr.P.C., P.W.2-Hari stated that he had not given such statement and further he did not tell as to how the Inspector had written this. He further deposed that when Jagdish was brought to Wazirganj, Jai Prakash was alive and he was also along with him and while reaching Varahmatpur, Jai Prakash died. Thereafter, they brought him to Niyamatpur. He also deposed that when he reached at the place of occurrence, the wife of Jagdish, his daughter, mother of Jagdish and Jagdish were present there. He further stated that he did not know as to whether prior to two days ago, Jai Prakash ploughed the land in dispute by tractor or not. He also stated that on account of attack, blood was oozing from the nose and mouth of Jai Prakash and wrist of the hand was broken. After the incident, accused persons had not seen in the village but they were coming in the interregnum period. He further stated that it is wrong to say that on account of fear or pressure of the accused, he has not stated the correct facts against the accused.

(25) P.W.2-Hari, in cross-examination made on behalf of the accused, has further stated that when alarm was raised in the morning and when other persons known, then, he also known the incident. When the alarm was raised, light was not proper but person from 10-15 steps could be recognized. The blood was oozing from the injuries of Jai Prakash and when Jai Prakash was laid on the cot, blood was also oozing from him. He also deposed that they were brought the deadbody of the deceased from Viramatpur.

(26) P.W.4-Kamlesh alias Poonam, who is the daughter of the informant Jagdish and niece of the deceased Jai Prakash, has deposed that in the month of November, 1990, at 05:30 p.m., she was not married and she was residing with her father Jagdish. On the date of the incident, when he was sleeping, and on listening the noise of her uncle Ambika Prasad coming outside her house, she woke up and came outside the house along with her family members and saw that accused persons Sadhu, Lot, Talluq and Shital brought Jai Prakash by holding, pushing and dragging towards West-South direction in the grove and slammed him beneath the mango tree planted in eastern direction of the grove and assaulted him with lathi and knife of lathi. Accused Lot Prasad, while climbing upon the chest of Jai Prakash, pressed his neck and also assaulted him. Apart from her, her other family members, her mother Gangotri Devi, her father Jagdish Prasad, her aunt Sakuntala wife of Jai Prakash and her grand-mother were also coming out from the house on the alarm. All the family members, while raising alarm, ran in order to save Jai Prakash and then, accused Sadhu and others ran towards Southern direction. Thereafter, they reached near to Jai Prakash and saw that Jai Prakash was breathing lightly; slight blood was oozing out from his nose and he was moaning. Thereafter, the death of Jai Prakash was caused after half an hour. She further stated that at the time of the incident, accused persons were carrying lathi and two persons were carrying danda.

In cross-examination, P.W.4-Kamlesh alias Poonam has stated that they were three sisters and she is elder daughter. Her marriage was solemnized on 24.05.1994 and other two sisters are unmarried and younger to him. She deposed that Jai Prakash and Ambika used to sleep outside the house and on the said date also, they were sleeping outside the house. Because of winter season, other family members were sleeping inside the house. The door was closed inside the house. Her father Jagdish told him that look whose alarm was coming, then, she listened that the noise was of Ambika and when they came outside the house, there was no daylight but there was moonlight. The moon was in the sky but he could not say as to whether moon was full or half but light was enough. She further stated that when they came outside the house, accused persons brought Jai Prakash about 20 steps far from them. They were not stopping there on account of fear but on raising alarm, they ran towards accused persons. Her father did not carry any lathi or weapon. Her father was not getting time to save Jai Prakash from the accused persons. As soon as they reached near Jai Prakash, accused persons, while assaulting Jai Prakash, ran away 10-5 steps from them. She has stated that at the time of the incident, Lot Prasad, while putting both the knee on the chest of Jai Prakash, pressed him frequently and beaten only on his mouth. She saw from 10-12 steps that Lot Prasad, while climbing on the chest of Jai Prakash, pressed and at that time, she was reaching towards Jai Prakash.

(27) D.W.1-Adalat, in his examination-in-chief, has stated that he had not ploughed the chak with his tractor as alleged by the prosecution. D.W.2-Shri has stated that Jai Prakash was lying unconscious when there was still one hour in the dawn, whereas D.W.3-Gyan Singh to corroborate D.W.2 and D.W.4 Lalit Prasad, a petition clerk of the Collectorate, Gonda to prove special report and D.W.5 Jagannath Prasad to state that at about 6

O'clock in the morning when the witness was going to each himself, the deceased was found lying unconscious in the grove beneath the mango tree and at that time, accused Shital, Shri, Daya Ram and others were present there.

(28) The learned trial Judge, after hearing the learned counsel for the parties and going through the record, convicted and sentenced the appellant Lot Prasad in the manner stated in paragraph-1 and acquitted the other accused persons, namely, Sadhu Prasad, Talluqdar, Shital from the charges levelled against them vide judgment and order dated 20.07.1995 while giving them benefit of doubt.

(29) It is pertinent to mention that the State of U.P. has not challenged the acquittal of accused persons, namely, Sadhu Prasad, Talluqdar and Shital by preferring an appeal under Section 378(1), Cr. P.C.

(30) As mentioned earlier, aggrieved by his conviction and sentence, appellant Lot Prasad preferred the instant criminal appeal before this Court.

(C) APPELLANT'S CASE

(31) On behalf of the convict/appellant, broadly the submissions of Sri I.B. Singh, learned Senior Advocate assisted by Sri Ishan Baghel, learned counsel for the appellant, while challenging the impugned judgment and order dated 20.07.1995, are as under :-

I. There were serious contradiction of the statements of P.W.1 and P.W.4 relating to manner of assault and the initial case as disclosed in the F.I.R. was wholly changed in the statement recorded under Section 161 Cr.P.C. and subsequently improved by the witnesses. In the F.I.R., it was stated by the informant Jagdish Prasad (P.W.1) that the deceased Jai Prakash was assaulted with Lathi and danda and thereafter he was taken towards the groove, whereas in the statement recorded under Section 161 Cr.P.C., P.W.1-Jagdish Prasad had stated that the deceased Jai Prakash was dragged to the groove, where the appellant Lot Prasad sat on his chest and pressed it and subsequently slapping him on his chin. This statement was subsequently improved by P.W.1-Jagdish Prasad, who, in his statement before the trial Court, has deposed that on hearing the noise, he came out of the house and, thereafter, his wife, wife of the deceased, his brother and his daughter came out of the house. Thus, the prosecution case has not been consistent and there has been material improvement as against the initial case setup in the F.I.R.

II. P.W.4-Kamlesh alias Punam, who is the daughter of the informant P.W.1-Jagdish Prasad, has deposed before the trial Court that the deceased Jai Prakash and Ambika were sleeping outside the house in a thatch and her grand-father Ambika raised the alarm, upon which her father Jagdish Prasad (P.W.1) asked her to see what was going on outside the house and thereafter, she came out of the house along with family members. Thus, there is clear cut contradiction in the statements of P.W.1 and P.W.4 and the prosecution case is not consistent in this regard.

III. Neither in the statement under Section 161 Cr.P.C. nor in the F.I.R., the fact that the appellant-Lot Prasad assaulted the deceased Jai Prakash while sitting on his chest, by lathi end (hura) on his chest

under the mango tree, was mentioned by the prosecution, however, after the receipt of post-mortem report, wherein the injury was found otherwise then, it has been disclosed in the F.I.R. If the witnesses seen the occurrence, they would have certainly stated from the very beginning that the appellant sat on the chest of the deceased under the mango tree and assaulted him with lathi and its end (hura).

IV. There is doubt in respect of the conduct of P.W.1 and P.W.4 in recognizing the accused persons. P.W.1, in his examination-in-chief, has stated that he was sleeping inside his house on the date of the incident i.e. on 01.11.1990 at 05:30 a.m. and in his cross-examination, he has stated that when he came out of his house after hearing noise/alarm, dawn was not prevailing and it was a moon light night and there was enough light on account of moon light and at that time, he was at a distance of 20-25 paces. P.W.4, in her statement before the trial Court, has reiterated the aforesaid fact and has stated that it was 5:30 a.m. and in the cross-examination, she has admitted the fact that there was moon light and the dawn was not prevailing. According to him, the evidence of P.W.4 shows that she had conveyed the happening to her father and thereafter her father came out from house and saw the incident. Submission is that if the father was in sleepy condition, then, it will take some time to come to normal sense and in the moon light, it was not possible for the witnesses to have recognized the accused persons. Furthermore, both P.W.1 and P.W.4 have stated before the trial court that Ambika, who is alleged to have sleeping along with the deceased, was suffering from night-blindness and, therefore, he could not have recognized the accused persons.

V. The special report was received on 02.11.1990 at 3:00 p.m. in the office of the District Magistrate and no explanation has been given by the prosecution as to why the same was received on 02.11.1990 when the said report was forwarded on 01.11.1990. In order to prove this fact, appellant has drawn our attention to the statement of D.W.4-Lalit Prasad, who was the Complaint Clerk of the Collectorate and has stated that D.W.4 Lalit Prasad, in his examination-in-chief, has deposed before the trial Court that he brought the original special report along with him and he subsequently proved the receiving of the same on 02.11.1990 by Zamdar Singh, who was the Steno to the District Magistrate, but in the cross-examination, nothing was asked from D.W.4 by the prosecution and the only question, which was asked is as to when the said report was received, is not entered in it.

VI. No independent witness is supporting the prosecution case. The prosecution story set out up during the trial, which is contrary to the prosecution story initiated in the F.I.R.. P.W.1-Jagdish Prasad, in his statement before the trial Court, has deposed that he went to lodge the F.I.R. all alone on foot at a distance of 8-9 Kms. to the police station Wazeerganj. He further deposed that though he was having motorcycle in his name, but the said motorcycle was not available at the time of the incident and the same was available at Belsar, where he was working as Gram Panchayat Officer. In his cross-examination, P.W.1 has deposed before the trial Court that he did not think it appropriate to take any person along with him to the police station because people told him that if he wastes time in these things, then, accused persons will indulge

him in the crime. This statement of P.W.1 itself shows that he was apprehensive of the fact that he can be named in the FIR by the accused persons as no one has seen the incident and there was possibility of naming of any person one way or the other. According to him, there was family dispute with regard to a land.

VII. The trial Court committed illegality in convicting the appellant, relying upon the statements of the so-called witnesses, who are highly interested and partisan witnesses, and whose statement have already been disbelieved by the trial Court in respect of the other co-accused persons, who have been given the benefit of doubt. There were serious contradiction of the statements of PW 1-Jagdish Prasad and PW4-Kamlesh alias Punam relating to manner of assault. The Trial Court has erroneously rejected the statements of the defense witnesss. The informant Jagdish Prasad (P.W.1) has a criminal history, which is admitted by him in his statement at para no.37 at page-24 to the effect that prior to 7-8 years from the date of the murder of his brother, a report under Section 436 I.P.C. was lodged against him in respect of the arson of the house of Ram Bihari Kori. The appellant is not a previous convict. According to him, there is clear improvement in the prosecution case solely in order to falsely implicate the appellant.

VIII. The nature of injuries alleged to have been received by the deceased not support the prosecution case at all. The deceased Jai Prakash has received all injuries on one side of his body and it is highly improbable that four persons assaulted a man with Lathi and Danda could have caused injuries only on one side of the body.

IX. The appellant happens to be the real brother of Sadhu. There was long drawn litigation between the parties and the result of the long drawn litigation would be in the nature of false implication of the appellant as well. According to him, the enmity which is alleged to be continuing between the parties since 1978 could be a strong motive for false implication of the accused including the appellant. The benefit of enmity was given to co-accused Sheetal but the said benefit has not been granted to the appellant by the trial Court.

(D) RESPONDENT/STATE CASE

Sri Arunendra, learned Additional Government Advocate appearing on behalf of the State has supported the impugned judgment and contended that the guilt of appellant is established from the material on record and he has been rightly convicted and sentenced by the impugned order.

(E) None appears on behalf of the complainant to contest this appeal.

(F) ANALYSIS

(32) As per the F.I.R., informant-Jagdish (P.W.1), son of Ram Tej, resident of Niyamatpur, was having enmity with accused Sadhu Prasad Pandey in respect of a land, which was lying barren and the said land was ploughed by a tractor by the brother of the informant-Jagdish (P.W.1), whereupon accused Sadhu Prasad son of Ram Bihari, resident of Niyamatpur stopped him from ploughing the field and after threatening him, went back. In the morning of 01.11.1990, at about 5:30 a.m., accused Sadhu Prasad, Talluqdar, Lot Prasad son of Ram Bihari and Sheetal son

of Bachhu resident of same village, came before the house of the informant Jagdish (P.W.1), armed with lathi, danda and started assaulting his brother Jay Prakash (deceased) and while assaulting him, dragged him to the groove and upon alarm being raised by his brother, he and his brother Ambika and his family members ran to save him, whereupon accused persons ran away. Thereafter, the informant Jagdish (P.W.1) saw his brother Jay Prakash (deceased) lying injured. Subsequently, he took his brother Jay Prakash (deceased) to Wazeerganj Hospital while on the way he died. Informant Jagdish (P.W.1) also stated that apart from him, other persons of the village, namely, Hira son of Aafat, Ram Deen son of Shankar and other persons also saw the accused persons assaulting the deceased Jay Prakash.

(33) On the basis of the aforesaid allegations, F.I.R. was lodged against four accused persons, namely, Sadhu Prasad, Talluqdar, Lot Prasad (appellant herein), Shital on 01.11.1990 at about 12:15 p.m. by the informant Jagdish (P.W.1), on the basis of which, chik F.I.R. was prepared and a case was registered against the aforesaid four accused persons as Case Crime No. 145 of 1990 under Section 302 I.P.C. by P.W.3-Constable Ram Narain. Thereafter, P.W.5-Sub-Inspector Mahendra Nath Sharma took the investigation of the case and proceeded to the spot and conducted the inquest report on 01.11.1990 at about 04:00 p.m. and sent the dead body of the deceased for post-mortem examination, which was conducted at District Hospital, Gonda on 02.11.1990 at about 4:05 p.m. The Investigating Officer, thereafter, prepared photo lash, site plan and took his possession the blood stained and simple earth under memo. After completion of the investigation, charge-sheet was filed against accused persons under Section 302 I.P.C. on 12.11.1990. and also after completion of the investigation, charge-sheet was filed against the accused persons under Sections 302/34 I.P.C. on 12.11.1990.

(34) The prosecution has produced seven witnesses, out of which, P.W.1-Jagdish Prasad, who is the informant, and P.W.4-Kamlesh alias Poonam, who is the daughter of the informant, were examined as eye-witnesses. Heera, who is the independent witness, was examined as P.W.2 and he turned hostile. Constable Ram Narain, who is the writer of Chik F.I.R. was examined as P.W.3. Mahendra Nath Sharma, who is the Investigating Officer of the case, was examined as P.W.5. Dr. P.K. Srivastava, who has conducted the post-mortem of the corpse of the deceased Jay Prakash, was examined as P.W.6. Constable Ram Khilawan, who took the corpse of the deceased Jay Prakash for post-mortem, was examined as P.W.7.

(35) From the side of defence, five witnesses were produced. Aadalat, who is the owner of the tractor, was examined as D.W.1. Shri, Gayan Singh and Jagnath, who are the villager, were examined as D.W.2, D.W.3 and D.W.5. Sri Lalit Prasad, who is the Petition Clerk, District Magistrate Office, Gonda, was examined as D.W.4.

(36) It transpires from the version of the F.I.R. that the deceased Jay Prakash was assaulted with lathi and danda and thereafter he was taken towards the groove by the accused persons. In the statement recorded under Section 161 Cr.P.C., informant Jagdish (P.W.1) has stated that the deceased Jay Prakash was dragged to

the groove where the appellant Lot Prasad sat on his chest and pressed it (humuk) and started slapping him on his chin. The aforesaid version of the FIR as well as statement recorded under Section 161 Cr.P.C. was further improved by the P.W.1-Jagdish before the trial Court by stating that upon hearing the noise, he came out from his house and thereafter his wife, wife of the deceased, his brother and his daughter came out of the house. P.W.1-Jagdish has categorically stated in his deposition before the trial Court that on hearing the noise, he came out from his house firstly and thereafter other family members came out and saw the incident. P.W.4-Kamlesh alias Poonam, who is the daughter of informant P.W.1-Jagdish, has stated before the trial Court the story of the incident otherwise. In cross-examination, P.W.4-Kamlesh alias Poonam has deposed before the trial Court that Jai Prakash (deceased) and Ambika used to sleep outside the house and on the date of the incident, they were sleeping outside the house. The winter season was started because of which other family members were sleeping inside the house and door was closed inside the house. She has further deposed that her father Jagdish had given a voice to her and said that look daughter, someone's voice is coming outside, then, she listened the voice of Ambika.

(37) At this juncture, it would be relevant to mention that the F.I.R. is not an encyclopedia and every fact is not required to be stated but factum of the incident and the manner of assault are important and that ought to be mentioned in the F.I.R. If one would have seen the occurrence, then certainly from the very inception of the F.I.R., it would have been stated that the deceased Jay Prakash was dragged to the groove while he was being assaulted with lathi and danda by the accused persons. The ante-mortem injuries sustained by the deceased Jay Prakash shows that injuries of lathi and danda have not been found on the person of the deceased Jay Prakash as alleged by the prosecution in the F.I.R. The factum that the deceased was taken to the groove and thereafter he was given lathi blow on his chest, has neither been mentioned in the F.I.R. nor in the statement recorded under Section 161 Cr.P.C. by the prosecution. But for the first time, the factum that the deceased was dragged to the groove by the accused persons while assaulting him with lathi and danda, has been deposed before the trial Court. Thus, it appears that P.W.1-Jagdish and P.W.4-Kamlesh alias Poonam have made material improvement, while deposing before the trial Court.

(38) P.W.1-Jagdish and P.W.4-Kamlesh alias Poonam, in their statement, have categorically stated that when they came outside the house after hearing the voice/alarm of Ambika, dawn was prevailing and it was a moon light and there was enough light on account of moon light and at that time, they were at a distance of 20-25 paces. As per the prosecution, the incident was happened on 01.11.1990 at 05:30 a.m. The sun rise on 01.11.1990 was at 06:31 a.m., which means that the statement given by the defense witnesses to the effect that there was still one hour for the dawn to commence, appears to be reasonable. As stated hereinabove, P.W.1 has stated that at the time of incident, he was sleeping and when he listened the voice of Ambika, he came outside the house and saw the incident, whereas P.W.4 has stated that at the time of

the incident, she was sleeping and her father Jagdish had given a voice to her and said that look daughter, someone's voice is coming outside, then, she listened the voice of Ambika and thereafter, they came outside the house and saw the incident.

(39) From the aforesaid, it transpires that both the witnesses i.e. P.W.1 and P.W.4, at the time of the incident, were sleeping inside the house and the door was closed from inside the house and after listening the voice of Ambika, they came outside the house and saw that the accused persons were dragging the deceased Jai Prakash to groove by assaulting with lathi and danda. They stated before the trial Court that at the time when they came outside the house, the accused persons were at a distance of 20-25 paces. Considering the aforesaid, it is quite improbable that P.W.1 and P.W.4, in a sleeping condition, came outside the house and recognized the accused persons from a distance of 20-25 paces particularly when there was only moonlight and the month of winter season was ensuing. Moreso, P.W.1 and P.W.4 have stated before the trial Court that Ambika, who was sleeping in a thatch along with deceased Jay Prakash, was suffering from night blindness. In such circumstances, it is quite impossible for Ambika to recognize the accused persons. It is not the case of the prosecution that Ambika told the name of the accused persons.

(40) The recognition in the moon light has been stated by MODI in his 24th Edition at page-277, which is reproduced as under :-

"**(ii) Moonlight-** According to Tidy, the best known person cannot be recognized in the clearest moonlight beyond a distance of 151/2 m (17 yards). Colonel Bary, IMS, is of the opinion that at distances greater than 10.9 m (12 yards), the statute or outline of the figure alone is available as a means of identification. To define the features at even shorter distance is practically impossible by moonlight."

(41) The 12 yards parameters as indicated hereinabove itself is indicative of the fact that in the moon light, the broad features of the accused persons could have been identified. Apart from it, the accused persons could not have been identified as PW-1 has stated that he was at a distance of 20-25 paces, when the deceased Jai Prakash was being taken by the accused persons forcibly towards groove. The distance of 20-25 paces would come to about 50-62 feet. The identification of the accused from such a long distance even in the moonlight would not have been possible.

(42) There is another aspect of the matter. The accused persons were not armed with any deadly weapons as P.W.1 and P.W.4 have stated from the beginning that the accused persons were armed with lathi and danda and they were dragging the deceased Jay Prakash by assaulting him with lathi and danda. If the accused persons were not armed with any deadly weapons, then, the informant Jagdish (P.W.1), P.W.4-Kamlesh alias Poonam, his brother Ambika and other family members and other witnesses ought to have tried to save the deceased from the clutches of the accused persons but no attempt was made by the informant and other family members to take any lathi or danda or any other weapon to save the deceased. This conduct of the informant P.W.1-Jagdish itself creates doubt upon the prosecution case. Morso, if the informant Jagdish, his family members and other persons were present at

the time when the accused persons alleged to have dragged the deceased Jay Prakash to groove by assaulting him with lathi and danda, then they could have very easily overpowered the accused and they could have saved the deceased from being killed by the accused/appellant.

(43) The theory of enmity between the informant and accused party is admitted. The main enmity was existing with the informant Jagdish (P.W.1) and a litigation had ensued at this instance between the parties since 1978. A criminal case has also been instituted against accused Sadhu by the informant Jagdish P.W.1 and, therefore, looking to the enmity on record, the possibility of false implication cannot be ruled out. The informant Jagdish (P.W.1) has admitted in his cross-examination that though the litigation was going on in respect of the said land from 1978 to 1990 but there has been no report and neither any dispute has taken place between them. Even he has not made any report in respect of the incident, which has taken place two days prior to the incident in regard to ploughing the disputed land by Jay Prakash (deceased) through the Tractor of Adalat. It transpires from the record that Adalat was examined as D.W.1, who, in his statement, has stated before the trial Court that he never went for ploughing on the disputed field, therefore, part of the case as set up by the prosecution stands falsified in view of the statement of D.W.1-Adalat. Thus, apparent motive setup by the prosecution in respect of ploughing of the disputed land by the deceased Jay Prakash is also not proved.

(44) Considering the aforesaid, I am of the opinion that the false implication of the accused persons including the appellant cannot be ruled out on account of long standing enmity between the parties.

(45) So far as injuries sustained by the deceased Jay Prakash is concerned, the post-mortem report shows that there is one contused swelling on the right side forehead, extending upto right temporal region in an area of 11 c.m. x 8 c.m. with few abrasions just above the right ear. Another injury has been found in the form of contusion on the left upper lid in an area of 41/2 c.m. x 2 ½ cm. The third injury is in the form of swelling with deformity on the left forearm just above the left wrist. Radius and ulna fractured on the left side, and the fourth injury was found as deep contusion present on the left side chest, lower part in an area of 5 c.m. x 4 c.m. The injury no.1 is on the forehead and injury no.2 is on the upper left lid, meaning thereby in the head region and chest, injury can be attributed to the appellant but the prosecution has failed to explain as to where are those injuries, which were caused on the deceased Jay Prakash by the accused persons, when the deceased was being taken forcibly and when he was being assaulted with fists and danda as stated by the P.W.1. P.W.4 has stated before the trial Court that accused persons dragged the deceased to the mango tree in the groove, where he was thrown to the ground and he was attacked with lathi and lathi's end (hura). Such assault in the nature of "hura' can be referred as kicking with a lathi in a piercing manner. Now, if lathi is used as like spear and assault is given in a piercing manner, then, the corresponding injury ought to have been received of a different nature rather than received by the deceased and certainly injury would be in a circular form. Moreso, even if it is assumed that the appellant sat on the chest of the deceased by putting his knees on his chest and thereafter, pressed his knees again and again (humuk),

then also the injury will be of different dimensions rather than the injury sustained by the deceased Jay Prakash in the form of deep contusion on the left side chest, lower part in an area of 5 c.m. x 4 c.m. whereas ribs 4,5, 6 and 7 were found to be broken. The injury from lathi and lathi's end (hura) i.e. assault in a piercing manner with lathi is not apparent from the post-mortem report. Thus, the manner of assault becomes doubtful as stated by P.W.1 and P.W.4.

(46) P.W.6-Dr. P.K. Srivastava, who has conducted the post-mortem of the deadbody of the deceased Jay Prakash, has stated before the trial Court in the cross-examination at page-11 that deceased Jay Prakash was not feeling well and took light food on the night of the incident. P.W.1-Jagdish has not stated before the trial Court which food was taken by the deceased at the time of sleeping and at what time, he took food. Normally, in village, people took food at around 08:00 p.m. If it is presumed that the deceased took food at 08:00 p.m. or for the sake of argument, it may be presumed that it may be taken at 09:00 p.m., then also, semi digested food would be present in the stomach within 2-3 hours. P.W.6-Dr. P.K. Srivastava has stated that the death has occurred within six hours of taking food, meaning thereby if the food was taken at 09:00 p.m., then, also the death had occurred prior to 03:00 a.m. Thus, it appears that incident took place in the dark hours and noobody has seen the occurrence and the evidence has been collected just to prove the case as setup by the prosecution.

(47) In view of the facts that the prosecution has not been able to fix the identity of the appellant by credible evidence as the assailant of the deceased, entering into the further details of the case will be futile. Moreover, the three accused persons, namely, Sadhu Prasad, Talluqdar and Shital, have already been acquitted by the trial Court by giving benefit of doubt vide impugned judgment and order dated 20.07.1995 passed by the trial Court, hence the appellant-Lot Prasad is also entitled for the benefit of doubt. Since, the identity of the miscreants was not established beyond all reasonable doubt, this is a case where appellant is entitled to acquittal on the ground of benefit of doubt.

(48) In the result, the appeal succeeds and is hereby **allowed.** The judgment and order dated 20.07.1995 passed in Sessions Trial No. 73 of 1992 so far as it relates to the appellant stands set aside. The appellant is acquitted from the charges levelled against him. The appellant is on bail. His bail bonds are hereby cancelled and sureties are discharged from their liabilities.

(49) Appellant is directed to file personal bond and two sureties each in the like amount to the satisfaction of the Court concerned in compliance of Section 437-A of the Code of Criminal Procedure, 1973.

(50) Let a copy of this judgment and the original record be transmitted to the trial court concerned forthwith for necessary information and compliance.

(2022)01ILR A466
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.11.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE VIKAS BUDHWAR, J.

Criminal Appeal No. 446 of 2015

Bala Prasad Kurmi ...Appellant
Versus
State Of U.P. ...Opposite Party

Counsel for the Appellant:
Sri K.K. Tripathi, Sri Prem Chandra, Sri Nand Lal Yadav, Sri Kamla Prasad, Sri R.L. Varma, Sri Anil Kumar, Sri Mohd. Kalim, Mary Punch Sheeb Zosi

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

Criminal Law - Indian Penal Code, 1860 - Sections 376 & 506 - Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989- Section 3(1)XII and 3(2)V- Conviction under- Sentence of Life Imprisonment- Quantum of Sentence- Proportionate Sentence- It is the duty of every court to award proper sentence having regard to nature of offence and manner of its commission- While considering imposition of appropriate punishment, the impact of crime on the society as a whole and rule of law needs to be balanced. Moreover, 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. At the same time, undue harshness should also be avoided keeping in view the reformative approach underlying in our criminal justice system- 'Reformative theory of punishment' is to be adopted and for that reason, it is necessary to impose punishment keeping in view the 'doctrine of proportionality'.

Sentence should be proportionate to the gravity of the offence, manner of commission and its impact on society and should not be unduly harsh in view of the judicial trend of adopting the corrective and reformative theory of punishment.

Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989- Section 3(1)XII and 3(2)V- There is neither any serious discussion nor any finding in the judgment in question with regard to the fact that the victim belongs to SC/ST category. Apart from the same, this Court finds that there is no witness to prove the caste of the victim. the sine qua non is that the victim should be a person, who belongs to scheduled caste or scheduled tribe and that the offence under the Indian Penal Code is committed against such person on the basis that such person belongs to the same caste and the offender does not belong to the same caste. If this is proved, then only conviction under Section 3(2)(V) of the Act, 1989 can be invoked. Thus inevitable conclusion is this that no offence under Section 3(2)V of SC/ST Act is made out and thus the conviction and the sentence so made under Section 3(2)V of SC/ST Act is unsustainable in the eyes of law.

In order to secure the conviction of an accused under Section 3(1)XII and 3(2)V of the Sc/St Act, it has to be proved and established that the victim belonged to a scheduled caste/ scheduled tribe while the offender did not belong to the said category. (Para 23, 24, 25, 26, 29)

Appeal Partly Allowed. (E-3)

Judgements/ Case law relied upon:-

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

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

3. Guru Basavraj Vs St. of Kar., [(2012) 8 SCC 73

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

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

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

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

8. Manoj Mishra @ Chhotkau Vs St. of U.P, Crl. Apl. No. 1167 of 2021, dec. on 8.10.2021

9. Hitesh Verma Vs The St. of U.K & anr, 2020 0 Supreme (SC) 653

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

11. Crl. Apl. No.204 of 2021, Vishnu Vs St. of UP dt. 28.1.2021

12. Crl. Apl. No. 3248 of 2014, Suresh Vs St. of U.P. dt. 24.11.2021

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

(Delivered by Hon'ble Vikas Budhwar, J.)

1. This appeal has been preferred against the judgment and order dated 23.1.2015 passed by Special Judge (SC/ST Act)/ Additional Sessions Judge, Banda Special Trial No. 60 of 1997 in Case Crime no. 89 of 1997, under Sections 376, 506 IPC and Section 3(1)XII and 3(2)V SC/ST Act, P.S. Bisanda, District Banda, whereby accused-appellant was convicted under Section 376 IPC read with Section 3(2)V SC/ST Act for life imprisonment and fine of Rs.30,000/- and in default of payment of fine, one year additional imprisonment.

2. Brief facts of the case are that the FIR was registered on 9.5.1997 on the basis of the application moved by the complainant on the same day, in which it was alleged that the victim, the complainant's daughter on the date of occurrence of the offence, i.e, 9.5.1997 was sleeping with her grandmother being the mother of the complainant in the courtyard. At that relevant point of time, the complainant and his wife Smt. Savitri were lying down in their room. In the night of the incident, i.e, on 9.5.1997, the grandmother of the victim, as well as the mother of the complainant had gone out of the house in the fields to answer the nature's call. However, it was alleged in the FIR dated 9.5.1997 that at about 1:00 P.M, in the night, Bala Prasad son of Guneshi Kurmi and an unnamed person silently came in the courtyard and they tied the mouth of the victim with a cloth and took her out of the house and committed a bad-act of rape outside the village, just near the mango tree of Badri Kurmi. The grandmother of the victim and the mother of the complainant became surprised, when she did not find the victim at that relevant point of time in the courtyard, so she immediately rushed to the room of the complainant, awaking the complainant and apprising him that the victim is nowhere found in the house and she is missing. Thereafter rapid search was being made to find out whereabouts of the victim and then it was discovered that the victim was coming towards her house and she was found near the pond, the victim thereafter narrated the entire incident and agony both physical and mental sustained by her. Thereafter accordingly the complainant accompanied her daughter and approached the relevant police station while filing a complaint on 9.5.1997, which culminated into lodging of the FIR in Case Crime No.89 of 1997 under Sections 376 IPC and Section 3(1)XII SC/ST Act.

3. One Sri Shailendra Kumar Yadav, Addl. S.P, tookup the investigation, visited the spot, prepared site plan, recorded statements of the prosecutrix and witnesses and after completing investigation submitted charge sheet against the accused under Section 376 and 506 IPC and Sections 3(1)XII and 3(2)V SC/ST Act. The matter being triable by court of sessions was committed to the sessions court.

4. The learned trial court framed charge under Section 376, 506 IPC and

Sections 3(1)XII and 3(2)V SC/ST Act, which was read over to the accused. The accused denied the charge and claimed to be tried. The prosecution so as to bring home the charge, examined the following witnesses, who are as under:-

1.	Victim	P.W.1
2.	Bhura son of Swamideen	P.W.2
3.	Dr. R.P. Gupta	P.W.3
4.	Dr. Pramod Kumar	P.W.4
5.	Addl. S.P. Shailendra Kumar Yadav	P.W.5

5. After completion of prosecution evidence, the accused was examined under Section 313 Cr.P.C. The accused did not examine any witness in defence.

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

1.	Written report	Ext. Ka-1
2.	Recovery Memo of Sari of victim	Ext. Ka-2
3.	X-ray report prepared by the Doctor at District Hospital, Banda	Ext. Ka-3
4.	Medical Report of Victim of District Hospital, Banda as well as Pathology Test Report	Ext. Ka-4
5.	Site Plan	Ext. Ka-5
6.	Charge Sheet	Ext. Ka-6
7.	FIR and G.D.	Ext. Ka-7

7. Heard Shri K.K. Tripathi, learned counsel for the appellant, the learned AGA for the State and also perused the record.

8. Perusal of record shows that occurrence took place on 9.5.1997 and the victim was medically examined on the same day, i.e, 9.5.1997 in District Hospital, Banda. In the medical examination, no marks of external injuries were found on the body of the victim. In the medical report, it was also mentioned that vaginal smear is positive for immotile spermatozoa, i.e, the dead spermatozoa were found. Further the medical report also reveals that at the time of the occurrence of the incident, the age of the victim was above 16 years and below 18 years.

9. The victim was examined by prosecution as PW-1 and she had stated that the accused had committed bad-act with her as when she was all alone in the courtyard, the accused came and forcibly took her while putting the cloth in the mouth of the victim, so as to create a situation, whereby there is no hue and cry at the end of the victim and thereafter the accused took her near the mango tree of one Badri Kurmi outside the village and committed rape. When searches were made regarding her whereabouts, then she was found coming to her house through a pond. Record further reveals that PW-1 in her statement has categorically named the accused and further so far as PW-2 being the father of the victim is concerned, he also gave his testimony, which is in conformity, in consonance and in line with the version of the prosecution while

narrating the fact that when the mother of the complainant being the grandmother of the victim had gone to answer the nature's call, then from the said moment, the victim was found to have been illegally taken away forcibly by the accused and the victim was recovered, when search was being made near the pond, wherein the victim narrated the entire incident with regard to the fact that the bad-act of rape had been committed forcefully by the accused. PW-4 being the Dr. Pramod Kumar in his statement has mentioned that dead spermatozoa was found in the vaginal smear. PW-5 Shailendra Kumar Yadav, Addl. S.P, in his statement dated 29.9.2014 has deposed that he had taken the statement of the victim, Smt. Maiki, Smt. Savitri, Kanhaiya Kori and Dasai and on the basis of the statement, so recorded with the permission of the Court, additional offence under Section 506 was also included.

10. Learned trial court after considering the evidence available on record, concluded that the appellant is to be sentenced under Section 376 IPC read with Section 3(2)V SC/ST Act and sentenced him for life imprisonment and a fine of Rs.30,000/- and in case of default, an additional imprisonment of one year.

11. After some arguments, learned counsel for the appellant has confined its argument with regard to the fact that the offences under Section 3(2)V of the SC/ST Act are not made out against the appellant, particularly, in view of the fact that there was neither any evidence adduced by the prosecution nor the issue has been dealt by the court below in the judgment under challenge.

12. Learned counsel for the appellant submitted that he is not pressing this appeal on its merits as far as Section 376 IPC is concerned, but he prays only for reduction of the sentence as the sentence of life imprisonment awarded to the appellant by the trial court is very harsh. Learned counsel also submitted that appellant is languishing in jail for the past more than 6 years and 11 months.

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

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

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

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

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

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

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

First.*- Against her will.*

Secondly*.- Without her consent.*

*T**hirdly.**- With her consent, when her consent has been obtained by putting*

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

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

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

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

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

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

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

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

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

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

14. Once, the appellant is not pressing the appeal on merits and as far as conviction under Sections 376 and 452 IPC is concerned, the scope of the present appeal gets narrowed down to the question of the quantum of punishment. The Hon'ble Supreme Court in the case of ***Mohd. Giasuddin Vs. State of Andhra Pradesh, reported in*** AIR 1977 SC 1926 had in paragraphs-16, 17, 18, 19 and 20 has observed as under: -

"16. The new Criminal Procedure Code, 1973 incorporates some of these ideas and gives an opportunity in s. 248(2) to both parties to bring to the notice of the court facts and circumstances which win help personalize the sentence from a reformative angle. This Court, in Santa Singh (1976) 4 SCC 190, has emphasized how fundamental it is to put such provision to dynamic judicial use, while dealing with the analogous provisions in s. 235(2) "This new provision in s. 235(2) is in consonance with the modern trends in penology and sentencing procedures. There was no such provision in the old Code,. It 'was realised that sentencing is an important stage in the process of administration of criminal justice- as important as the adjudication of guilt-and it should not be con-signed to a Subsidiary position as if it were a matter of not much consequence. It should be a matter of some anxiety to the court to impose an appropriate punishment on the

criminal and sentencing should, therefore, receive serious attention of the Court. (p. 194.).

Modern penology regards crime and criminal as equally material when the right sentence has to be picked out. It turns the focus not only on the crime, but also on the criminal and seeks to personalise the punishment so that the reformist component is as much operative as the deterrent element. It is necessary for this purpose that facts of a social and personal nature, sometimes altogether irrelevant if not injurious, at the stage of fixing the guilt, may have to be brought to the notice of the court when the actual sen- tence is determined. (p. 195).

A proper sentence is the amalgam of many factors such as the nature of the offence, the circumstances extenuating or aggravating-of the offence, the prior criminal record, if any, of the offender, the age of the offender, the record of the offender as to employment, the background of the offender with reference to education, home life, sobriety and social adjustment, the emotional and mental condition of the offender, the prospects for the rehabilitation of the offender, the possibility of return of the offender to normal life in the community, the possibility of treatment or training of the offender, the possibility that the sentence may serve as a deterrent to crime by the offender or by others and the current community need, if any, for such a deterrent in respect to the particular type of offence. These factors have to be taken into account by the Court in deciding upon the appropriate sentence. (p.

195).

The hearing contemplated by section 235(2) is not confined merely to hearing oral submissions, but it is also intended to give an opportunity to the prosecution and the ac- cused to place before the court facts and material relating to various factors' bearing on the question of sentence and if they are contested by other side, then to produce evidence for the purpose of establishing the same. Of course, care would have to be taken by the court to see that this hearing on the question of sentence is not abused and turned into an instrument for unduly protracting the proceedings. The claim of due and proper hearing would have to be harmonised with the requirement of expeditious disposal of proceedings." (p. 196).

17. It will thus be seen that there is a great discretion vested in the Judge, especially when pluralistic factors , enter his calculations Even so, the judge must exercise this discretionary power, drawing his inspiration from the humanitarian spirit of the law, and living down the traditional precedents which have winked at the personality of the crime doer and been swept away by the features of the crime. What is dated has to be discarded. What is current has to, be incorporated. Therefore innovation, in all conscience, is in the field of judicial discretion.

18. Unfortunately, the Indian Penal Code still lingers in the somewhat compartmentalised system of punishment viz. imprisonment simple or rigorous, fine and, of course, capital sentence. There is a wide range of choice and flexible treatment which must be available with the judge if he is to fulfil his tryst with cruing the criminal in a hospital setting. Maybe in an appropriate case actual hospital treatment

may have to be prescribed as part of the sentence. In another case, liberal parole may have to be suggested and, yet in a third category, engaging in certain types of occupation or even going through meditational drills or other courses may be part of the sentencing prescription. The perspective having changed, the legal strategies and judicial resources, in their variety, also have to change. Rule of thumb sentences of rigorous imprisonment or other are too insensitive to the highly delicate and subtle operation expected of a sentencing judge. Release on probation, conditional sentences, visits to healing centres, are all on the cards. We do not wish to be exhaustive. Indeed, we cannot be.

19. Sentencing justice is a facet of social justice, even as redemption of a crime-doer is an aspect of restoration of a whole personality. Till the new Code recognised statutorily that punishment required considerations beyond the nature of the crime and circumstances surrounding the crime and provided a second stage for bringing in such additional materials, the Indian courts had, by and large, assigned an obsolescent backseat to the sophisticated judgment on sentencing. Now this judicial skill has to come of age.

20. The sentencing stance of the court has been outlined by us and the next question is what 'hospitalization' techniques will best serve and sentencee, having due regard to his just deserts, blending a feeling for a man behind the crime, defence of society by a deterrent component and a scientific therapeutic attitude at once correctional and realistic. The available resources for achieving these ends within the prison campus also has to be considered in this context. Noticing the scant regard paid by the courts below to the soul of S. 248 (2) of the Code and compelled to gather information having sentencing relevancy, we permitted counsel on both sides in the present appeal to file affidavits and other materials to help the Court make a judicious choice of the appropriate 'penal' treatment. Both sides have filed affidavits which disclose some facts pertinent to the project. "

15. In the case of ***Deo Narain Mandal vs. State of UP*** r*eported in (2004) 7 SCC 257,* in paragraphs-11 and 12, the Hon'ble Apex Court has held as under: -

"11. To find out whether the period already undergone by the appellant would be sufficient for reducing the sentence we had called upon the learned counsel appearing for the State to give us the necessary information and from the list of dates provided by the State, we notice that the appellant was arrested on 12th of January, 1983 and was granted bail on 14th of January, 1983 by the Trial Court which shows he was in custody for two days that too as an under trial prisoner. Trial Court sentenced the appellant on 31st of May, 1988 and the High Court released the appellant on the 8th of July, 1988. It is not clear from the list of date when exactly the appellant surrendered to his bail after the judgment of the Trial Court. Presuming the fact in favour of the appellant that he was taken into custody on the date of the judgment i.e. 31st of May, 1988 itself. Since he was released on bail by the High Court of 8th of July, 1988, he would have been custody as a convict for 38 days which together with the two days spent as an under trial, would take the period of

custody to 40 days. On facts and circumstances of this case, we must hold that sentence of 40 days for an offence punishable under Section 365/511 read with Section 149 is wholly inadequate and disproportionate.

12. For the reasons stated above, we are of the opinion that the judgment of the High Court, so far as it pertains to the reduction of sentence awarded by the Trial Court will have to be set aside."

16. In the case of ***Jameel vs State of UP*** *[(2010) 12 SCC 532*, the Hon'ble Supreme Court in paragraphs- 14, 15 and 16 held as under:

"14. The general policy which the courts have followed with regard to sentencing is that the punishment must be appropriate and proportional to the gravity of the offence committed. Imposition of appropriate punishment is the manner in which the Courts respond to the society's cry for justice against the criminals. Justice demands that Courts should impose punishment befitting the crime so that the Courts reflect public abhorrence of the crime.

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.

16. It was 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."

17. In the case of ***Guru Basavraj vs State of Karnatak***, [(2012) 8 SCC 734, the Hon'ble Apex Court observed in paragraphs- 30 to 34 has held as under: -

"30. From the aforesaid authorities, it is luminous that this Court has expressed its concern on imposition of adequate sentence in respect of commission of offences regard being had to the nature of the offence and demand of the conscience of the society. That apart, the concern has been to impose adequate sentence for the offence punishable under Section 304-A of the IPC. It is worthy to note that in certain circumstances, the mitigating factors have been taken into consideration but the said aspect is dependent on the facts of each case. As the trend of authorities would show, the proficiency in professional driving is emphasized upon and deviation therefrom that results in rash and negligent driving and causes accident has been condemned. In a motor accident, when a number of people sustain injuries and a death occurs, it creates a stir in the society; sense of fear prevails all around. The negligence of one shatters the tranquility of the collective. When such an accident occurs, it has the effect potentiality of making victims in many a layer and creating a concavity in the social fabric. The agony and anguish of the affected persons, both direct and vicarious, can have nightmarish effect. It

has its impact on the society and the impact is felt more when accidents take place quite often because of rash driving by drunken, negligent or, for that matter, adventurous drivers who have, in a way, no concern for others. Be it noted, grant of compensation under the provisions of the Motor Vehicles Act, 1988 is in a different sphere altogether. Grant of compensation under Section 357(3) with a direction that the same should be paid to the person who has suffered any loss or injury by reason of the act for which the accused has been sentenced has a different contour and the same is not to be regarded as a substitute in all circumstances for adequate sentence.

31. Recently, this Court in Rattiram & Ors. v. State of M.P. Through Inspector of Police, (2012) 4 SCC 516 , though in a different context, has stated that:

"64. ... The criminal jurisprudence, with the passage of time, has laid emphasis on victimology which fundamentally is a perception of a trial from the view point of the criminal as well as the victim. Both are viewed in the social context. The view of the victim is given due regard and respect in certain countries... It is the duty of the court to see that the victim's right is protected."

32. We may note with profit that an appropriate punishment works as an eye-opener for the persons who are not careful while driving vehicles on the road and exhibit a careless attitude possibly harbouring the notion that they would be shown indulgence or lives of others are like "flies to the wanton boys". They totally forget that the lives of many are in their hands, and the sublimity of safety of a human being is given an indecent burial by their rash and negligent act.

33. There can hardly be any cavil that there has to be a proportion between the crime and the punishment. 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. In Siriya alias Shri Lal v. State of M.P. (2008) 8 SCC 72, it has been held as follows: (SCC pp.75-76, para 13)

"13. "7. ... Protection of society and stamping out criminal proclivity must be the object of law which must be achieved by imposing appropriate sentence. Therefore, law as a cornerstone of the edifice of "order" should meet the challenges confronting the society. Friedman in his Law in Changing Society stated that: "State of criminal law continues to be - as it should be - a decisive reflection of social consciousness of society". Therefore, in operating the sentencing system, law should adopt the corrective machinery or the 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.' * "

34. In view of the aforesaid, we have to weigh whether the submission advanced by the learned counsel for the appellant as regards the mitigating factors deserves acceptance. Compassion is being sought on the ground of young age and mercy is being invoked on the foundation of solemnization of marriage. The date of occurrence is in the month of March, 2006.

The scars on the collective cannot be said to have been forgotten. Weighing the individual difficulty as against the social order, collective conscience and the duty of the Court, we are disposed to think that the substantive sentence affirmed by the High Court does not warrant any interference and, accordingly, we concur with the same."

18. The Hon'ble Supreme Court, in the case of ***Sumer Singh vs Surajbhan Singh***, [(2014) 7 SCC 323, in paragraphs-36 and 37 held as under:-

" *36. Having discussed about the discretion, presently we shall advert to the duty of the court in the exercise of power while imposing sentence for an offence. It is the duty of the court to impose adequate sentence, for one of the purposes of imposition of requisite sentence is protection of the society and a legitimate response to the collective conscience. The paramount principle that should be the guiding laser beam is that the punishment should be proportionate. It is the answer of law to the social conscience. In a way, it is an obligation to the society which has reposed faith in the court of law to curtail the evil. While imposing the sentence it is the Court's accountability to remind itself about its role and the reverence for rule of law. It must evince the rationalized judicial discretion and not an individual perception or a moral propensity. But, if in the ultimate eventuate the proper sentence is not awarded, the fundamental grammar of sentencing is guillotined. Law cannot tolerate it; society does not withstand it; and sanctity of conscience abhors it. The old saying "the law can hunt one's past" cannot be allowed to be buried in an indecent manner and the rainbow of mercy, for no fathomable reason, should be allowed to rule. True it is, it has its own room, but, in all circumstances, it cannot be allowed to occupy the whole accommodation. The victim, in this case, still cries for justice. We do not think that increase in fine amount or grant of compensation under the Code would be a justified answer in law. Money cannot be the oasis. It cannot assume the centre stage for all redemption. Interference in manifestly inadequate and unduly lenient sentence is the justifiable warrant, for the Court cannot close its eyes to the agony and anguish of the victim and, eventually, to the cry of the society. Therefore, striking the balance we are disposed to think that the cause of justice would be best subserved if the respondent is sentenced to undergo rigorous imprisonment of two years apart from the fine that has been imposed by the learned trial judge.*

37. Before parting with the case we are obliged, nay, painfully constrained to state that it has come to the notice of this Court that in certain heinous crimes or crimes committed in a brutal manner the High Courts in exercise of the appellate jurisdiction have imposed extremely lenient sentences which shock the conscience. It should not be so. It should be borne in mind what Cicero had said centuries ago: -

"it can truly be said that the magistrate is a speaking law, and the law a silent magistrate."

19. Further in the case of ***State of Punjab vs Bawa Singh,*** (2015) 3 SCC 441, the Hon'ble Apex Court in paragraphs-16 to 18 had observed as under: -

"16. We again reiterate in this case that undue sympathy to impose inadequate sentence would do more harm

to the justice system to undermine the public confidence in the efficacy of law. 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. The court must not only keep in view the rights of the victim of the crime but also the society at large while considering the imposition of appropriate punishment. Meagre sentence imposed solely on account of lapse of time without considering the degree of the offence will be counter-productive in the long run and against the interest of the society.

17. Recently, in the cases of State of Madhya Pradesh vs. Bablu, (2014) 9 SCC 281 and State of Madhya Pradesh vs. Surendra Singh, 2014 (12) SCALE 672, after considering and following the earlier decisions, this Court reiterated the settled proposition of law that one of the prime objectives of criminal law is the imposition of adequate, just, proportionate punishment which commensurate with gravity, nature of crime and the manner in which the offence is committed. One should keep in mind the social interest and conscience of the society while considering the determinative factor of sentence with gravity of crime. The punishment should not be so lenient that it shocks the conscience of the society. It is, therefore, solemn duty of the court to strike a proper balance while awarding the sentence as awarding lesser sentence encourages any criminal and, as a result of the same, the society suffers.

18. Perusal of the impugned order passed by the High Court would show that while reducing the sentence to the period already undergone, the High Court has not considered the law time and again laid down by this Court. Hence the impugned order passed by the High Court is set aside and the matter is remanded back to the High Court to pass a fresh order in the revision petition taking into consideration the law discussed hereinabove after giving an opportunity of hearing to the parties. The appeal is accordingly allowed with the aforesaid direction."

20. In the case of ***Raj Bala vs State of Haryana,*** [(2016) 1 SCC 463, the Hon'ble Apex Court in paragraph-16 held as under:-

"A Court, while imposing sentence, has a duty to respond to the collective cry of the society. The legislature in its wisdom has conferred discretion on the Court but the duty of the court in such a situation becomes more difficult and complex. It has to exercise the discretion on reasonable and rational parameters. The discretion cannot be allowed to yield to fancy or notion. A Judge has to keep in mind the paramount concept of rule of law and the conscience of the collective and balance it with the principle of proportionality but when the discretion is exercised in a capricious manner, it tantamounts to relinquishment of duty and reckless abandonment of responsibility. One cannot remain a total alien to the demand of the socio-cultural milieu regard being had to the command of law and also brush aside the agony of the victim or the survivors of the victim. Society waits with patience to see that justice is done. There is a hope on the part of the society and when the criminal culpability is established and the discretion is irrationally exercised by the court, the said hope is shattered and the

patience is wrecked. It is the duty of the court not to exercise the discretion in such a manner as a consequence of which the expectation inherent in patience, which is the "finest part of fortitude" is destroyed. A Judge should never feel that the individuals who constitute the society as a whole is imperceptible to the exercise of discretion. He should always bear in mind that erroneous and fallacious exercise of discretion is perceived by a visible collective."

21. Following the consistent view of the Hon'ble Apex Court with regard to proportionality of a punishment in ***Ravada Sasikala vs. State of A.P.*** AIR 2017 SC 1166, it was held as under: -

"15. In Shyam Narain v. State (NCT of Delhi) (2013) 7 SCC77: (AIR 2013 SC 2209), it has been ruled that primarily it is to be borne in mind that sentencing for any offence has a social goal. Sentence is to be imposed 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 realise 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 designed so that the individuals in the society which ultimately constitute the collective do not suffer time and again for such crimes. It serves as a deterrent. The Court further observed that on certain occasions, opportunities may be granted to the convict for reforming himself but it is equally true that the principle of proportionality between an offence committed and the penalty imposed are to be kept in view. It has to be borne in mind that while carrying out this complex exercise, it is obligatory on the part of the court to see the impact of the offence on the society as a whole and its ramifications on the immediate collective as well as its repercussions on the victim.

16. In State of Madhya Pradesh v. Najab Khan and others, (2013) 9 SCC 509: (AIR 2013 SC 2997), the High Court of Madhya Pradesh, while maintaining the conviction under Section 326 IPC read with Section 34 IPC, had reduced the sentence to the period already undergone, i.e., 14 days. The two-Judge Bench referred to the authorities in Shailesh Jasvantbhai v. State of Gujarat, (2006) 2 SCC 359: (2006 AIR SCW 436), Ahmed Hussain Vali Mohammed Saiyed v. State of Gujarat, (2009) 7 SCC 254: (AIR 2010 SC (Supp) 846), Jameel v. State of Uttar Pradesh (2010) 12 SCC 532: (AIR 2010 SC (Supp) 303), and Guru Basavaraj v. State of Karnataka, (2012) 8 SCC 734 : (2012 AIR SCW 4822) *and held thus:- "In operating the sentencing system, law should adopt the corrective machinery or 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 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 courts must not only keep in view the rights of the victim of the crime but also the society at large while*

considering the imposition of appropriate punishment." In the said case, the Court ultimately set aside the sentence imposed by the High Court and restored that of the trial Judge, whereby he had convicted the accused to suffer rigorous imprisonment for three years.

17. In Sumer Singh v. Surajbhan Singh & others, (2014) 7 SCC 323: (AIR 2014 SC 2840), while elaborating on the duty of the Court while imposing sentence for an offence, it has been ruled that it is the duty of the court to impose adequate sentence, for one of the purposes of imposition of requisite sentence is protection of the society and a legitimate response to the collective conscience. The paramount principle that should be the guiding laser beam is that the punishment should be proportionate. It is the answer of law to the social conscience. In a way, it is an obligation to the society which has reposed faith in the court of law to curtail the evil. While imposing the sentence it is the court's accountability to remind itself about its role and the reverence for the rule of law. It must evince the rationalised judicial discretion and not an individual perception or a moral propensity. The Court further held that if in the ultimate eventuate the proper sentence is not awarded, the fundamental grammar of sentencing is guillotined and law does not tolerate it; society does not withstand it; and sanctity of conscience abhors it. It was observed that the old saying "the law can hunt one's past" cannot be allowed to be buried in an indecent manner and the rainbow of mercy, for no fathomable reason, should be allowed to rule. The conception of mercy has its own space but it cannot occupy the whole accommodation. While dealing with grant of further compensation in lieu of sentence, the Court ruled:-

"We do not think that increase in fine amount or grant of compensation under the Code would be a justified answer in law. Money cannot be the oasis. It cannot assume the centre stage for all redemption. Interference in manifestly inadequate and unduly lenient sentence is the justifiable warrant, for the Court cannot close its eyes to the agony and anguish of the victim and, eventually, to the cry of the society."

18. In *State of Punjab v. Bawa Singh,* (2015) 3 SCC 441: (AIR 2015 SC (Supp) 731), this Court, after referring to the decisions in State of Madhya Pradesh v. Bablu, (2014) 9 SCC 281 : (AIR 2015 SC 102) and State of Madhya Pradesh v. Surendra Singh, (2015) 1 SCC 222: (AIR 2015 SC 298), reiterated the settled proposition of law that one of the prime objectives of criminal law is the imposition of adequate, just, proportionate punishment which is commensurate with the nature of crime regard being had to the manner in which the offence is committed. It has been further held that one should keep in mind the social interest and conscience of the society while considering the determinative factor of sentence with gravity of crime. The punishment should not be so lenient that it would shock the conscience of the society. Emphasis was laid on the solemn duty of the court to strike a proper balance while awarding the sentence as imposition of lesser sentence encourages a criminal and resultantly the society suffers.

19. Recently, in Raj Bala v. State of Haryana and others, (2016) 1 SCC 463: (AIR 2015 SC 3142), on reduction of

sentence by the High Court to the period already undergone, the Court ruled thus:-

"Despite authorities existing and governing the field, it has come to the notice of this Court that sometimes the court of first instance as well as the appellate court which includes the High Court, either on individual notion or misplaced sympathy or personal perception seems to have been carried away by passion of mercy, being totally oblivious of lawful obligation to the collective as mandated by law and forgetting the oft quoted saying of Justice Benjamin N. Cardozo, "Justice, though due to the accused, is due to the accuser too" and follow an extremely liberal sentencing policy which has neither legal permissibility nor social acceptability." And again:-

"A Judge has to keep in mind the paramount concept of rule of law and the conscience of the collective and balance it with the principle of proportionality but when the discretion is exercised in a capricious manner, it tantamounts to relinquishment of duty and reckless abandonment of responsibility. One cannot remain a total alien to the demand of the socio-cultural milieu regard being had to the command of law and also brush aside the agony of the victim or the survivors of the victim. Society waits with patience to see that justice is done. There is a hope on the part of the society and when the criminal culpability is established and the discretion is irrationally exercised by the court, the said hope is shattered and the patience is wrecked."

20. Though we have referred to the decisions covering a period of almost three decades, it does not necessarily convey that there had been no deliberation much prior to that. There had been. In B.G. Goswami v. Delhi Administration, (1974) 3 SCC 85: (AIR 1973 SC 1457), the Court while delving into the issue of punishment had observed that punishment is designed to protect society by deterring potential offenders as also by preventing the guilty party from repeating the offence; it is also designed to reform the offender and reclaim him as a law abiding citizen for the good of the society as a whole. Reformatory, deterrent and punitive aspects of punishment thus play their due part in judicial thinking while determining the question of awarding appropriate sentence.

21. The purpose of referring to the aforesaid precedents is that they are to be kept in mind and adequately weighed while exercising the discretion pertaining to awarding of sentence. Protection of society on the one hand and the reformation of an individual are the facets to be kept in view. In Shanti Lal Meena v. State (NCT of Delhi), (2015) 6 SCC 185: AIR 2015 SC 2678), the Court has held that as far as punishment for offence under the Prevention of Corruption Act, 1988 is concerned, there is no serious scope for reforming the convicted public servant. Therefore, it shall depend upon the nature of crime, the manner in which it is committed, the propensity shown and the brutality reflected. The case at hand is an example of uncivilized and heartless crime committed by the respondent No. 2. It is completely unacceptable that concept of leniency can be conceived of in such a crime. A crime of this nature does not deserve any kind of clemency. It is individually as well as collectively intolerable. The respondent No. 2 might have felt that his ego had been hurt by such

a denial to the proposal or he might have suffered a sense of hollowness to his exaggerated sense of honour or might have been guided by the idea that revenge is the sweetest thing that one can be wedded to when there is no response to the unrequited love but, whatever may be the situation, the criminal act, by no stretch of imagination, deserves any leniency or mercy. The respondent No. 2 might not have suffered emotional distress by the denial, yet the said feeling could not to be converted into vengeance to have the licence to act in a manner like he has done."

22. Recently in the matter of ***Manoj Mishra @ Chhotkau vs. State of Uttar Pradesh, Criminal Appeal No. 1167 of 2021, decided on 8.10.2021***, the Hon'ble Apex Court in paragraphs- 16 and 17 has held as under: -

"16. On arriving at the conclusion that the appellant is liable to be convicted under Section 376 IPC and not under Section 376 D IPC, the appropriate sentence to be imposed needs consideration. The incident in question is based on the complaint dated 09.08.2013. In this circumstance, though it is noted that Section 376 has been amended w.e.f. 21.04.2018 providing for the minimum sentence of 10 years, the case on hand is of 2013 and the conviction of the appellant was on 20.05.2015. The incident having occurred prior to amendment, the pre-amended provision will have to be taken note. The same provides that a person committed of rape shall be punished with rigorous imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life and shall also be liable to fine. In the instant case, taking into consideration all facts including that no material is available on record to indicate that the appellant has any criminal antecedents and that he is also a father of five children and the eldest son is more than 18 years, it appears that there is no reason to apprehend that the appellant would indulgence similar acts in future. In that circumstance, we deem it appropriate that the sentence of 7 years would have been sufficient deterrent to serve the ends of justice. From the custody certificate dated 05.12.2017 issued by the Jail Superintendent, District Jail, Bahraich, it is noticed that the appellant has been in custody from 20.09.2013. If that be the position, he has been in custody and served the sentence for more than 8 years which shall be his period of sentence. As such he has served the sentence imposed by us except payment of fine. The fine and default sentence as imposed by the trial court is maintained.

17. In the result we make the following order:

(i) The conviction and sentence under Section 363, 366, and Section 4 of POCSO Act is confirmed.

The conviction under Section 506 IPC is set aside.

(ii) The conviction order made by the trial court and confirmed by the High Court under Section 376 D IPC is modified. The appellant is instead convicted under Section 376 IPC and is sentenced, for the period undergone. The fine and default sentence as imposed by the trial court shall remain unaltered.

(iii) Since the custody certificate dated 20.09.2013 indicates that the

appellant has undergone sentence for more than 8 years, the appellant is ordered to be released on payment of fine as all the sentences have run concurrently and if he is not required to be detained in any other case.

(iv) The appeal is accordingly allowed in part.

(v) Pending application, if any, shall stand disposed of."

23. In view of the legal proposition, so culled out from the aforesaid judgments, the facts and the given circumstances of 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. Needless to point out that it is the duty of every court to award proper sentence having regard to nature of offence and manner of its commission. The Apex Court has gone even to the extent that the 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. Moreover, 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.

24. Generally speaking, 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.

25. 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.

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

27. Learned AGA has confirmed that appellant is in jail since conviction, i.e, for the last 6 years and 11 months. Since, the appellant has already served 6 years and 11 months in jail, ends of justice will be met if sentence is reduced to 8 years remission and maintaining fine and default sentence.

28. Learned counsel for the appellant has placed reliance on the decisions of the Apex Court in ***Hitesh Verma Vs. The State of Uttarakhand and another, 2020 0 Supreme (SC) 653, Ramawatar Vs. State of Madhya Pradesh, 2021 0 Supreme (SC) 625*** and the reported judgments of this Court in ***Criminal Appeal No.204 of 2021, Vishnu vs. State of UP*** dated 28.1.2021 as well as in ***Criminal Appeal No. 3248 of 2014, Suresh Vs. State of U.P.*** dated 24.11.2021, penned by one of us (Dr.Kaushal Jayendra Thaker, J.) contending that no case under Section 3 (2) (v) of SC/ST Act is made out and the conviction under the said section requires to be upturned. Learned counsel for the appellant has also relied on the judgment in ***Patan Jamal Vali vs The State Of Andhra Pradesh, AIR 2021 SC 2190*** and contends that as the prosecutrix has not laid any evidence to prove that the offence was committed knowing that the victim belongs to scheduled caste category within a meaning of Section 3(2)(v) of S.C./S.T.Act.

29. We have carefully gone through the judgment and order dated 23.12015 passed by the court below under challenge and we find that in paragraph-18 of the judgment itself the learned trial court has observed that the onus to prove that the offences have been committed by the accused-appellant under Section 376 IPC read with Section 3(2)V of SC/ST Act is upon the prosecution. However, there is neither any serious discussion nor any finding in the judgment in question with regard to the fact that the victim belongs to SC/ST category. Apart from the same, this Court finds that there is no witness to prove the caste of the victim. Thus inevitable conclusion is this that no offence under Section 3(2)V of SC/ST Act is made out and thus the conviction and the sentence so made under Section 3(2)V of SC/ST Act is unsustainable in the eyes of law.

30. The conviction of the appellant under the provisions under Section 3(2)(V) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to as "the SC/ ST Act') is not made out. The provisions under Section 3(2(V) of SC/ST Act reads as follows:-

*"**Section 3(2)(v)** Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe, commits any offence under the Indian Penal Code (45 of 1860) punishable with imprisonment for a term of ten years or more against a person or property on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property* belongs to such member, shall be punishable with imprisonment for life and with fine"

31. The learned counsel for the appellant has contended that the judgment of this High Court in Criminal Appeal No. 204 of 2021, Vishnu vs. State of Uttar Pradesh, passed on 28.1.2021 will come to the aid of accused. There is no case as enumerated in the said section is made out. The learned counsel for the appellant has further submitted that the ingredients of Section 3(2)(V) of SC/ST Act are not made

out and the finding and punishment is contrary.

32. In view of the decision in ***Patan Jamal Vali (supra)***, the sine qua non is that the victim should be a person, who belongs to scheduled caste or scheduled tribe and that the offence under the Indian Penal Code is committed against such person on the basis that such person belongs to the same caste and the offender does not belong to the same caste. If this is proved, then only conviction under Section 3(2)(V) of the Act, 1989 can be invoked.

33. The evidence goes to show that there was no utterance by accused, which would prove that the ingredients of Section 3(2)(V) of the SC/ST Act are fulfilled. The judgment in ***Patan Jamal Vali (supra)*** applies to facts in this case, and therefore, when the prosecutrix and her witnesses are silent on the factum of the incident occurring due to she being of caste, which falls within the purview of SC/ST Act, the conviction cannot be sustained.

34. We pass the following orders:-

(I) The sentence awarded to the appellant by the learned trial-court for the commission of offence under Section 376 read with Section 506 of IPC is reduced to a period of 8 years with fine of Rs.5,000/- and the default sentence is maintained looking to the poverty of the appellant.

(ii) As far as Section 3(2)(V) read with Section 3(1)XII) of the SC/ST Act is concerned, this Court upturns the sentence both of incarceration and fine and the same is quashed if the fine is deposited, which is a fine under Section 325 IPC, same shall be refunded. The accused is acquitted of the said charges.

(iii) As far as Section 326 IPC is concerned, we lessen the fine to Rs.2000/-, which should be paid to the father of the prosecutrix.

35. The appeal is **partly allowed**. The records be sent back to the court below.

(2022)01ILR A484
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.11.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE VIKAS BUDHWAR, J.

Criminal Appeal No. 2137 of 2015

Smt. Sudha & Anr. ...Appellants
Versus
State Of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Nipun Singh, Sri Manoj Vashisth, Sri Santosh Kumar Tiwari, Sri Santosh Tripathi

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

Criminal Law – Indian Penal Code, 1860 – Section 304(1) - Allegation-dowry death-burn injuries-husband admitted in the hospital-dying declaration-cause of death-septicimia-accused had no intention to cause death-injuries though sufficient to cause death-hence incident fall under Ex.1 and 4 to section 300 IPC-offence will fall under section 304 (1) IPC-conviction u/s 302 IPC converted into under section 304 (1) IPC.

Appeal partly allowed. (E-9)

List of Cases cited:

1. St. of U.P. Vs Ramesh Prasad Misra & anr. 1996 AIR (Supreme Court) 2766

2. Koli Lakhmanbhai Chanabhai Vs St. of Guj., reported in (1999) 8SCC 624

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

4. Prakash & anr. Vs St. of M.P. (1992) 4 SCC 225

5. Laxman Vs St. of Mah. (2002) 4 SCC 710

6. Babulal & ors. Vs St. of M.P. (2003) 12 SCC 490

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

8. Vijay Pal Vs St. (Government of NCT of Delhi) (2015) 4 SCC 749

9. Mafabhai Nagarbhai Raval Vs St. of Guj. (1992) 4 SCC 69

10. St. of M.P. Vs Dal Singh & ors. (2013) 14 SCC 159

11. Ganga Dass Alias Godha Vs St. of Haryana1994 Supp(1) SCC 534

12. B.N. Kavatakar & anr. Vs St. of Karnataka 1994 Supp(1) SCC 304

13. Jagtar Singh & anr. Vs St. of Punj. (1999) 2 SCC 174

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

15. Bengai Mandal @ Begai Mandal Vs St. of Bihar [(2010) 2 SCC 91

16. Chirra Shivraj Vs St. of Andhra Pradesh (2010) 14 SCC 444

17. Sanjay Vs St. of U.P. (2016) 3 SCC 62

18. Khokan Alias Khokhan Vishwas Vs St. of Chhattisgarh (2021) 3 SCC 337

19. Gujarat High court in Criminal Appeal No.83 of 2008 (Gautam Manubhai Makwana Vs St. of Gujarat) decided on 11.9.2013

20. Criminal Appeal No.1944 of 2014, Ram Prakash Alias Pappu Yadav Vs St. of U.P.

(Delivered by Hon'ble Vikas Budhwar, J.)

1. This appeal has been preferred against the judgment and order dated 8.5.2015 passed by learned Sessions Judge, Meerut in Special Trial No.519 of 2011 (State Vs. Smt. Sudha and another) arising out of Case Crime No.190 of 2000, under Sections 498A, 304B in alternate Section 302 IPC and Section 3/4 the Dowry Prohibition Act, P.S. Partapur, Meerut whereby the appellants have been convicted under Section 302 of the IPC for life imprisonment along with find of Rs.20,000/- each and in default of the payment of fine an additional imprisonment of one year.

2. The brief facts of the case are that a first information report was registered on 19.5.2000 at 15.30 p.m. on the basis of an application moved by the complainant, father of the deceased being Smt. Jaya in police station Partapur, District Meerut alleging that the daughter of the complainant being Smt. Jaya aged about 23 years solemnized marriage with one Sri Raghuvir s/o Dev Dutt Swarnkar r/o Acchrauden, P.S. Partapur, District Meerut on 15.2.1999 after offering expensive gifts such as Shelf, T.V., Cooler, Double Bed, Sofa, Sewing Machine, Cooking ware, Wall Clock, Gas Cylinder, Clothes and Jewellery but neither the accused nor the family members were happy with gifts so offerred to them, whenever Smt. Jaya (Deceased) used to visit her parental house, then she used to make complaint of the appellants being sister-in-laws and Sri Raghuvir s/o Dev Dutt Swarnkar the

husband, that dowry was being demanded them and they used to administer beating.

3. In the FIR, it was further alleged by the complainant that on 5.5.2000, he received information that his daughter being the deceased/victim had sustained burn injuries. Accordingly, he along with his wife rushed to the matrimonial house of his daughter on 6.5.2000 and thereafter, the complainant was apprised that Smt. Jaya, being the daughter of the complainant, has been admitted by her husband namely Sri Raghuvir s/o Dev Dutt Swarnkar and mother-in-law in Jeevan hospital at Modi Nagar, Meerut.

4. Accordingly, the complainant visited the hospital and the daughter of the complainant, however, did not disclose any facts to either the complainant or his wife. Subsequently, the daughter of the complainant being Smt. Jaya wife of Sri Raghuvir s/o Dev Dutt Swarnkar was referred to Safdarjung Hospital Delhi for treatment. The statement of Smt. Jaya being the daughter of the complainant was recorded by the Magistrate on 7.5.2000 in the presence of the complainant, in which, the daughter of the complainant narrated the facts that on 30.4.2000, the appellants, who happened to be her sister-in-laws, used to often quarrel and administer beating upon her and on 30.4.2000, the appellants poured kerosene oil over her and thereafter the appellant no.1 ignited the same. At the relevant point of time, Sri Raghuvir, who happened to be the husband of the deceased/ Smt. Jaya was present, but he allowed her sisters, being the appellant, to push away from the spot, he poured water over the deceased and when request was being made by the deceased for taking her for proper treatment, the husband of the deceased took the deceased to a medical practitioner in village Saidpur, bandage was wrapped over her. In her statement, the deceased also stated that she was not taken anywhere with a view that she may not write a letter to anyone narrating the said incident and she was locked in the room. It was further alleged in the first information report that during the course of the treatment, the complainant's daughter being Smt. Jaya succumbed to burn injuries on 12.5.2000 in Safdarjung Hospital. On the basis of the complaint dated 19.5.2000, the FIR was registered.

5. Consequent to the lodging of the complaint, as noted above, a first information report was lodged under Section 304B IPC, 1860 on 18.5.2000 against the appellants being Case Crime No.190 of 2000 before the police station Partapur, Meerut. S.I. Om Prakash took up the investigation. During the course of the investigation, he recorded the statement of the witnesses, prepared site plan, victim's dying declaration was also recorded by S.D.M. Najafgarh. After the death of the victim, inquest report was prepared and the dead-body was sent for postmortem.

6. After completing the investigation, the Investigation Officer submitted the charge sheet against the accused Raghuvir s/o Dev Dutt Swarnkar (husband) and against the appellants, who were absconding. Hence the investigation was kept pending against them.

7. The file of Sri Raghuvir s/o Dev Dutt Swarnkar being the husband of the victim was committed to the Court of Sessions by the Magistrate concerned and the Sessions Trial No.1095 of 2000 was proceeded with, which culminated into an order passed by the Court of Fast Track/Additional District and Sessions

Judge, Meerut on 14.3.2003. However, the investigation which was pending against the appellants was concluded and given to its logical end while filing of the charge sheet against the appellants for the offences punishable under Sections 498A, 304B of the IPC, 1860 read with Section 3/4 Dowry Prohibition Act. The case being triable by the Court of Sessions was committed by the competent Magistrate to the Court of Sessions.

8. Learned Trial Court framed charges against the appellants under Sections 498A, 304 IPC read with Section 3/4 D.P. Act. Accused denied the charges and claimed to be tried.

9. To bring home the charges, the prosecution produced following witnesses, namely:

1.	Dharmvir Singh	PW1
2.	Prem Narayan	PW2
3.	Arun Kumar	PW3
4.	Dr. Arvind	PW4
5.	Omprakash	PW5
6.	Navneet Singh Sikeria	PW6
7.	Roshan Lal Sharma	PW7

Apart from the aforesaid witnesses the prosecution submitted following documents which were proved by alleging the evidence.

1.	**First Information Report**	Ex.ka1
2.	**Dying Declaration**	Ex.ka2
3.	**Application for postmortem**	Ex.ka3
4.	**Brief facts**	Ex.ka4
5.	**Death report**	Ex.ka5
6.	**Postmortem report**	Ex.ka6
7.	**Medico legal report**	Ex.ka7
8.	**Death summary**	Ex.ka8
9.	**Death report**	Ex.ka9
10.	**Charge-sheet**	Ex.ka10
11.	**Charge-sheet**	Ex.ka11
12.	**Site-plan**	Ex.ka13

10. Heard Sri Santosh Kumar Tiwari learned counsel for the appellants, learned AGA for the State and perused the record.

Learned counsel for the appellants had made manifolds submissions namely:

(a) As the star witness being PW2 and also PW1 have not supported the prosecution case and they have turned hostile so conviction of appellants is not legally justified.

(b) Though dying declaration was recorded when the victim was surviving, but the dying declaration has no corroboration with any prosecution evidence. Therefore, the trial court has committed grave error by convicting the accused on the basis of dying declaration.

(c) Once the accused were acquitted under the offences punishable under Section 3/4 of the Dowry Prohibition Act read with Sections 498A and 304 IPC then there was no occasion to convict the appellants under Section 302 of the IPC particularly when there was a doubt as to whether the deceased succumbed on account an act of suicide or by virtue of the burns sustained while pouring of kerosene by the appellants.

(d) The appellants could not have been convicted under Section 302 of the IPC particularly when the death was on account of septicemia and at maximum the case could have travelled up to the limits of offences under Section 304 IPC.

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

12. Learned counsel for the appellants while elaborating his first submission had sought to argue that main prosecution witness has not supported the prosecution case and the witnesses had turned hostile as so far as the PW-1 Sri Dharmvir Singh is concerned, he turned hostile to the prosecution as in his examination-in-chief, he has only stated that he is well-versed with Sri Raghuvir, Sudha and Madubal @ Anuradha accused (appellants) as they were the resident of his village and he is not aware that Raghuvir married to whom. Even in fact in the cross-examination of PW1 Dharmvir has also denied his statement alleged to be recorded under Section 161 Cr.P.C., meaning thereby he did not support the prosecution version.

13. According to the learned counsel for the appellants, the most crucial witness was the complainant, who happens to be the father of the deceased/victim (PW-2), though in his examination-in-chief had admitted lodging of the above noted FIR and the same has also been proved but the PW2 in his statement had come up with the case that the deceased daughter was never harassed for demand of dowry and she never complained about the same. It was further deposed by the PW2 that his deceased daughter denied that the appellants had ever beaten or quarrelled with her or committed the occurrence which culminated into the conviction of the appellants. It has further been argued by the learned counsel for the appellants that once the PW2 has resiled from his statement recorded under Section 161 of the Cr.P.C. while alleging that FIR was prepared under the dictation of some police personnel and was not signed by him then in these circumstances there remained no witness so as to suggest the story so propounded by the prosecution was true and reliable.

14. In nutshell, the submission of learned counsel for the appellants is to the extent that once the prosecution witnesses do not support the prosecution version and they have also been declared hostile then the entire case of the prosecution has no legs to stand and thus the conviction of the appellants is unsustainable in the eyes of law.

15. The argument so raised by the learned counsel for the appellants with

respect to the PW-1 Sri Dharmvir Singh and PW-2 Sri Prem Narayan being declared to be hostile and thus the entire prosecution case has no legs to stand though appears to be attractive but is not liable to be accepted particularly in view of the fact that here in the present case, there is a distinguishable feature that admittedly a first information report was lodged on 19.5.2000 at 15.30 p.m. on an application moved by the complainant Sri Prem Narayan PW2, who happens to be the father of the deceased/victim. PW5 S.I. Sri Om Prakash in his testimony had deposed that while he was posted as head Munshi at Police Station Partarpur District Meerut on 9.5.2000, he lodged Chik No.109 of Case Crime No.190 of 2000, under Section 304B of the IPC upon written report of the complainant. The registration of the case crime number was entered in General Diary No.26 at 15.30 p.m. on 19.5.2000. The said documents were compared and proved also. Even otherwise PW6 I.O. Navneet Singh Sikeria also proved the said document being complaint lodged by the PW1 Prem Narayan. The aforesaid facts itself reveal that it is the complainant being PW2, who had moved complainant which transformed into lodging of an FIR. Thus it is only on the basis of the complaint that FIR was lodged and the motion for conducting investigation commenced. Even spot map was also prepared on the basis of the directions of the complainant Prem Narayan (PW2).

16. Hon'ble Apex Court had the occasion to consider the contingency wherein the witnesses turned hostile and it was held that the evidence of hostile witness can be relied upon to the extent it supports the version of the prosecution and it is not necessary that it should be relied upon or rejected as well as even otherwise it is a settled law that evidences of hostile witness can be relied upon to the extent to which it supports the prosecution version.

17. In the case of **State of U.P. vs. Ramesh Prasad Misra and another 1996 AIR (Supreme Court) 2766,** the Hon'ble Apex Court has held as under:-

"the Hon'ble Apex Court held that evidence of a hostile witnesses would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. Thus, the law can be summarized to the effect that evidence of a hostile witness cannot be discarded as a whole, and relevant part thereof, which are admissible in law, can be used by prosecution or the defence."

18. In the case of **Koli Lakhmanbhai Chanabhai Vs. State of Gujarat, reported in (1999) 8SCC 624, t**he Hon'ble Apex Court in paragraphs-5 and 6 has held as under:-

5. From the aforesaid evidence on record, in our view, it cannot be said that the High Court erred in relying upon some portion of the evidence of P.W. 7 who was cross-examined by the prosecution. It is settled law that evidence of hostile witness also can be relied upon to the extent to which it supports the prosecution version. Evidence of such witness cannot be treated as washed off the record. It remains admissible in the trial and there is no legal bar to base his conviction upon his testimony if corroborated by other reliable evidence. In the present

case, apart from the evidence of P.W.7, the prosecution version that he saw that appellant was having knife in his hand and was quarreling with the deceased gets corroboration from the evidence of P.Ws 11 and 12 to whom he disclosed the incident immediately. On the basis of the said information, within one hour, FIR was lodged disclosing the name of the appellant as the person who has inflicted the knife blow. Number of incised wounds are found as per the Postmortem report. The prosecution version gets further corroboration from discovery of Muddamal knife containing human blood Group 'A' Further the bush-shirt and baniyan which were put on by the accused at the time of incident were having extensive blood stains which were also found containing human blood group 'A'. Learned counsel for the appellant, however, contended that accused is also having blood Group 'A' and that he was having injury on the thigh as per the evidence of the Doctor. In our view there is no substance in his contention because as per the medical evidence, the injuries caused to the accused were minor and that because of such injuries, there would not be extensive bloodstains on the bush-shirt and baniyan put on by the accused. In his 313 statement also, accused has not explained how he got bloodstains on his bush-shirt and baniyan. He has also not denied the recovery of the said bush-shirt and baniyan from his person at the time of his arrest.

6. Hence, considering the above stated evidence on record, it cannot be said that High Court committed any error in convicting the appellant for the offence punishable under Section 302 IPC.

19. Further in the case of **Ramesh Harijan Vs. State of Uttar Pradesh 2012(5) SCC 777 para 23 and 24**, the Hon'ble Apex Court in paragraphs- 23 and 24, has held as under:-

23. It is a settled legal preposition that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross examine him.

24 The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent that their version is found to be dependable on a careful scrutiny thereof.

In the case of Vinod Kumar Vs. State of Punjab (2015) 3 SCC 220, the Hon'ble Apex Court in paragraphs- 31 and 32 has held as under:-

31. The next aspect which requires to be adverted to is whether testimony of a hostile evidence that has come on record should be relied upon or not. Mr. Jain, learned senior counsel for the Appellant would contend that as PW-7 has totally resiled in his cross-examination, his evidence is to be discarded in toto. On a perusal of the testimony of the said witness, it is evincible that in examination-in-chief, he has supported the prosecution story in entirety and in the cross-examination he has taken the path of prevarication. In Bhagwan Singh v. State of Haryana (1976) 1 SCC 389, it has been laid down that even if a witness is characterised has a hostile witness his evidence is not completely effaced. The said evidence remains admissible in the trial and there is no legal bar to base a conviction upon his testimony, if corroborated by other reliable evidence. In Khuji @ Surendra Tiwari v. State of Madhya Pradesh (1991) 3 SCC

627, the Court after referring to the authorities in Bhagwan Singh (supra), Rabindra Kumar Dey v. State of Orissa (1976) 4 SCC 233 and Syad Akbar v. State of Karnataka (1980) 1 SCC 30, opined that the evidence of such a witness cannot be effaced or washed off the record altogether, but the same can be accepted to the extent it is found to be dependable on a careful scrutiny thereof.

32. In this context, we think it apt to reproduce some passages from Rammi @ Rameshwar v. State of Madhya Pradesh (1999) 8 SCC 649, where the Court was dealing with the purpose of re-examination. After referring to Section 138 of the Evidence Act, the Court held thus:

17. There is an erroneous impression that reexamination should be confined to clarification of ambiguities which have been brought down in cross-examination. No doubt, ambiguities can be resolved through re-examination. But that is not the only function of the re-examiner. If the party who called the witness feels that explanation is required for any matter referred to in cross-examination he has the liberty to put any question in re-examination to get the explanation. The Public Prosecutor should formulate his questions for that purpose. Explanation may be required either when the ambiguity remains regarding any answer elicited during cross-examination or even otherwise. If the Public Prosecutor feels that certain answers require more elucidation from the witness he has the freedom and the right to put such questions as he deems necessary for that purpose, subject of course to the control of the court in accordance with the other provisions. But the court cannot direct him to confine his questions to ambiguities alone which arose in cross-examination.

18. Even if the Public Prosecutor feels that new matters should be elicited from the witness he can do so, in which case the only requirement is that he must secure permission of the court. If the court thinks that such new matters are necessary for proving any material fact, courts must be liberal in granting permission to put necessary questions.

20. Accordingly, we are satisfied that the learned trial court had meticulously scrutinized the evidence available on record and after following the proposition of law laid down by the Hon'ble Apex Court in the afore-noted decision had proceeded to consider the statements of the hostile witnesses, in so far as it supports the prosecution version.

21. Learned counsel for the appellants has next contended that the dying declaration of the deceased/victim cannot be relied upon as the same is doubtful and not corroborated by witness of facts, hence it cannot be the sole basis of conviction.

22. As far as the issue of dying declaration is concerned, it has come on record that one Sri Arun Kumar Mishra, the then S.D.M. Nazafgarh and presently posted as Director Delhi Municipal Corporation was examined as PW3. Dying declaration as recorded by PW3 was after obtaining the certificate of medical fitness from the doctor. Even after completion of dying declaration also the doctor as given a certificate that during the course of the statement, fit state of mind of the deceased was not there.

23. The reliability of dying declaration has always been subject matter

of scrutiny before the courts of law and it has been held that dying declaration is in fact the statement of person, who cannot be called a witness and therefore cannot be cross-examined and same cannot be brushed-aside. In case the Court comes to a conclusion that dying declaration is true and reliable and has been recorded by a person at a time when the deceased was physically and mentally fit to make the said declaration then it can be the sole basis for recording conviction.

24. In the case of P**rakash and another Vs. State of Madhya Pradesh (1992) 4 SCC 225,** the Hon'ble Apex Court in paragraph-11 has held as under:-

11. After giving our anxious consideration to the facts and circumstances of the case and the arguments advanced by the counsel for the parties and judgment delivered both by the Additional Sessions Judge and the High Court of Madhya Pradesh, it appears to us that the fatal injuries had been inflicted by Prakash with the gupti. The gupti was recovered at the instance of the accused and such recovery was not otherwise possible if the accused himself had not assisted for such recovery of the gupti. The said gupti was stained with human blood and no reasonable explanation has been given by accused for such blood stain. The injuries found on the person of the deceased could be inflicted by a gupti and complicity of Prakash in inflicting the fatal injuries by gupti has been corroborated by the eye-witness. There may be some minor discrepancies in the evidence of the eye-witness but so far as the complicity of Prakash is concerned, the depositions of the eye-witnesses were consistent. In discarding the evidence of the brother of the deceased namely Ajay Singh the learned Additional Sessions Judge was influenced by the tender age of Ajay (about 14 years) and was of the view that he was likely to be tutored. We do not think that a boy of about 14 years of age cannot give a proper account of the murder of his brother if he has an occasion to witness the same and simply because the witness was a boy of 14 years it will not be proper to assume that he is likely to be tutored. The High Court has given very convincing reasons for accepting the evidence of Ajay Singh as an eye-witness of the murderous act and we do not find any infirmity in the finding made by the High Court. In so far as the dying declaration is concerned, we are inclined to accept the finding of the High Court that the deceased was alive at least up to half an hour after the assault. He had been taken to the hospital where he received some treatment for about 10-15 minutes. It is not borne out from the evidence of the doctor that the injuries were so grave and the condition of the patient was so critical that it was unlikely that he could make any dying declaration. As a matter of fact, on second thought, the learned Additional Sessions Judge has accepted the dying declaration and has convicted Prakash on the basis of dying declaration. The injuries inflicted by Prakash were very serious on vital parts of the body causing death of the deceased within a very short time. In such circumstances, conviction under Section 302, I.P.C. and sentence of life imprisonment of the accused Prakash is justified and no interference is called for. In our view, the High Court has taken a very reasonable view in convicting the other accused namely Shiv Narayan under Section 326 read with Section 34, I.P.C. and has considered his case with such sympathy as the said accused deserved by sentencing him for imprisonment for the

period already undergone by him, for an offence under Section 326 read with Section 34, I.P.C. We, therefore, find no reason to interfere with the conviction or the sentence passed against the accused Shiv Narayan. The appeals therefore fail and are dismissed. The bail bond of the accused Prakash is discharged and he would surrender and serve out the sentence.

25 . In the case of **Laxman Vs. State of Maharashtra (2002) 4 SCC 710,** the Hon'ble Apex Court in paragraph-11 has held as under:-

The court, however has to always be on guard to see that the statement of the deceased was not as a result of either tutoring or promoting or a product of imagination. The court also must further decide that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant. Normally, therefore, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration dying declaration look up to the medical opinion. But where the eyewitnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. A dying declaration can be oral or in writing and in any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a magistrate or a doctor or a police officer. When it is recorded, no oath is necessary nor is the presence of a magistrate is absolutely necessary, although to assure authenticity it is usual to call a magistrate, if available for recording the statement of a man about to die. There is no requirement of law that a dying declaration must necessarily be made to a magistrate and when such statement is recorded by a magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who record a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise.

26 . In the case of **Babulal and others Vs. State of M.P. (2003) 12 SCC 490,** the Hon'ble Apex Court in paragraph-7 has held as under:-

7. The pivotal point which was pressed into service with some amount of vehemence was acceptability of dying declaration . There is no legal bar for the information given by the deceased to be treated as a dying declaration. This position was stated succinctly by this Court in Munnu Raja and Anr. v. State of M.P. 1976CriLJ1718 . Section 32 of the Indian Evidence Act, 1872.

The materials on records clearly established that the deceased was in mentally fit condition, though battered in the physical frame. The High Court has rightly held that presence of PWs 1 and 2 did not result in any presumption of tutoring, when the FIR was recorded. Merely because there was a thumb impression on the FIR, and not the signature as stated by PW-1, that does not falsify the prosecution version. The same has been clarified by the High Court. It has to be noted that PW-16, who had scribed the FIR, stated that the contents were read over to the deceased, who had thereafter put his thumb impression. In fact the defence itself has suggested to PW-1 during cross examination that the thumb impression was taken on the paper first and thereafter the writings were inserted. In other words, there was acceptance of the fact that the thump impression was there but writings were done later which have been denied by PW-1. We do not find any reason to discard the dying declaration only on this ground. The High Court has also found in analyzing the evidence that the plea relating to anti dating or anti timing of the FIR is a myth. Though some of the accused persons have been acquitted by the trial Court, the High Court has carefully analysed the evidence and have sifted the grain from the chaff and disengaged truth from falsehood.. Merely because some persons have not been named in the FIR and have given the benefit of doubt, that cannot be a reason for discarding the dying declaration or the evidence of the witnesses.

27. In the case of **Lakhan Vs. State of Madhya Pradesh (2010) 8 SCC 514**, the Hon'ble Apex Court in paragraphs-18 and 19 has held as under:-

18. In Amol Singh v. State of M.P. (2008) 5 SCC 468, this Court, placing reliance upon the earlier Judgment in Kundula Bala Subrahmanyam and Anr. v. State of Andhra Pradesh (1993) 2 SCC 684, held that it is not the plurality of dying declarations but the reality thereto that aids weight to the prosecution's case. If a dying declaration is found to be voluntary, reliable and made in a fit mental condition, it can be relied upon without any corroboration. If there is more than one dying declaration, they should be consistent. In case of inconsistencies between two or more dying declarations made by the deceased, the Court has to examine the nature of inconsistencies namely, whether they are material or not and in such a situation, the Court has to examine the multiple dying declarations in the light of the various surrounding facts and circumstances.

19. In Heeralal v. State of Madhya Pradesh (2009) 12 SCC 671, this Court considered the case having two dying declarations, the first recorded by a Magistrate, wherein it was clearly stated that the deceased had tried to set herself ablaze by pouring kerosene on herself. However, the subsequent declaration was recorded by another Magistrate and a contrary statement was made. This Court set aside the conviction after appreciating the evidence and reaching the conclusion that the courts below came to abrupt conclusions on the purported possibility that the relatives of the accused might have compelled the deceased to give a false dying declaration. No material had been brought on record to justify such a conclusion.

28. In the case of **Vijay Pal Vs. State (Government of NCT of Delhi) (2015) 4**

SCC 749, the Hon'ble Apex Court in paragraph-22 has held as under:-

22. Thus, the law is quite clear that if the dying declaration dying declaration is absolutely credible and nothing is brought on record that the deceased was in such a condition, he or she could not have made a dying declaration to a witness, there is no justification to discard the same. In the instant case, PW-1 had immediately rushed to the house of the deceased and she had told him that her husband had poured kerosene on her. The plea taken by the Appellant that he has been falsely implicated because his money was deposited with the in-laws and they were not inclined to return , does not also really breathe the truth, for there is even no suggestion to that effect.

29. Another aspect also needs to be considered i.e. the issue of reliability of the dying declaration when the deceased had sustained high degree of injuries. The Apex Court has observed that it is not an abstract principle of law that a dying declaration of a person sustaining high degree of burn injuries cannot be relied upon as the same depends upon facts and circumstances of every individual case.

30. In the matter of **Mafabhai Nagarbhai Raval Vs. State of Gujarat (1992) 4 SCC 69** the Hon'ble Apex Court in paras 3, 4 & 5 have held as under: -

3. The deceased aged about 40 years was the widow of one Savaji and was living in a wooden cabin near the maternity hospital in Harij and she was maintaining herself by doing casual work in the maternity hospital. She developed illicit intimacy with the accused. Her grown-up children were dissatisfied with her character and other members of her community were also dissatisfied. Since then she was living alone in the wooden cabin near the maternity hospital. There was some quarrel between the accused and the deceased. At about midnight on 9.7.78 the accused went to her cabin and sprinkled kerosene oil on her and set fire to her clothes and then fled. The deceased ran from her cabin inside the compound of the maternity hospital raising cries. One Patavala Motibhai came there and put a quilt on her body. The said Patavala Motibhai went and informed the Medical Officer, P.W. 2 of the Government Hospital who immediately ran to the spot and separated the burnt clothes from her body and gave first aid. He questioned as to who had set lire and the deceased replied that the accused was the culprit. P.W. 2 recorded her statement which is the first dying declaration in the case. P.W. 2 shifted her to the hospital and he himself went to the police station and gave a report. The police Jamadar also recorded her statement in the hospital which is yet another dying declaration in the case. By that time information was sent to the Taluka Magistrate with a request to record the dying declaration. P.W. 3, the Taluka Magistrate went to the spot and he also recorded the dying declaration. The deceased died in the early morning of 10.7.78. Inquest was held over the dead body and post-mortem was conducted by P.W. 2. The learned Sessions Judge, in our view, has unnecessarily doubted the veracity of P.W. 2, the Doctor. He observed that the moment the flames had been seen by the deceased on her person she must have received a severe shock and the same must have become "graver and graver" and in that state of mind it is not believable at all that the deceased could keep balance of

her mind and full consciousness so as to make the statement. With this initial doubt the learned Sessions Judge proceeded to examine the evidence of the Doctor. The Doctor stated that in some cases mental shock immediately does . not develop and that in the instant case the deceased developed the mental shock for the first time at 4 A.M. Thereafter it gradually increased. The learned Sessions Judge called it irresponsible statement. It is in the medical evidence that 99% of the body of the deceased was affected by extensive bums and that the clothes of the deceased were also burnt to ashes. Therefore, the learned Judge thought that it was not at all possible to believe that the lady might. have developed the shock only at 4 A.M. and he gave his firm opinion that the moment the deceased had seen the flames she must have sustained mental shock and these circumstances convinced him that right from the very beginning she must have been under a mental shock and on that ground the learned Judge disbelieved the Doctor. Likewise he has pointed out certain circumstances purely based on surmises and on his inferences.

4. On the same process of reasoning the learned Sessions Judge has also doubted the evidence of P.W. 3, the Executive Magistrate. The learned Judge found fault with the procedure . adopted by the Executive Magistrate namely that he did not record the statement in the form of questions and answers. The learned Judge, in our view, without any basis reached the conclusion that the Executive Magistrate did not record the dying declaration dying declaration exactly in the words stated by the deceased. There is third dying declaration recorded by the police Jamadar but we need not consider the same.

5. It must be noted that P.W. 2 recorded the statement within five minutes and noted the time also in the statement. The High Court has rightly pointed out that both the dying declarations are true and voluntary. It is not the case of the defence that she gave tutored version. The entire attack of the defence was on the mode of recording the dying declarations and on the ground that the condition of the deceased was serious and she could not have made the statements. On these aspects as noted above, the evidence of the Doctor is relevant and important. We have gone through the evidence of the Doctor as well as that of the Executive Magistrate. We find absolutely no infirmity worth mentioning to discard their evidence; It therefore emerges that both the dying declarations are recorded by independent witnesses and the same give a true version of the occurrence as stated by the deceased. The dying declarations by themselves are sufficient to hold the appellant guilty. The High Court has rightly interfered in an appeal against acquittal. The appeal is accordingly dismissed.

31. Following the said judgment the Hon'ble Supreme Court in the case of **State of Madhya Pradesh Vs. Dal Singh and others (2013) 14 SCC 159 in paras 14 to 22** have observed as under:-

Whether 100 per cent burnt person can make a dying declaration or put a thumb impression:

14. In Mafabhai Nagarbhai Raval v. State of Gujarat AIR 1992 SC 2186, this Court dealt with a case wherein a question arose with respect to whether a person suffering from 99 per cent burn injuries could be deemed capable enough for the purpose of making a dying declaration. The learned trial Judge thought that the same

was not at all possible, as the victim had gone into shock after receiving such high degree burns. He had consequently opined, that the moment the deceased had seen the flame, she was likely to have sustained mental shock. Development of such shock from the very beginning, was the ground on which the Trial Court had disbelieved the medical evidence available. This Court then held, that the doctor who had conducted her post-mortem was a competent person, and had deposed in this respect. Therefore, unless there existed some inherent and apparent defect, the court could not have substitute its opinion for that of the doctor's. Hence, in light of the facts of the case, the dying declarations made, were found by this Court to be worthy of reliance, as the same had been made truthfully and voluntarily. There was no evidence on record to suggest that the victim had provided a tutored version, and the argument of the defence stating that the condition of the deceased was so serious that she could not have made such a statement was not accepted, and the dying declarations were relied upon. A similar view has been re-iterated by this Court in Rambai v. State of Chhatisgarh (2002) 8 SCC 83.

15. In Laxman v. State of Maharashtra : AIR 2002 SC 2973, this Court held, that a dying declaration can either be oral or in writing, and that any adequate method of communication, whether the use of words, signs or otherwise will suffice, provided that the indication is positive and definite. There is no requirement of law stating that a dying declaration must necessarily be made before a Magistrate, and when such statement is recorded by a Magistrate, there is no specified statutory form for such recording. Consequently, the evidentiary value or weight that has to be attached to such a statement, necessarily depends on the facts and circumstances of each individual case. What is essentially required, is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind, and where the same is proved by the testimony of the Magistrate, to the extent that the declarant was in fact fit to make the statements, then even without examination by the doctor, the said declaration can be relied and acted upon, provided that the court ultimately holds the same to be voluntary and definite. Certification by a doctor is essentially a rule of caution, and therefore, the voluntary and truthful nature of the declaration can also be established otherwise.

16. In Koli Chunilal Savji v. State of Gujarat AIR 1999 SC 3695, this Court held, that the ultimate test is whether a dying declaration can be held to be truthfully and voluntarily given, and if before recording such dying declaration, the officer concerned has ensured that the declarant was in fact, in a fit condition to make the statement in question, then if both these aforementioned conditions are satisfactorily met, the declaration should be relied upon. (See also: Babu Ram and Ors. v. State of Punjab AIR 1998 SC 2808).

17. In Laxmi v. Om Prakash and Ors. AIR 2001 SC 2383, this Court held, that if the court finds that the capacity of the maker of the statement to narrate the facts was impaired, or if the court entertains grave doubts regarding whether the deceased was in a fit physical and mental state to make such a statement, then the court may, in the absence of corroborating evidence lending assurance

to the contents of the declaration, refuse to act upon it.

18. In Govindappa and Ors. v. State of Karnataka (2010) 6 SCC 533, it was argued that the Executive Magistrate, while recording the dying declaration did not get any certificate from the medical officer regarding the condition of the deceased. This Court then held, that such a circumstance itself is not sufficient to discard the dying declaration. Certification by a doctor regarding the fit state of mind of the deceased, for the purpose of giving a dying declaration, is essentially a rule of caution and therefore, the voluntary and truthful nature of such a declaration, may also be established otherwise. Such a dying declaration must be recorded on the basis that normally, a person on the verge of death would not implicate somebody falsely. Thus, a dying declaration must be given due weight in evidence.

19. In State of Punjab v. Gian Kaur and Anr. AIR 1998 SC 2809, an issue arose regarding the acceptability in evidence, of the thumb impression of Rita, the deceased, that appeared on the dying declaration, as the trial court had found that there were clear ridges and curves, and the doctor was unable to explain how such ridges and curves could in fact be present, when the skin of the thumb had been completely burnt. The court gave the situation the benefit of doubt.

20. The law on the issue can be summarised to the effect that law does not provide who can record a dying declaration, nor is there any prescribed form, format, or procedure for the same. The person who records a dying declaration must be satisfied that the maker is in a fit state of mind and is capable of making such a statement. Moreover, the requirement of a certificate provided by a Doctor in respect of such state of the deceased, is not essential in every case.

21. Undoubtedly, the subject of the evidentiary value and acceptability of a dying declaration, must be approached with caution for the reason that the maker of such a statement cannot be subjected to cross-examination. However, the court may not look for corroboration of a dying declaration, unless the declaration suffers from any infirmity.

22. So far as the question of thumb impression is concerned, the same depends upon facts, as regards whether the skin of the thumb that was placed upon the dying declaration was also burnt. Even in case of such burns in the body, the skin of a small part of the body, i.e. of the thumb, may remain intact. Therefore, it is a question of fact regarding whether the skin of the thumb had in fact been completely burnt, and if not, whether the ridges and curves had remained intact.

32. In case of **Vijay Pal (Supra)** in paragraphs 23 and 24 the Hon'ble Apex Court has relied upon the judgment in the case of **Mafabhai Nagarbhai Raval (Supra)** and **Dal Singh** has observed as under:-

23. It is contended by the learned Counsel for the Appellant when the deceased sustained 100% burn injuries, she could not have made any statement to her brother. In this regard, we may profitably refer to the decision in Mafabhai Nagarbhai Raval v. State of Gujarat (1992) 4 SCC 69 wherein it has been held a person suffering 99% burn injuries could be deemed capable enough for the purpose of

making a dying declaration. The Court in the said case opined that unless there existed some inherent and apparent defect, the trial Court should not have substituted its opinion for that of the doctor. In the light of the facts of the case, the dying declaration was found to be worthy of reliance.

24. In State of Madhya Pradesh v. Dal Singh and Ors. : (2013) 14 SCC 159, a two-Judge Bench placed reliance on the dying declaration of the deceased who had suffered 100% burn injuries on the ground that the dying declaration was found to be credible.

33. Coming to the facts of the present case while applying the law laid down by the Hon'ble Apex Court as referred to above an inescapable conclusion emerges that the statement of the deceased/victim was recorded on 7.5.2000 by one Sri Arun Kumar Mishra the then S.D.M. Nazafgarh (PW3) at 12.15 p.m. and a certificate of fitness was also obtained from the doctor and thumb impression of the deceased was also taken on the same. The factum of fitness was also certified by Medical Officer as apparent from the deceased Bed Head Ticket which was also proved before the court below. The testimony of Executive Magistrate PW3 Sri Arun Kumar Mishra was found to be fully intact and he was held to be reliable witness having no grudge or motive against any side.

34. As already noticed, none of the witnesses or the authorities involved in recording the dying declaration had turned hostile. On the contrary, they have fully supported the case of prosecution. The dying declaration is reliable, truthful and was voluntarily made by the deceased, hence, this dying declaration can be acted upon without corroboration and can be made the sole basis of conviction. Hence, learned trial court has committed no error on acting on the sole basis of dying declaration. Learned trial court was completely justified in placing reliance on dying declaration Ex. KA-2 and convicting the accused-appellant on the basis of it.

35. Accordingly, we therefore, do not find any error committed by the court below while also taking into consideration, the dying declaration of the deceased as this Court of the opinion that the court is below has scrutinized the issue in detail carefully.

36. Next argument so canvassed by the learned counsel for the appellants is to the effect that once the appellants have not been convicted for the offences under Sections 498A, 304B of the IPC read with Section 3/4 of the D.P. Act then the conviction of the appellants under Section 302 of the IPC is not justified.

37. Having heard arguments of the learned counsel for the parties as well as perusal of the record, it reveals that the appellants have not been convicted under Sections 498A, 304B IPC read with Section 3/4 of the D.P. Act. However, from the perusal of the records, it is undoubtedly clear that the FIR was lodged against the appellants as well as Sri Raghuvir Singh, the husband of the deceased/victim on 19.5.2000 alleging commissioning of the aforenoted offences. Undisputedly, there exist dying declaration also of the deceased which as observed earlier shows the cause of the death of the deceased on account of burn injuries. Though there is a cloud of doubt on the issue as to whether the death

was an act of suicide or by pouring kerosene oil by the appellants or on account of quarrel.

38. However, once there are sufficient evidence on record demonstrating the fact that the deceased sustained burn injuries and there also exist on record the dying declaration of the deceased as well as the testimony of the prosecution witness which also cannot be disbelieved or disregarded in toto then merely because there is doubt with respect to the direct evidence supporting either the version of the prosecution with relation to the cause of death occurring due to pouring of kerosene oil or on account of quarrel, it cannot be said that the deceased did not sustain burn injuries.

39. Hence in totality of the circumstances while considering the testimony of the hostile prosecution witnesses as well as the dying declaration of the deceased, this Court of the firm opinion that the deceased sustained burn injuries which resulted to her hospitalization then ultimately leading to her death.

40. Lastly, learned counsel for the appellants had argued that the actual cause of the death of the deceased/victim was septicemia, thus, the appellants even if are to be convicted then the offence would be punishable under Section 304 Part-1 of the IPC and Section 302 of the IPC. Elaborating the said submission of the learned counsel for the appellants had argued that as per the prosecution case itself the deceased/victim sustained 70% of burn injuries while pouring kerosene oil on 30.4.2000 and she was admitted in the hospital on 6.5.2000 and as per the postmortem report of the Department of Forensic Medicine Safdarjung Hospital New Delhi dated 16.5.2000, the cause of death was shown to be septicemia. Hence the order under challenge convicting the appellants under Section 302 IPC is illegal as at best the present case can be said to be within the four-corners of Section 304 Part-1 of the IPC.

41. The word Septicemia has been defined in **Harrison's Principles of Internal Medicine Volume 1 (14th Edition) Fauci Braunwald Isselbacher Wilson Martin Kasper Hauser Longo** reads as under:-

Septicemia:- Systemic illness caused by the spread of microbes or their toxins via the bloodstream.

42. Further Septicemia has been defined in Merriam Webster dictionary as under:-

potentially life-threatening invasion of the bloodstream by pathogenic agents and especially bacteria along with their toxins from a localized infection (as of the lungs or skin) that is accompanied by acute systemic illness

--called also blood poisoning

Britannica has defined Septicemia as under:

septicemia, formerly called blood poisoning, infection resulting from the presence of bacteria in the blood(bacteremia). The onset of septicemia is signaled by a high fever, chills, weakness, and excessive sweating, followed by a decrease in blood pressure. The typical microorganisms that produce septicemia, usually gram-negative bacteria,

release toxic products that trigger immune responses and widespread blood clotting (coagulation) within the blood vessels, thus reducing the flow of blood to tissues and organs. (For information on the systemic inflammatory condition that occurs as a complication of infection by any class of microorganism,see sepsis.)

43 Here in the present case the deceased/victim undoubtedly sustained burn injuries to the tune of 70%, she was taken to Jevan Hospital Modi Nagar on 6.5.2000 and thereafter admitted at Safdarjung Hospital New Delhi and she succumbed on 12.5.2000. The dates regarding sustaining of burn injuries on 30.4.2000 admission in Jevan Hospital Modi Nagar on 6.5.2000 referring her to be admitted in Safdarjung Hospital New Delhi on 6.5.2000 and succumbing on 12.5.2000 are not disputed. It is also not under dispute that the cause of the death was septicemia as the opinion of the doctors of Department of Forensic Medicine Safdarjung Hospital, New Delhi itself shows that the cause of death was septicemia. The trial court has itself recorded a finding that the deceased was burnt at her matrimonial house in 70% degree and was admitted to the hospital and further she was looked and treated by doctor by way of bandage etc. and which itself shows that the victim was in hospital itself from the period 6.5.2000 till 12.5.2000, when she was expired meaning thereby that the patient was admitted to the hospital for approximately more than six days. Once in the postmortem report the facts of death was found to be septicemia then there is no doubt that the deceased died due to septicemia.

44. The findings of the fact with regard to sustaining of burn injuries on the basis of the testimony of the hospital witnesses as well as dying declaration cannot be faulted with. Death of the deceased was homicidal death. The fact that it was an homicidal death takes this court to most vex question whether it will fall within the four-corners of murder or culpable homicide not amounting to murder.

45. Therefore, we consider the question whether it would be a murder or culpable homicide not amounting to murder punishable under Section 304 IPC. Accused is in jail since six and half years.

46. The Hon'ble Apex Court in the case of **Ganga Dass Alias Godha Vs. State of Haryana1994 Supp(1) SCC 534** in para 6 has observed as under:-

6. We find considerable force in this submission. As stated above the occurrence took place on 18.11.88 and the deceased died 18 days later on 5.12.88 due to septicemia and other complications. The Doctor found only one injury on the head and that was due to single blow inflicted with an iron pipe not with any sharp-edged weapon. Having regard to the circumstances of the case, it is difficult to hold that the appellant intended to cause death nor it can be said that he intended to cause that particular injury. In any event the medical evidence shows that the injured deceased was operated but unfortunately some complications set in and ultimately he died because of cardio failure etc. Under these circumstances, we set aside the conviction of the appellant under Section 302 I.P.C. and the sentence of imprisonment for life awarded thereunder. Instead we convict him under Section 304 Part II I.P.C. and sentence him to undergo

six years' R.I. Accordingly the appeal is partly allowed.

47. The Hon'ble Apex Court in the case of ***B.N. Kavatakar and another Vs. State of Karnataka 1994 Supp(1) SCC 304*** *in paras 9 and 10 have observed as under:-*

9. The next question that comes up for our consideration is what is the nature of the offence that the appellants have committed. The Medical Officer who conducted autopsy on the dead body of the deceased has opined that the death was as a result of septicemia secondary to injuries and peritonitis. As we have indicated above, the deceased died after five days of the occurrence in the hospital. On an overall scrutiny of the facts and circumstances of the case coupled with the opinion of the Medical Officer, we are of the view that the offence would be one punishable under Section 326 read with Section 34 IPC.

10 .In the result, we set aside the conviction under Section 302 read with Section 34 IPC and the sentence of imprisonment for life imposed therefore on each of the appellants. Instead we convict them under Section 326 read with Section 34 IPC and sentence each of the appellants to undergo rigorous imprisonment for a period of three years. With the above modification in the conviction and sentence, the appeal is dismissed.

48. The *Hon'ble Apex Court in the case of* ***Jagtar Singh and another Vs. State of Punjab (1999) 2 SCC 174*** in para 7 has observed as under:-

7. Having given our anxious consideration to the first contention of Mr. Gujral we do not find any substance in it. It is true that Naib Singh died 17 days after the incident due to septicemia, but Dr. M. P. Singh (P.W. 1), who held the postmortem examination, categorically stated that the septicemia was due to the head injury sustained by Naib Singh and that the injury was sufficient in the ordinary course of nature to cause death. From the impugned judgment we find that the above contention was raised on behalf of the appellants and in rejecting the same the High Court observed :--

"It is well settled that culpable homicide is not murder when the case is brought within the five exceptions to Section 300, Indian Penal Code. But even though none of the said five exceptions is pleaded or prima facie established on the evidence on record, the prosecution must still be required under the law to bring the case under any of the four clauses, firstly to fourthly, of Section 300 , Indian Penal Code, to sustain the charge of murder. Injury No. 1 was the fatal injury. When this injury is judged objectively from the nature of it and other evidence including the medical opinion of Dr. M. P. Singh (P.W. 1), we are of the considered view that injury was intended to be caused with the intention of causing such a bodily injury by Harbans Singh appellant on the person of Naib Singh which was sufficient in the ordinary course of nature to cause death ....."

On perusal of the evidence of P.W. 1 in the light of explanation 2 to Section 299, I.P.C. we are in complete agreement with the above- quoted observations of the High Court.

49. The Hon'ble Apex Court in the case of **Maniben Vs. State of Gujarat**

(2009) 8 SCC 796 in paras 18, 19 and 20 have observed as under:-

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

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

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

50. The Hon'ble Apex Court in the case of **Bengai Mandal alias Begai Mandal vs. State of Bihar [(2010) 2 SCC 91** in para 20 has observed as under:-

The appellant has already served rigorous imprisonment for a period of seven years. Considering the facts that the death ensued after twenty six days of the incident as a result of septicemia and not as a consequence of burn injuries, we are of the considered view that the period already undergone by the appellant would be sufficient to meet the ends of justice. We, therefore, partly allow the appeal to the aforesaid extent and direct that the appellant be released forthwith if not wanted in connection with any other case.

51. The Hon'ble Apex Court in the case of **Chirra Shivraj Vs. State of Andhra Pradesh (2010) 14 SCC 444 in paras 3, 4 and 21** have observed as under:-

3. At the time when the deceased was in flames, her husband, Nagabhushanam arrived and upon seeing his wife in flames, he immediately took her to the Government civil Hospital, Nizamabad. Upon police being informed, R. Gangaram, Assistant Sub Inspector (P.W.11) rushed to the hospital and recorded the statement of the deceased. FIR No. 46 of 1999 was filed on the basis of the statement made by the deceased against the appellant for commission of an offence under Section 307 of IPC. Looking to the nature of burn injuries suffered by

the deceased, her dying declaration was recorded by Mr. Narsimha Chary, First Class Judicial Magistrate (Special Mobile Court), Nizamabad (P.W.10) around 8 p.m. The deceased specifically stated in the said statement that she was being abused by the appellant and on that day also, as usual, when she was being abused, she poured kerosene on herself and thereafter the appellant had thrown a lighted match stick on her, because of which she was in flames and she was severely burnt and her husband Nagabhushanam had brought her to the hospital.

4. Because of the burn injuries, the deceased suffered from septicemia and as a result thereof she died on 1st August, 1999. The said fact was brought to the notice of the authorities by the husband of the deceased. The said information was recorded as FIR No. 152 of 1999 on 2nd August, 1999. As a result of the death of the deceased, the appellant was also charged under Section 302 of the IPC. At the time of the trial, most of the witnesses, who are family members of the deceased as well as the appellant, turned hostile. However, on the basis of the dying declaration (Ext.P.12) recorded on 21st April, 1999, which supported the contents of the FIR filed by the complainant, the trial court convicted the appellant for the offence punishable under Section 304 Part II of the IPC and sentenced the appellant to undergo simple imprisonment for five years.

21. 19. Even the learned Counsel for the appellant could not show that the information with regard to the death of the deceased, which was recorded as second FIR No. 152/99 caused any prejudice to the accused. In the aforestated circumstances, we do not agree with the submission made by the learned Counsel for the appellant that merely because second FIR was filed, the entire investigation was defective and that should result into acquittal of the accused.

52. The Hon'ble Apex Court in the case of **Sanjay Vs. State of Uttar Pradesh (2016) 3 SCC 62 in paras 14, 15, 16 and 17** have observed as under:-

14. However, in the instant case, it is apparent that the death occurred sixty two days after the occurrence due to septicemia and it was indirectly due to the injuries sustained by the deceased. The proximate cause of death on 13.10.1998 was septicemia which of course was due to the injuries caused in the incident on 11.08.1998. As noted earlier, as per the evidence of Dr. Laxman Das (PW-9), Roop Singh was discharged from the hospital in good condition and he survived for sixty two days. In such facts and circumstances, prosecution should have elicited from Dr. Laxman Das (PW-9) that the head injury sustained by the deceased was sufficient in the ordinary course of nature to cause death. No such opinion was elicited either from Dr. Laxman Das (PW-9) or from Dr. Gulecha (PW-3). Having regard to the fact that Roop Singh survived for sixty two days and that his condition was stable when he was discharged from the hospital, the court cannot draw an inference that the intended injury caused was sufficient in the ordinary course of nature to cause death so as to attract Clause (3) of Section 300 Indian Penal Code.

15. In Ganga Dass alias Godha v. State of Haryana 1994 Supp (1) SCC 534, the accused gave iron pipe single blow on the head of the deceased and the deceased died eighteen days after the occurrence due

to septicemia and other complications, the conviction of the Appellant Under Section 302 Indian Penal Code was altered by this Court to Section 304 Part II Indian Penal Code. This Court observed as under:

6. We find considerable force in this submission. As stated above the occurrence took place on November 18, 1988 and the deceased died 18 days later on December 5, 1988 due to septicemia and other complications. The Doctor found only one injury on the head and that was due to single blow inflicted with an iron pipe not with any sharp-edged weapon. Having regard to the circumstances of the case, it is difficult to hold that the Appellant intended to cause death nor it can be said that he intended to cause that particular injury. In any event the medical evidence shows that the injured deceased was operated but unfortunately some complications set in and ultimately he died because of cardiac failure etc. Under these circumstances, we set aside the conviction of the Appellant Under Section 302 Indian Penal Code and the sentence of imprisonment for life awarded thereunder. Instead we convict him Under Section 304Part II Indian Penal Code and sentence him to undergo six years' RI. The sentence of fine of Rs. 2000 along with default clause is confirmed. Accordingly the appeal is partly allowed.

16. In the instant case, the Appellants used firearms countrymade pistol and fired at Roop Singh at his head and the accused had the intention of causing such bodily injury as is likely to cause death. As the bullet injury was on the head, vital organ, second Appellant intended of causing such bodily injury and therefore conviction of the Appellant is altered from Section 302 Indian Penal Code to Section 304 Part I Indian Penal Code. The learned Counsel for the Appellant-Sanjay submitted that it was only Narendra who fired at Roop Singh at his head, Appellant-Sanjay fired on Sheela (PW-2) on her neck, stomach and leg. Learned Counsel for the Appellant-Sanjay contended that as Sanjay fired only at Sheela, he could not have been convicted for causing death of Roop Singh Under Section 302 Indian Penal Code read with Section 34 Indian Penal Code. There is no force in the above contention. The common intention of the Appellants is to be gathered from the manner in which the crime has been committed. Both the Appellants came together armed with firearms in the wee hours of 11.08.1998. Both the Appellants indiscriminately fired from their countrymade pistols at Roop Singh-deceased and Sheela (PW-2) respectively. The conduct of the Appellants and the manner in which the crime has been committed is sufficient to attract Section 34 Indian Penal Code as both the Appellants acted in furtherance of common intention. The conviction of the Appellant-Sanjay Under Section 302 Indian Penal Code read with Section 34 Indian Penal Code is modified to conviction Under Section 304 Part I Indian Penal Code.

17. Conviction of the Appellants-Narendra and Sanjay Under Section 302 Indian Penal Code and Section 302 Indian Penal Code read with Section 34 Indian Penal Code respectively is modified to Section 304 Part I Indian Penal Code and Section 304 Part I Indian Penal Code read with Section 34 Indian Penal Code respectively and each of them are sentenced to undergo rigorous imprisonment for ten years and the same

shall run concurrently alongwith sentence of imprisonment imposed on the Appellants. Conviction of the Appellants for other offences and the respective sentence of imprisonment imposed on the Appellants and fine is affirmed. The appeals are partly allowed to the above extent.

53. The Hon'ble Apex Court in the case of **Khokan Alias Khokhan Vishwas Vs. State of Chhattisgarh (2021) 3 SCC 337 in paras 13, 14 and 15** have observed as under:-

13. Now so far as the reliance placed upon the decision of this Court in the case of Sanjay (supra) by the learned Counsel appearing on behalf of the Appellant-Accused is concerned, on considering the said decision, we are of the opinion that in the facts and circumstances of the case, the said decision shall not be applicable to the facts of the case on hand. In the said case, the death occurred 62 days after the occurrence due to septicemia. In between, the deceased was discharged from the hospital in good condition and he survived

14 .However, at the same time, it is also required to be noted that the deceased was admitted to the hospital after 24 hours and thereafter he died within three days due to septicemia. If he was given the treatment immediately, the result might have been different. In any case, as observed hereinabove, there was no premeditation on the part of the Accused; the Accused did not carry any weapon; quarrel started all of a sudden and that the Accused pushed the deceased and stood on the abdomen and therefore, as observed hereinabove, the case would fall under exception 4 to Section 300 Indian Penal Code and neither Clause 3 of Section 300 nor Clause 4 of Section 300 shall be attracted.

15. In view of the above and for the reasons stated hereinabove, the present appeal succeeds in part. The impugned judgment and order passed by the High Court as well as the judgment and order passed by the learned trial Court convicting the Appellant-Accused for the offence Under Section 302, Indian Penal Code are hereby modified to the extent convicting the Appellant-Accused for the offence Under Section 304-I, Indian Penal Code and sentencing him to the period already undergone by him i.e., 14.5 years. Rest of the judgment and order passed by the learned trial Court, confirmed by the High Court, is hereby confirmed.

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

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

where the dying declaration itself is attended by suspicious circumstances, has not been recorded in accordance with law and settled procedures and practices, then, it may be necessary for the court to look for corroboration of the same.

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

14. However, we have also not lost sight of the fact that the deceased had died after a month of treatment. From the medical reports, it is clear that the deceased suffered from Septicemia which happened due to extensive burns.

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

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

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

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

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

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

55. A Division Bench of this Court in the case of **Criminal Appeal No.1944 of 2014, Ram Prakash Alias Pappu Yadav Vs. State of U.P.** decided on 12.11.2021 wherein one of the judges (Justice Dr. K.J. Thaker) was a member had the occasion to consider the legal issue as to whether in case of a death on account of septicemia either the provisions contained under Section 302 IPC or 304(1) of the IPC would apply. This Court mandated that once facts of the death is septicemia that conviction under Section 302 IPC to be converted into conviction under Section 304 (1) IPC.

56. Over all scrutiny of the facts and circumstances coupled with the medical evidence and the opinion of the Medical Officer and considering the numbers of law laid down by the courts of law in the above referred cases, we are considered opinion that in the case at hand the offence would be punishable under Section 304(1) IPC.

57. Upshot from the aforesaid discussion and inescapable position emerges that the death caused by the accused of the victim/deceased was on account of septicemia and further accused had no intention to caused the death of the deceased. The injuries were though sufficient in ordinarily course of nature to have cause death however accused had no intention to do away with deceased. Hence the incident falls under Ex.1 and 4 to Section 300 IPC, while considering the Section 299 IPC offence committed will fall under Section 304(1) IPC.

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

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

(2022)01ILR A508
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.12.2021

BEFORE

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

Criminal Appeal No. 2209 of 2019

Smt. Preeti & Anr. ...Appellants
Versus
State Of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Shiv Sharan Tripathi, Sri Noor Mohammad

Counsel for the Opposite Party:

A.G.A.

Criminal Law - Indian Evidence Act, 1872 - Section 32- Dying Declaration- The dying declaration can be acted upon without collaboration if it inspires truth. Thus having summarize the law we are of the considered opinion that no other view than that taken by the learned Judge can be taken for upholding the conviction of the accused on the basis of dying declaration.

It is settled law that if the Court is satisfied that the dying declaration is true and voluntary, it can record conviction on its basis without corroboration.

Criminal Law - Indian Penal Code, 1860 - Section 302 - Section 304 II - Death was due to ante thermal burns and due to septicemia. The law as far as it concerned septicemia is well settled the death occurred after few days. The deceased died during treatment, this High Court substituted the sentence as the deceased died out of septicemial septicemia. The offence is not under Section 302 of I.P.C. but is culpable homicide.

Where the deceased died as a result of septicaemia after a few days of the occurrence, the offence would be one of culpable homicide not amounting to murder. (Para 10, 12, 13, 14, 15)

Criminal Appeal partly allowed. (E-3)

Judgements/ Case law relied upon:-

1. **Krishan Vs. St. of Har,(2013) 3SCC 280**

2. **Crl. Appeal No. 245 of 2004 of the Guj. High Court** dec. on 13.09.2013.

3. **Crl. Appeal No.83 of 2008 (Gautam Manubhai Makwana Vs. St. of Guj.)** dec. on 11.9.2013

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

1. By way of this appeal, the appellant has challenged the Judgment and order 20.2.2019 passed by Additional Sessions Judge, Court No.1, Etah in S.T. No. 228 of 2016, State Vs. Veerpal @ Anuj and another arising out of Case Crime No. 0014 of 2016, under Sections 302/34 of IPC, Police Station Marhara, District Etah whereby the accused-appellant was convicted under Section 302 IPC and sentenced to life imprisonment with fine of Rs.25,000/-, and in case of default of payment of fine, to undergo further imprisonment for one year.

3. The brief facts as per prosecution case are that complainant's daughter Manisha was married to Mahipal and he had given dowry and gifts according to his capacity, a 4 year daughter was born out of their wedlock. Manisha in-laws were not happy with the dowry and gifts and there was a demand of motor-cycle by them but due to nonfulfilment of demand they use to torture and harass Manisha. On 07.01.2016 at about 2:00 O' clock, they poured kerosene oil on Manisha and put her ablaze, On telephonic information by the villagers complainant and his family reached to Manisha's matrimonial home and brought her to Varun Trauma Centre, Aligarh for treatement where she succumbed to death on 13.01.2016.

4. The investigation Officer tookup the investigation visited the spot, prepared site plan, recorded statements of the deceased and witnesses and after completing investigation submitted charge sheet against the accused.

5. The prosecution so as to bring home the charges examined six witnesses, who are as under:-

1.	Suraj Pal (Complainant)	P.W.1
2.	Smt. Reshma Devi(mother of deceased)	P.W.2
3.	Jugendra Singh(brother)	P.W.3
4.	Sri Son Pal	P.W.4
5.	Sri Mahipal(Husband)	P.W.5
6.	Dr. Anil Kumar Singh	P.W.6
7.	Sri Ram Surat Pandey, S.D.M	P.W.7
8.	Dr. Virendra Singh Sisaudia	P.W.8
9.	Sri Jinendra Kumar Jain	P.W.9
10.	Sri Arun Kumar, CC	P.W.10
11.	Sri D.S Garbyal, Rtd C.O/I.O	P.W.11
12.	Sri Naurangi Lal Rtd. SHO/I.O	P.W.12
13.	Sri Manveer (faher-in-law)	P.W.13
14.	Smt. Phool Shree (mother-in-law)	P.W.14

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

1.	Tehreer	Ext. Ka-1
2.	Postmorterm report	Ext. Ka-2
3.	Proform 384B Full Body view	Ext. Ka-3
4.	Inquest Report	Ext. Ka-4
5.	Police Proforma	Ext. Ka-5
6.	Letter to R.I	Ext. Ka-6
7.	Letter to C.M.O	Ext. Ka-7
8.	Photograph of deadbody, Proforma 379	Ext. Ka-8
9.	Dying declaration of the deceased	Ext. Ka-9
10.	Chik FIR	Ext. Ka-10
11.	Copy of G.D	Ext. Ka-11
12.	Site Plan	Ext. Ka-12
13.	Charge-sheet	Ext. Ka-13

8. Heard Noor Mohammad, learned counsel for the appellant and learned AGA for the State and also perused the record.

9. It is submitted by the counsel for the appellant that P.W.-1, P.W.-2 and P.W.-3 have deposed that there was no demand of dowry. The deposition is supported by the evidence of P.W.-5 who is the husband of the deceased. The present appellants were not staying with the deceased. The appellants are in jail since 14.06.2016 and has submitted that Dr. Anil Kumar Singh who conducted the postmortem of the deceased deposed that the deceased died due to 95% of burn but there was no kerosene or petrol oil present on the body of the deceased. It was further submitted that Dr. Virendra Singh Sisodia and Dr. Jinendra Kumar Jain, Additional City

Magistrate, Aligarh who recorded the dying declaration of the deceased have conveyed no specific depositions regarding the smell of petrol or kerosene oil from the body of the deceased was recorded.

10. While going through the factual scenario we are of the opinion that even if we go by the factual data that the dying declaration was not a tutored one and could have been voluntarily made and that it satisfies the quantoes of dying declaration, we would concur with the learned trial court rather the Sessions Judge. The learned Judge has relied on several judgements . The learned Judge has categorically mentioned that when the dying declaration would be acted upon and when the same cannot be he has traced the judicial history beginning from 1962 and has traced it right upto 1992 and has summed up the same. The dying declaration can be acted upon without collaboration if it inspires truth. Thus having summarize the law we are of the considered opinion that no other view than that taken by the learned Judge can be taken for upholding the conviction of the accused on the basis of dying declaration. We are fortified in view of the decision of the Apex Court in "**Krishan Vs. State of Haryana, reported in (2013) 3SCC 280"** wherein the same decision was considered by one of us in **Criminal Appeal No. 245 of 2004 of the Gujrat High Court** decided on 13.09.2013.

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

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

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

14. However, we have also not lost sight of the fact that the deceased had died after a month of treatment. From the medical reports, it is clear that the deceased suffered from Septicemia which happened due to extensive burns.

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

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

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

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

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

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

17. The conviction of the appellants - original accused under Section 302 of Indian Penal Code vide judgment and order dated 19.12.2007 arising from Sessions Case No. 149 of 2007 passed by the Additional Sessions Judge, Fast Track Court No. 6, Ahmedabad is converted to conviction under Section 304 (Part I) of Indian Penal Code. However, the conviction of the appellants - original accused under section 452 of Indian Penal Code is upheld. The appellants - original accused are

ordered to undergo rigorous imprisonment for a period of ten years and fine of Rs. 5000/- each in default rigorous imprisonment for six months under section 304 (Part I) of Indian Penal Code instead of life imprisonment and sentence in default of fine as awarded by the trial court under section 302 IPC. The sentence imposed in default of fine under section 452 IPC is also reduced to two months. Accordingly, the appellants are ordered to undergo rigorous imprisonment for a period of ten years and fine of Rs. 5000/-, in default, rigorous imprisonment for six months for offence punishable under section 304(I) of Indian Penal Code and rigorous imprisonment for a period of five years and fine of Rs. 2,000/-, in default, rigorous imprisonment for two months for offence punishable under section 452 of Indian Penal Code. Both sentences shall run concurrently. The judgement and order dated 19.12.2007 is modified accordingly. The period of sentence already undergone shall be considered for remission of sentence qua appellants - original accused. R & P to be sent back to the trial court forthwith."

12. The death was because of after effect of the treatment as she had developed other diseases also and the deceased developed what is known as septicemia.

13. No doubt suspicion, however graved it may be, it can not take place of proof but here we are clear that it is not only suspicion but based on truth and we concur with the learned Judge. This takes us to the issue of whether te case would fall within under Section 304 or Section 302 I.P.C. We are convinced that from the basis of the postmortem report which was conducted on 13.01.2016, the death was due to ante thermal burns and due to septicemia. The law as far as it concerned septicemia is well settled the death occurred after few days. The deceased died during treatment, this High Court substituted the sentence as the deceased died out of septicemial septicemia.

14. We come to the definite conclusion that the death was due to septicemia. The judgments cited by the learned counsel for the appellant would permit us to uphold our finding which we conclusively hold that the offence is not under Section 302 of I.P.C. but is culpable homicide.

15. The accused is in jail since 14.06.2016. The decision of this Court and and of the Gujarat High Court in **Gautam Manubhai (Supra)** wherein the undersigned (Dr.K.J. Thaker,J.) was a also a signatory and the decision in **Maniben (Supra)** wherein the Apex Court has converted the conviction under Section 302 of I.P.C. to Section 304 Part II of I.P.C. which will come to the aid of the accused.

16. In view of the aforementioned discussion, we are of the view that the appeal has to be partly allowed, hence, it is partly allowed.

17. Appellant-accused is in jail since 14.06.2016, if 8 years of incarceration for all the offences and the default sentence is maintained would start after the period of eight years is over, the accused would be entitled to all remissions. The judgment and order impugned in this appeal shall stand modified accordingly.

18. Let a copy of this judgment along with the trial court record be sent to the Court and Jail Authorities concerned for compliance.

19. We are thankful to learned counsels has ably assisted the Court.

(2022)01ILR A514
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.12.2021

BEFORE

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

Criminal Appeal No. 2345 of 1983

Harnath Singh & Ors. ...Appellants (In Jail)
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri S.D.N. Singh, Sri Pradeep Kumar Mishra, Sri V.S. Sengar, Sri Vinay Saran

Counsel for the Respondent:
A.G.A.

Criminal Law - Indian Penal Code, 1860- Section 149 - Unlawful Assembly- Common Object- As per Section 149 IPC to convict a person with the aid of this Section, it is necessary to prove the following ingredients; namely, (1) the offence is committed by any member of an unlawful assembly; and (2) the offence must be committed in prosecution of the common object of an unlawful assembly; or such as the members of that assembly knew to be likely to be committed in prosecution of that object.

Section 149 of the IPC fastens vicarious liability upon every member of an unlawful assembly for the offence actually committed by other members of the same unlawful assembly in prosecution of a common object which the members of such unlawful assembly had knowledge of likelihood of the commission of that offence.

Criminal Law - Indian Penal Code, 1860 - Section 149- Keeping in mind that all the accused were stated to be standing in front of their own house and not having gone as a group of persons, armed, to another place to commit an offence, they cannot be said to be part of an unlawful assembly with a common object, at the stage, when the gun shots were fired- Members of an unlawful assembly may have community of object upto the certain point of time and not beyond that. It cannot with certitude be held that the common object of the assembly was either to commit the murder of Dhirendra Singh (the deceased) or to cause such bodily injuries to him or to anybody else that may result in death because the accused persons did not move as a group to assault the victims-As the prosecution failed to provide evidence to prove that accused persons including the surviving appellants held a common object to cause the death of Dhirendra Singh or to cause any such injury which in ordinary course of event would have resulted in his death, the surviving appellants cannot be held liable for the murder of Dhirendra Singh under Section 302 IPC with the aid of Section 149 IPC- Even the rest of the accused persons could get collected with their lathies but that by itself would not be sufficient to infer that they shared common object with the co-accused, who fired at the deceased.

Where the appellants were standing infront of their home and had not gone as a group and it cannot be established that they shared the common object of committing murder of the deceased, as they were armed with lathies which were wielded after shots were fired by the other accused, the present appellants cannot be convicted u/s 302 IPC with the aid of Section 149 IPC.

Criminal Law - Indian Penal Code, 1860 - Section 149 - In stage (C), according to the prosecution, a total of five persons including the surviving appellants Brijendra Singh (appellant no.5) and Saleem (appellant no.7) participated, but as we have earlier held that involvement and presence of Saleem (appellant no.7) appears to be doubtful and benefit of doubt is, therefore, extended in his favour, therefore, Saleem (appellant no.7) cannot be convicted under Section 147 and 323

IPC for even stage (C) of the entire incident. Appellant No. 5 (Bijendra Singh) was member of an unlawful assembly and participated in stage (C) of the entire incident and was armed with lathi along with other co-accused persons and injury report of Rajendra Singh (PW-2) shows that he sustained a contusion with two abrasions, therefore, appellant no. 5 (Bijendra Singh) can be convicted under Section 323 IPC with the aid of Section 149 IPC.

Where the accused has inflicted injuries at a subsequent stage and without participating in the offence of committing murder then instead of Section 302 IPC readwith Section 149 IPC, he shall be liable for having committed the offence punishable with Section 323 IPC readwith Section 149 IPC.

The Juvenile Justice (Care and Protection of Children) Act, 2015- Section 18(1) (d) & 21 - The claim of juvenility was raised after the Juvenile Justice (Care and Protection of Children) Act, 2015 had come into force with effect from 15.01.2016. The proviso to sub-section (2) of Section 9 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (for short Act, 2015) enables raising of a claim before any court even after final disposal of the case and such a claim is to be determined in accordance with the provisions contained in the Act and the Rules made thereunder even if the person has ceased to be a child on or before the date of commencement of the Act-Comparison of the provisions of Section 21 of Juvenile Justice Act, 1986 with the provisions of Section 18 of the Juvenile Justice (Care and Protection of Children) Act, 2015 - there exist similar provisions for orders that could be passed in respect of a juvenile in conflict with law including direction to pay fine. Hence, by applying the law laid down by the Apex Court in Jitendra Singh's case (Supra) and by keeping in mind the provisions of Section 18(1) (d) of the Act, 2015, and provisions of Section 21 of of Juvenile Justice Act, 1986, we are of the view that the appropriate punishment that ought to be awarded to appellant no.5 (Brijendra Singh), who was a juvenile on the date of the incident, would be 'fine'.

Settled law that the claim of juvenility can be raised at any time and the same has to be adjudicated in terms of the Act 2015 even if the person was not a juvenile on the date of commencement of the said Act and since provisions of the Act 1986 are similar to the provisions of the Act 2015 , accordingly the appropriate punishment would be fine. (Para 37, 40, 41, 42, 44, 52, 53, 64, 65, 67)

Accordingly, the appeal of surviving appellant No. 7 (Saleem) is allowed whereas, the appeal of appellant No. 5 (Brijendra Singh) is partly allowed. (E-3)

Judgements/ Case law relied upon:-

1. Shivjee Singh & ors. Vs St. of Bih. (2008) 11 SCC 631

2. Roy Fernades Vs St. of Goa & ors, (2012) 3 SCC 221

3. Ashok Kumar Vs St. of M.P (Spl. Leave to Appeal (Crl.) No.643 of 2020)

4. Jitendra Singh @ Babbu Singh Vs St. of U.P.(2013) 11 SC 193

(Delivered by Hon'ble Sameer Jain, J.)

1. The present appeal was filed by seven appellants. The appeal of appellant no.1 (Harnath Singh); appellant no.2 (Vishwa Nath Singh); appellant no.3 (Shivnath Singh); appellant no.4 (Raghvendra Singh) and appellant no.6 (Aditya Singh) has already been abated, on account of their deaths, vide order dated 23.12.2015.

2. The appeal of appellant no.5 (Brijendra Singh) and appellant no.7 (Saleem) survives. Therefore, by way of present judgment, we will decide the appeal of appellant no.5 (Brijendra Singh) and appellant no.7 (Saleem) the surviving appellants.

3. Appellant no.5 (Brijendra Singh) and appellant no.7 (Saleem) have been convicted vide judgment and order dated 29.9.1983 passed by 2nd Additional Sessions Judge, Farrukhabad in Sessions Trial No.210 of 1981(State Vs. Harnath Singh and others) under Sections 302/149 IPC and under Sections 147 and 323 IPC and awarded life imprisonment for offences under Sections 302/149 IPC; and six months rigorous imprisonment for offence under Sections 147 and 323 IPC.

4. The case of the prosecution in nutshell is that on 22.7.1980 at about 9.30 AM Kanchan Singh(PW-1) lodged FIR of the present case against appellant no.5 (Brijendra Singh) and appellant no.7 (Saleem) and five other co-accused persons at Police Station Kannauj, under Sections 147,148,149, 307, 323 and 302 IPC, District Farrukhabad vide Case Crime No. 395 of 1980.

5. As per the FIR, on 22.7.1980 at about 7.00 AM in the morning when nephew of Kanchan Singh (the informant) (PW-1), namely, Dhirendra Singh, was returning back after attending nature's call, the appellant no.5 (Brijendra Singh) and appellant no.7 (Saleem) along with five other co-accused persons exhorted him and co-accused Harnath Singh fired at Dhirendra Singh from his licensed gun whereas co-accused Aditya Singh opened fire from his country made pistol, which hit Rajendra (PW-2), the son of informant. In the incident, Dhirendra Singh, nephew of the informant Kanchan Singh (PW-1), died at spot. The above incident is said to have taken place due to long standing enmity between both the parties. In the FIR it is further stated that number of cases of civil and criminal nature were pending in the court between the parties.

6. According to the FIR, appellant no.5 (Brijendra Singh) and appellant no.7 (Saleem), who were armed with lathies, along with co-accused Shiv Nath Singh, Vishwa Nath Singh and Raghvendra Singh, also wielded their lathies. It is further mentioned in the FIR that after the incident accused persons entered the house of co-accused Shiv Nath Singh and bolted it from inside, which was surrounded by villagers.

7. After the FIR, the Police arrived at the spot and arrested appellant no.5 (Brijendra Singh) along with co-accused Harnath Singh, Vishwa Nath Singh, Shiv Nath Singh, Raghvendra Singh and Aditya Singh from the house of co-accused Shiv Nath Singh. Appellant no.7 (Saleem), however, could not be arrested as he was not found there. At the time of arrest licensed gun of Harnath Singh was also recovered but country made pistol allegedly used by Aditya Singh could not be recovered.

8. During investigation, Investigating Officer prepared recovery memo of licensed gun and cartridges (Ext.Ka.18 and Ext. Ka.23). The Investigating Officer also prepared recovery memo of blood stained shirt of injured Rajendra Singh (PW-2) (Ext. Ka-24) and he also prepared recovery memo of blood stained soil (Ext.Ka.25). Injured Mahipal Singh (not examined), Kanchan Singh (PW-1) and Rajendra Singh (PW-2) were medically examined at

Primary Health Centre, Saray Mira, Kannauj, District Farrukhabad on 22.7.1980 between 4.00 PM to 4.30 PM and their injury reports were exhibited as Ext.Ka.6, Ext.Ka.7 and Ext.Ka.8 respectively. The post mortem of the body of deceased Dhirendra Singh was conducted on 23.7.1980 at about 3.45 PM (Ext. Ka.5) and after investigation, Investigating Officer submitted charge sheet against surviving appellant no.5 (Brijendra Singh) and appellant no.7 (Saleem) and other co-accused persons, namely, Harnath Singh, Vishwa Nath Singh, Shivnath Singh, Raghvendra Singh and Aditya Singh on 9.8.1980 under Sections 147, 148, 149, 307, 323 and 302 IPC. After submission of charge sheet, the case was committed to the court of session and trial court framed charges against appellant no.5 (Brijendra Singh) and appellant no.7 (Saleem) for offences under Sections 302 read with 149 PC, Section 147 IPC and Sections 323/149 IPC. Both the appellants refused to plead guilty and claimed trial.

9. During trial, prosecution examined nine witnesses. Out of nine witnesses, two witnesses, namely, Kanchan Singh (informant) (PW-1) and Rajendra Singh (PW-2) were witnesses of facts and rest are formal witnesses.

10. The trial court convicted appellant no.5 (Brijendra Singh) and appellant no.7 (Saleem) for offences under Sections 302/149 IPC, 323 and 147 IPC along with other co-accused persons and sentenced them as above.

11. We have heard Sri Vinay Saran, learned Senior Advocate, assisted by Sri Pradeep Kumar Mishra, learned counsel for the surviving appellants; and Sri H.M.B.Sinha and Sri Amit Sinha, learned AGAs, for the State and have carefully perused the entire evidence on record.

12. Learned counsel for the surviving appellants contended that although in the FIR as many as six eye witnesses were nominated but during investigation only two witnesses, Kanchan Singh (PW-1) (informant) and Rajendra Singh (PW-2) were examined and rest of the eye witnesses including one of the persons injured (Mahipal Singh) were not examined, which casts a serious doubt on the prosecution case. He further contended that it appears from the record that PW-1 (the informant) (Kanchan Singh) was not present at the spot and appellants were implicated due to long standing enmity and in fact the evidence produced by the prosecution is not of such nature on the basis of which surviving appellants, namely, Brijendra Singh (appellant no.5) and Saleem (appellant no.7), could be convicted under Section 302 IPC with the aid of Section 149 IPC as prosecution failed to prove the formation of unlawful assembly as well as its common object, which are essential ingredients and must be proved before convicting a person with the aid of Section 149 IPC. He submits that in absence of necessary ingredients of an unlawful assembly, the evidence on record should be analysed to ascertain the individual act of the surviving appellants. As there is no evidence on record, who caused lathi blow to whom, injured Mahipal having not been examined and injury of Kanchan Singh (PW-1) is a result of friction therefore, both the surviving appellants can not even be convicted under Section 323 IPC.

13. Learned defence counsel further contended that appellant no.7, namely, Saleem is neither related to other

appellants, who were of the same family, nor was arrested from the house of co-accused Shivnath Singh from where rest of accused persons were arrested, therefore, his participation in the incident is highly doubtful especially when, as per prosecution case, all the accused persons including Saleem (appellant no.7) after commission of the crime entered the house of co-accused Shivnath Singh to protect themselves from the surrounding villagers. Further, there is no evidence on record, which can show that Saleem (appellant no.7) managed to escape either from the house of Shivnath Singh or from the spot. Therefore, he has been falsely implicated in the present case and should be acquitted.

14. Per contra, learned AGA contended that all the accused persons including the surviving appellants participated in the incident, which resulted in the death of Dhirendra Singh; and surviving appellants, namely, Brijendra Singh (appellant no.5) and Saleem (appellant no.7), also used lathies during the incident along with other co-accused persons, therefore, their conviction under Sections 302/149 and under Sections 323 and 147 IPC is justified and they, as a whole, formed an unlawful assembly with a common object.

Discussion of prosecution evidence:

15. Before discussing the prosecution evidence and evaluating the arguments advanced by both sides, it is necessary to examine in brief the prosecution evidence adduced by the prosecution during trial.

16. The prosecution firstly examined PW-1(Kanchan Singh), who is the informant of the case. As per PW-1 (Kanchan Singh) a long standing enmity existed between both sides. The deceased Dhirendra Singh was his real nephew. On 22.7.1980, at about 7.00 AM, when he along with his son Rajendra Singh (PW-2) were going to visit their fields, they heard shouts and shrieks, when they arrived there, they saw Dhirendra Singh (deceased) was standing in the open field of Fatte Lal Katiyar and accused persons, namely, Harnath Singh, Shivnath Singh, Vishwa Nath Singh, Aditya Singh, Raghvendra Singh and Brijendra Singh (surviving appellant no.5) and Saleem (surviving appellant no.7) standing near the door of the house of Shiv Nath Singh. Harnath Singh held a licensed gun; Aditya Singh held a country made pistol whereas remaining five accused persons including the surviving appellants held lathies. All the accused persons were abusing his nephew Dhirendra Singh. Harnath Singh opened fire from his gun upon Dhirendra Singh, which hit him. He fell down in the field of Fatte Lal Katiyar and died. PW-1 further stated that co-accused Aditya Singh also opened fire from his country made pistol, which hit Rajendra Singh (PW-2) whereas rest of accused persons used lathies, which caused injuries to Rajendra Singh (PW-2), Mahipal Singh (not examined) and to him (PW-1). This witness proved the clothes worn by deceased Dhirendra Singh, which were exhibited as Ext. 1 and Ext.2; and the shirt worn by Rajendra Singh (injured)(PW-2) which was marked, Ext.3. PW-1 also proved FIR as Ext.Ka.16.

17. PW-1 in his cross-examination stated that only two gun shots were fired, one from the gun of co-accused, Harnath Singh and the other from the country made pistol carried by co-accused Aditya Singh. First gun shot hit Dhirendra Singh. Thereafter, Aditya Singh opened fire from his country made pistol and after that,

surviving appellants and three others, who were having lathies, gave a single lathi blow.

18. PW-1 also stated that his medical was conducted at Kannauj Hospital on the same day of incident at about 4.00 P.M. and from the Hospital, he went to Makkoo Lal and Ayodhya Prasad Firm where he was working as a servant and next day, he returned back to his village. PW-1 in his cross-examination stated that when co-accused Harnath Singh and Aditya Singh opened fire then the surviving appellants Brijendra Singh (appellant no.5) and Saleem (appellant no.7) were about 5-6 steps away from the co-accused persons, who opened fire. He further stated that lathi was used immediately after the fire but he was unable to state as to whose lathi caused injury to whom.

19. PW-2 (Rajendra Singh) is one of the injured and son of the informant, Kanchan Singh (PW-1). He also reiterated the same version as narrated by his father PW-1 (Kanchan Singh). PW-2 also stated that firstly Harnath Singh opened fire from his gun and thereafter Aditya Singh opened fire from country made pistol and thereafter accused persons including the surviving appellants ran towards him and his father and used their lathies. PW-2 also stated that after the incident all the accused persons including appellant no.7 entered the house of co-accused Shiv Nath Singh from where, except appellant no.7 (Saleem) were arrested by the Police. He also stated that when they entered the house of accused Shiv Nath Singh, his house was surrounded by the villagers. PW-2 could not state that who caused lathi injuries to whom.

20. PW-3, Dr. B.P.Bhatnagar, Medical Officer, District Hospital Fatehgarh, who conducted post mortem (Ext.Ka.5) of deceased (Dhirendra Singh), on 23.7.1980, at about 3.45 PM, found following injuries on his body:

1. 6 gun shot wound of entry in an area of 3"x2.5inch on the middle of chest anterior aspect each measured 1/4"x1/4"x chest cavity deep. Margins inverted.

2. Abrasion 3/4x1/4 inch on the right side chest 2x2" below right nipple at 5'O Clock position.

21. According to PW-3, Dhirendra Singh (deceased) died about 1-1/2 day before. PW-3 proved the post mortem report as Ext. Ka.5. PW-3 stated deceased died due to shock and haemorrhage as a result of ante mortem injury.

22. PW-4 is Dr. J.C.Harsh, Medical Officer, Primary Health Centre, Kamalganj. He stated on 22.7.1980 he was posted at Medical Officer at PHC, Saraymira, Kannauj and at 4.00 PM he examined Mahipal Singh and found following injuries on his body:

"1.Lacerated wound: 1cm x 0.5 cm x scalp deep left side head 4.5cm above left ear, bleeding.

2.Traumatic swelling 1cm x1cm left side face 4 cm away from left ear.

***Opinion:-** Injury No.1 &2 caused by blunt weapon, simple in nature and about half day in duration."*

23. PW-4 on the same day also examined Kanchan Singh (the informant) (PW-1) at about 4.15 PM and found single abrasion 1cmx0.5 cm on inner side left thigh 11 cm above left knee joint.

According to him, injury was caused by friction, simple in nature and about half day in duration.

24. Dr. J.C.Harsh (PW-4) also examined Rajendra Singh (PW-2) on 22.7.1980 at about 4.30 PM and found following injuries on his body:

(1) "Contusion: 5 cm x2cm on left foot, 4cm below from left ankle joint, radish in colour.

(2) Abrasion:2cmx1cm on right shoulder region 4.5cm below from right clavicle.

(3) Abrasion: 1cm x.5cm on right side chest. 6 cm away from right nipple.

(4) One Gun short would of entry 1/10"x1/10"x skin deep on left side chest 2cm x below left clavicle blood clotted.

(5) One gun shot wound of entry 1/10" x x1/10" x skin deep on right side chest.5cm above right nipple, blood clotted.

Opinion:Injury no.1 due to blunt weapon. Injury Nos. 2 & 3 due to fraction and injury nos. 4&5 due to fire arm, simple in nature and half day in duration.

25. PW-4 proved injury reports of Mahipal Singh(not examined), Kanchan Singh (the informant) (PW-1) and Rajendra Singh (PW-2) which were exhibited as Ext.Ka-6, Ext.Ka-7 and Ext.Ka-8 respectively.

PW-4 in his cross-examination stated that the injury sustained by Kanchan Singh (the informant) (PW-1) cannot be caused by lathi and this injury may be self inflicted one.

26. PW-5 (Satkar Singh) is a Constable. He stated that on 22.7.1980 he was posted at Police Station Kannauj and he received the body of deceased Dhirendra Singh in a sealed condition at about 1.15 PM. He along with Constable Maharaj Singh brought the dead body to Fatehgarh on a tractor and it was handed over to the Doctor for post mortem at 2.00 PM on 23.7.1980.

PW-5 (Satkar Singh) in his cross-examination stated that when Police arrived in the village then, at that time, the accused persons were inside the house but nobody surrounded the house though several persons were there at the door.

27. PW-6 (Ram Asrey Pandey) is the Junior Scientist Officer, Forensic Lab, Lucknow, U.P. This witness is a Forensic Expert and provided evidence in respect of gun used by co-accused Harnath Singh and the cartridges collected from the spot. Therefore, this witness is of no concern for the surviving appellants, who were with lathies only. Thus for deciding the present appeal, the testimony of PW-6 (Ram Asrey Pandey) is not relevant.

28. PW-8 is SI Narsingh Dayal. He stated that in September, 1980 he was posted as SI at Sadar Malkhana, Fatehgarh. According to him on 5.9.1980 the articles related to the present case were deposited and on 9.9.1980 three sealed packets were sent for chemical analysis to Agra through Constable Hanuman Prasad and on

11.9.1980 one sealed packet was sent to Lucknow for analysis by a ballistic expert.

29. PW-9 is Sri K.N.Singh, SI. He is the Investigating Officer of the present case. He stated that in July 1980 he was posted as SI at Police Station Kannauj and on 22.7.1980 the chik report of the present case was prepared by H.M.Phool Singh. He proved chik report (Ext.Ka.16) and the GD report no.5 as Ext. Ka.17. He stated H.M.Phool Singh had died. PW-9 (K.N.Singh) stated that he arrived at the spot on 22.7.1980 and arrested co-accused Harnath Singh, Shivnath Singh, Brijendra Singh, Raghvendra Singh, Aditya Singh and Vishwa Nath Singh from the house of co-accused Shivnath Singh whereas accused Saleem (appellant no.7) had escaped from the spot. He recovered the licensed gun from the possession of Harnath Singh and upon unloading the gun he found one live cartridge. The recovery memo of gun and live cartridge prepared by him was proved as Ext. Ka.18. He proved material Ext.11 and Ext.12, i.e., gun and live cartridge. This witness further stated that inquest report (panchayatnama) of the body of Dhirendra Singh was prepared and body was sent for post mortem examination. He proved the inquest report (panchayatnama) as Ext.Ka-19. He also stated that he did the spot inspection and the site plan prepared by him on the pointing out of the informant (Kanchan Singh) (PW-1) was proved as Ext.Ka.26.

30. The Investigating Officer (K.N.Singh) (PW-9) in his cross-examination stated that the accused persons opened the door without offering resistance and that he did not have to use force. He further stated that although he recovered the gun from co-accused Harnath Singh but he could not recover country made pistol allegedly used by co-accused Aditya Singh. He further stated that none of the witnesses informed him that co-accused Saleem (surviving appellant no.7) had managed to escape from the spot.

31. After recording the statement of prosecution witnesses, trial court recorded the statements of the accused including the surviving appellants, Brijendra Singh (appellant no.5) and Saleem (appellant no.7) under Section 313 Cr.P.C. and, thereafter, on the basis of evidence adduced by the prosecution, convicted the surviving appellants amongst others under Sections 302/149 IPC and under Sections 323/147 IPC.

Analysis:

32. First, we deal with the case of Saleem (appellant no.7). As per the prosecution case mentioned in the FIR as well as narrated by the witnesses of facts, namely, Kanchan Singh (the informant)(PW-1) and Rajendra Singh (PW-2), appellant no.7 (Saleem) was also involved in the present case along with other six remaining accused persons. It is the case of the prosecution since the beginning that after commission of the offence, Saleem (appellant no.7) along with other accused entered the house of co-accused Shivnath Singh (appellant no.3) to hide and that the villagers surrounded the house of Shiv Nath Singh. This indicates that there was no scope for Saleem (appellant no.7) to escape from the house of co-accused Shiv Nath Singh (appellant no.3).

33. Prosecution evidence further shows that when, after the FIR, the police

arrived then all the accused persons were arrested from the house of co-accused Shivnath Singh except appellant no.7 (Saleem)) and their arrest could be made after the door of the house of co-accused Shivnath Singh was opened.

34. The Investigating Officer, K.N.Singh (PW-9) stated that he could not find Saleem (appellant no.7) in the house of co-accused Shivnath Singh and that he managed to escape. But there is no evidence on record on the basis of which it can be said that Saleem (appellant no.7) managed to escape from the house of co-accused Shivnath Singh. Non-arrest of Saleem (appellant no.7) from the house of co-accused Shivnath Singh creates doubt about his presence and involvement in commission of the present crime as all the other remaining six accused persons were arrested from the house of Shiv Nath Singh. Moreover, Saleem (appellant no.7) is not related to other accused persons. Further, as he was not arrested from where all other accused persons were arrested in spite of the fact that the house of Shiv Nath Singh was surrounded by the villagers and there was no chance for his escape from there, would suggest that he was not with the other accused as part of the alleged unlawful assembly.

35. The testimony of PW-1, Kanchan Singh and PW-2, Rajendra Singh in respect of Saleem (appellant no.7), therefore, does not inspire confidence. Hence, in our considered view, benefit of doubt should be extended in favour of Saleem (appellant no.7) to hold that he was not involved in commission of the present crime.

36. As both the surviving appellants, namely, Brijendra Singh (appellant no.5) and Saleem (appellant no.7) were convicted by the trial court under Section 302 IPC with the aid of Section 149 IPC, we now proceed to examine whether they formed part of an unlawful assembly and could be convicted with the aid of Section 149 IPC.

The Section 149 IPC reads as follows:

"**149. Every member of unlawful assembly guilty of offence committed in prosecution of common object**.--If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence."

37. As per Section 149 IPC to convict a person with the aid of this Section, it is necessary to prove the following ingredients; namely, (1) the offence is committed by any member of an unlawful assembly; and (2) the offence must be committed in prosecution of the common object of an unlawful assembly; or such as the members of that assembly knew to be likely to be committed in prosecution of that object.

38. Section 141 IPC defines unlawful assembly and, according to Section 141 IPC, an assembly of five or more persons is designated an "unlawful assembly", if the common object of the persons composing that assembly is any one or more of those specified in that Section.

39. In the present case, the prosecution case is that co-accused Harnath

Singh opened fire upon Dhirendra Singh, who was standing in the open field of Fatte Lal Katiyar; after that, co-accused Aditya Singh opened fire through his country made pistol. Following that, surviving appellants, namely, Birendra Singh (appellant no. 5) and Saleem (appellant No.7) started hurling their lathies along with other accused, who also had lathies. Admittedly, till both gun shots were fired, surviving appellants were standing in front of the house of co-accused Shivnath Singh and had not participated in causing any injury either to deceased (Dhirendra Singh) or to injured Rajendra Singh (PW-2). The allegation against them is that after two fires were made, they started using their lathies. From this, it cannot be said that they shared the common object with the other accused, who caused fire arm injuries to the deceased and the injured Rajendra Singh (PW-2). The role of causing fire arm injuries to Dhirendra Singh (the deceased) is specifically attributed to co-accused Harnath Singh and the role of causing fire arm injury to injured Rajendra Singh (PW-2) is attributed to accused Aditya Singh.

40. What is now to be examined is whether the surviving appellants were part of the unlawful assembly which had a common object of causing injury to the deceased. At this stage, we may notice that the accused were standing in front of the door of the house of co-accused Shiv Nath Singh, as per the prosecution case, and the deceased was standing on the field of one Fatte Lal. Accused persons were hurling abuses at Dhirendra from a distance of 13-14 paces. Upon hearing the abuses, PW-1 and others arrived at the spot. Then the witnesses saw co-accused Har Nath pointing gun at the deceased and co-accused Aditya holding pistol in his hand. PW-1 in paragraph 12 of his cross-examination, held on 14.08.2012, stated that at that time he did not expect that the accused would use their weapon and, therefore, the complainant party was unarmed. But soon thereafter, co-accused Harnath moved ahead from the door of his house and from a distance of 7-8 paces fired at the deceased; and, thereafter, Aditya fired. Till then, there was nothing from which it could be held that all the accused persons had a common object to cause injury to the deceased. It appears that when, hot words were exchanged, on account of previous enmity, co-accused fired at the deceased. The co-accused persons alleged to be armed with lathi, only joined when the shots had already been fired. Thus, in our considered view, keeping in mind that all the accused were stated to be standing in front of their own house and not having gone as a group of persons, armed, to another place to commit an offence, they cannot be said to be part of an unlawful assembly with a common object, at the stage, when the gun shots were fired.

41. The Supreme Court in the case of **Shivjee Singh and others Vs. State of Bihar** reported in **(2008) 11 SCC 631** discussed the import of the words 'object' and 'common' used in Section 149 IPC. The relevant portion, contained in paragraph no.-10 is as follows:-

".....The word object' means the purpose or design and, in order to make it `common', it must be shared by all. In other words, the object should be common to the persons, who compose the assembly, that is to say, they should all be aware of it and concur in it. A common object may be formed by express agreement after mutual

consultation, but that is by no means The word `object' means the purpose or design and, in order to make it `common', it must be shared by all. In other words, the object should be common to the persons, who compose the assembly, that is to say, they should all be aware of it and concur in it. A common object may be formed by express agreement after mutual consultation, but that is by no means necessary. It may be formed at any stage by all or a few members of the assembly and the other members may just join and adopt it. Once formed, it need not continue to be the same. It may be modified or altered or abandoned at any stage."

Further, in the same paragraph the Apex Court held:

"The expression in prosecution of common object' as appearing in Section 149 have to be strictly construed as equivalent to `in order to attain the common object'. It must be immediately connected with the common object by virtue of the nature of the object. There must be community of object and the object may exist only up to a particular stage, and not thereafter. Members of an unlawful assembly may have community of object up to certain point beyond which they may differ in their objects and the knowledge, possessed by each member of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command, but also according to the extent to which he shares the community of object, and as a consequence of this the effect of Section 149, IPC may be different on different members of the same assembly."

Thus, it is clear from the aforesaid decision that members of an unlawful assembly may have community of object upto the certain point of time and not beyond that.

42. In the present case, in the context of the prosecution evidence led, it cannot with certitude be held that the common object of the assembly was either to commit the murder of Dhirendra Singh (the deceased) or to cause such bodily injuries to him or to anybody else that may result in death because the accused persons did not move as a group to assault the victims, the accused were in front of their own house and the incident occurred after exchange of hot words, when co-accused Har Nath Singh went ahead, perhaps in the heat of the moment, to fire at the deceased which, in our view, was his individual act and cannot be attributed to be in furtherance of the object of that group of accused persons. Similarly, the shot fired by co-accused Aditya Singh was his individual act. Consequently, as the prosecution failed to provide evidence to prove that accused persons including the surviving appellants held a common object to cause the death of Dhirendra Singh or to cause any such injury which in ordinary course of event would have resulted in his death, the surviving appellants cannot be held liable for the murder of Dhirendra Singh under Section 302 IPC with the aid of Section 149 IPC.

43. A similar question as to whether the commission of murder by an individual member of an unlawful assembly would attract the provisions of Section 149 IPC, came before Apex Court in the case of **Roy Fernades Vs. State of Goa and others**, reported in **(2012) 3 SCC 221.** Apex Court after discussing the provisions of Sections 149 and 141 IPC observed that the sudden action of one of the members of the unlawful assembly cannot fall under the

ambit of Section 149 IPC as the members of unlawful assembly cannot be presumed to knew that such an offence was likely to be committed by any of its member.

44. In the present case, as we observed earlier that there is no evidence on record, which can prove the common object of all the accused persons including the surviving appellants to commit the murder of deceased Dhirendra Singh, neither the surviving appellants nor the other co-accused persons, except Harnath Singh, could have had knowledge or awareness that Harnath Singh would open fire from his gun upon Dhirendra Singh. Therefore, in these prevailing circumstances, the conviction of surviving appellants, namely, Brijendra Singh (appellant no.5) and Saleem (appellant no.7) under Section 302 IPC with the aid of Section 149 IPC cannot be sustained.

45. At this stage, we may examine the prosecution evidence from another angle as to ascertain whether all the co-accused persons were there together from before at the door of the house of co-accused Shiv Nath or some of them may have arrived hearing the shouts or verbal exchanges between the deceased and co-accused Har Nath Singh. It is important to notice here that according to PW-1, the eye witness, and PW-2, the injured witness, both, in the morning, had set out to go to their fields, when they heard shouts, they went to the spot and witnessed the incident and found the accused and the deceased in a verbal duel. If PW-1 and PW-2 could get drawn to the scene of occurrence upon hearing verbal duel, even the rest of the accused persons could get collected with their lathies but that by itself would not be sufficient to infer that they shared common object with the co-accused, who fired at the deceased. From all these angles, the conviction of surviving appellant cannot be with the aid of Section 149 IPC.

46. Since we have already held that the conviction of surviving appellants is unsustainable with the aid of Section 149 IPC, now we will analyse and examine the individual offence, if any, committed by surviving appellants, namely, Brijendra Singh (appellant no.5) and Saleem (appellant no.7).

47. At this stage, we may notice that the trial court also convicted them under Section 147 IPC along with Section 323 IPC. Thus, we first deal with the conviction of surviving appellants under Section 147 IPC.

48. Section 147 IPC provides punishment for rioting and Section 146 IPC defines the offence of rioting. As per Section 146 IPC, whenever force or violence is used by an unlawful assembly, or by any member thereof, in prosecution of the common object of such assembly, every member of such assembly is guilty of the offence of rioting.

49. In the present case there are three stages of the entire incident:-

(A) Altercation, Followed by shot fired by co-accused Harnath Singh at the deceased Dhirendra Singh resulting in his death;

(B) Shot fired by co-accused Aditya Singh from his country made pistol causing injury to Rajendra Singh (PW-2); and

(C) After both the shots were fired, lathi was wielded by remaining five

accused including the surviving appellants, namely, Brijendra Singh (appellant no.5) and Saleem(appellant no.7).

50. As we have already formed an opinion that common object cannot be attributed to surviving appellants, namely, Brijendra Singh (appellant no. 5) and Saleem (appellant no.7) for causing injuries to (deceased) Dhirendra Singh and Rajendra Singh (PW-2), for stages (A) and (B), therefore, appellant no.5, Brijendra Singh and appellant no.7, Saleem cannot be convicted under Section 147 IPC and under Section 323 IPC for stages (A) and (B).

51. In stage (C), according to the prosecution, a total of five persons including the surviving appellants Brijendra Singh (appellant no.5) and Saleem (appellant no.7) participated, but as we have earlier held that involvement and presence of Saleem (appellant no.7) appears to be doubtful and benefit of doubt is, therefore, extended in his favour, therefore, Saleem (appellant no.7) cannot be convicted under Section 147 and 323 IPC for even stage (C) of the entire incident.

52. Now we will examine the conviction of surviving appellant Brijendra Singh (appellant no.5) under Sections 147 and 323 IPC for stage (C).

In stage (C) accused persons, namely, Shivnath Singh, Vishwa Nath Singh, Raghvendra Singh, Brijendra Singh (appellant no.5) and Salim (appellant no. 7), who were standing at the house of Shivnath Singh participated and caused injuries to Kanchan Singh (PW-1) and Mahipal singh (not examined) and Rajendra singh (PW-2) from their lathies, but we have already extended benefit of doubt to Saleem (appellant no.7), therefore for stage (C) only four accused persons remained including the surviving appellant no. 5 (Brijendra Singh). But as co- accused Harnath Singh and Aditya Singh, who participated in stages (A) and (B) of the entire incident, were already there, when appellant no. 5 (Brijendra Singh) participated in Stage-C along with other co-accused persons, they all formed an unlawful assembly with common object to cause injuries to PW-1 (Kanchan Singh), PW-2 (Rajendra Singh) and Mahipal Singh (not examined) and therefore, the conviction of appellant no.5 (Brijendra Singh) under section 147 IPC, in our considered view, is fully sustainable and, in our opinion, trial court rightly convicted Brijendra Singh (appellant no.5) for offence under Section 147 IPC.

53. As far as conviction of appellant No.5 (Brijendra Singh) under Section 323 IPC is concerned, in this regard it is important to point out that although charge against him was framed under Sections 323/ 149 IPC but the trial court convicted him under Section 323 IPC without the aid of Section 149 IPC. As we have already observed that appellant No. 5 (Bijendra Singh) was member of an unlawful assembly and participated in stage (C) of the entire incident and was armed with lathi along with other co-accused persons and injury report of Rajendra Singh (PW-2) shows that he sustained a contusion with two abrasions, therefore, appellant no. 5 (Bijendra Singh) can be convicted under Section 323 IPC with the aid of Section 149 IPC.

54. Learned defence counsel although argued that there is on evidence on record, which can show, who caused the lathi injury to Rajendra Singh (PW-2) and

Mahendra Singh (another injured), who was not examined, therefore, appellant no. 5 (Brijendra Singh) cannot be convicted even under Section 323/149 IPC, but, in our considered view, as appellant no. 5 (Brijendra Singh) was a member of an unlawful assembly, he can very well be convicted under Section 323 IPC with the aid of Section 149 IPC.

Therefore, we set aside the conviction of Brijendra Singh (appellant no.5) under Section 323 IPC but convicted him under Sections 323/149 IPC.

55. In view of the above discussion, we allow the appeal filed by Saleem (appellant no.7) and set-aside his conviction awarded by the trial court under Sections 302/149, 323 and 147 IPC and acquit him of all the charges.

56. As far as the appeal filed on behalf of Brijendra Singh (appellant no.5) is concerned, we partly allow his appeal and set aside his conviction under Sections 302/149 IPC but his conviction under Section 147 IPC is maintained. We also set aside the conviction of appellant no.5 (Brijendra Singh) awarded by trial court under Section 323 IPC but convict him under Section 323/149 IPC.

57. During the pendency of the present appeal appellant no.5 (Brijendra Singh) raised a claim of juvenility on date of the incident, i.e., on 12.7.1980. On his plea, this Court on 26.2.2018 directed the Juvenile Justice Board to hold a proper enquiry in accordance with law as provided under the Juvenile Justice (Care and Protection of Children) Act, 2015 (in short, 'the Act of 2015') as to whether on the date of occurrence surviving appellant no.5 (Brijendra Singh) was juvenile or not. In pursuance thereof, Juvenile Justice Board conducted an enquiry in respect of claim of juvenility of appellant no.5 (Brijendra Singh) and after enquiry Juvenile Justice Board found that the certificate of High School Examination, 1979 of Brijendra Singh (appellant no.5) was a reliable certificate and according to that his date of birth is 9.10.1962. The Juvenile Justice Board in its enquiry found that the age of Brijendra Singh (appellant no.5) on the date of incident, i.e., on 22.7.1980 was 17 years 9 months and 13 days and submitted its report dated 12.10.2018.

58. As per report of Juvenile Justice Board dated 12.10.2018, appellant no.5 (Brijendra Singh) was juvenile on the date of incident, i.e., 12.7.1980. On 26.10.2021, this Court granted 10 days' time to the counsel for the complainant to submit his objection in respect of the report of Juvenile Justice Board.

59. In spite of opportunity to file an objection to the report of Juvenile Justice Board dated 12.10.2018, no objection was taken on behalf of the complainant.

60. We have perused the report of the Juvenile Justice Board dated 12.10.2018. It is well settled principle that the claim of juvenility can be raised at any stage including the appellate stage. Very recently the Hon'ble Supreme Court in **Ashok Kumar Vs. the State of Madhya Pradesh (Special Leave to Appeal (Crl.) No.643 of 2020)** on 29.11.2021 observed as under:

"The Juvenile Justice Act, 1986, which was in force on the date of commission of the offence as also the date of the judgment and order of conviction and sentence by the Sessions Court was repealed by the Juvenile Justice (Care and Protection of Children) Act, 2000. The Act of 2000 received the assent of the President of India on 30.12.2000 and came into force on 01.04.2001. The Act of 2000 defined juvenile in conflict with The Juvenile Justice Act, 1986, which was in force on the date of commission of the offence as also the date of the judgment and order of conviction and sentence by the Sessions Court was repealed by the Juvenile Justice (Care and Protection of Children) Act, 2000. The Act of 2000 received the assent of the President of India on 30.12.2000 and came into force on 01.04.2001. The Act of 2000 defined juvenile in conflict with the law to mean a juvenile, who was alleged to have committed an offence and had not completed 18th year of age as on the date of commission of such an offence.

Under the 1986 Act, the age of juvenility was upto the 16th year. Section 7A of the 2000 Act as inserted by Act 33 of 2006 with effect from 22.08.2006 provided as follows:-

"7A. Procedure to be followed when claim of juvenility is raised before any Court.-(1) Whenever a claim of juvenility is raised before any court or a court is of the opinion that an accused person was a juvenile on the date of commission of the offence, the court shall make an inquiry, take such evidence as may be necessary (but not an affidavit) so as to determine the age of such person, and shall record a finding whether the person is a juvenile or a child or not, stating his age as nearly as may be:

Provided that a claim of juvenility may be raised before any Court and it shall be recognised at any stage, even after final disposal of the case, and such claim shall be determined in terms of the provisions contained in this Act and the rules made thereunder, even if the juvenile has ceased to be so on or before the date of commencement of this Act.

(2) If the court finds a person to be a juvenile on the date of commission of the offence under sub-section(1), it shall forward the juvenile to the Board for passing appropriate orders and the sentence, if any, passed by a court shall be deemed to have no effect."

The claim of juvenility can thus be raised before any Court, at any stage, even after final disposal of the case and if the Court finds a person to be a juvenile on the date of commission of the offence, it is to forward the juvenile to the Board for passing appropriate orders, and the sentence, if any, passed by a Court, shall be deemed to have no effect.

Even though the offence in this case may have been committed before the enactment of the Act of 2000, the petitioner is entitled to the benefit of juvenility under Section 7A of the Act of 2000, if on inquiry it is found that he was less than 18 years of age on the date of the alleged offence."

Thus, we accept the report of Juvenile Justice Board dated 12.10.2018 and hold that appellant no.5 (Brijendra Singh) was juvenile as defined by Section 2 (k) of Juvenile Justice (Care and Protection of Children) Act, 2000 (in short, 'the Act of 2000'); and Section 2 (35) of the Juvenile Justice (Care and Protection of Children) Act, 2015 on the date of incident.

61. As we have already declared appellant no.5 (Brijendra Singh) juvenile as per the provisions of Act of 2000.

Therefore, now we will examine what was the sentence that could be awarded to appellant no.5 (Brijendra Singh). The Apex Court in the case of **Jitendra Singh alias Babbu Singh Vs. State of U.P.(2013) 11 SC 193** upheld the conviction and, on the question of sentence, by taking into account the provisions of Juvenile Justice Act, 1986 and Juvenile Justice (Care and Protection of Children) Act, 2000 held as follows:

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

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

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

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

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

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

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

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

Provided that.....

Provided further that .....

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

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

Provided that .....

(3) -(4)"

32. A perusal of the "punishments' provided for under the Juvenile Justice Act, 1986 indicate that given the nature of the offence committed by the appellant, advising or admonishing him [clause (a)] is hardly a "punishment' that can be awarded since it is not at all commensurate with the gravity of the crime. Similarly, considering his age of about 40 years, it is completely illusory to expect the appellant to be released on probation of good conduct, to be placed under the care of any parent, guardian or fit person [clause (b)]. For the same reason, the appellant cannot be released on probation of good conduct under the care of a fit institution [clause (c)] nor can he be sent to a special home under Section 10 of the Juvenile Justice Act, 1986 which is intended to be for the rehabilitation and reformation of delinquent juveniles [clause (d)]. The only realistic punishment that can possibly be awarded to the appellant on the facts of this case is to require him to pay a fine under clause (e) of Section 21(1) of the Juvenile Justice Act, 1986.

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

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

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

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

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

59. It is also directed that whenever an accused, who physically appears to be a juvenile, is produced before a Magistrate, he or she should form

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

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

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

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

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

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

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

66. Pursuant to the order passed by this Court, an enquiry was held by Juvenile Justice Board, Fatehgarh District Farrukhabad and the appellant no.5 (Brijendra Singh) has been found to be of age below 18 years and, therefore, a child

in conflict with law as per the provisions of Juvenile Justice (Care and Protection of Children) Act, 2015. Section 18 of the Juvenile Jutice (Care and Protection of Children), Act, 2015 is extracted here-in-below:

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

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

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

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

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

Provided that, in case the child is working, it may be ensured that the provisions of any labour law for the time being in force are not violated; e. direct the child to be released on probation of good conduct and placed under the care of any parent, guardian or fit person, on such parent, guardian or fit person executing a bond, with or without surety, as the Board may require, for the good behaviour and child's well-being for any period not exceeding three years;

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

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

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

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

i. attend school; or

ii. attend a vocational training centre; or

iii. attend a therapeutic centre; or

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

v. undergo a de-addiction programme.

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

67. When we compare the provisions of Section 21 of Juvenile Justice Act, 1986 with the provisions of Section 18 of the Juvenile Justice (Care and Protection of Children) Act, 2015, we find that there exist similar provisions for orders that could be passed in respect of a juvenile in conflict with law including direction to pay fine. Hence, by applying the law laid down by the Apex Court in Jitendra Singh's case (Supra) and by keeping in mind the provisions of Section 18(1) (d) of the Act, 2015, and provisions of Section 21 of of Juvenile Justice Act, 1986, we are of the view that the appropriate punishment that ought to be awarded to appellant no.5 (Brijendra Singh), who was a juvenile on the date of the incident, would be 'fine'. We find that the court below while convicting appellant no.5 (Brijendra Singh) under Section 147 IPC has not awarded any fine and as we, in the present appeal, have convicted him under Section 323/149 IPC after setting aside his conviction under Section 323 IPC, therefore, the quantum of fine is to be determined by the Juvenile Justice Board after giving opportunity of hearing to appellant no.5 (Brijendra Singh) in the light of the observations contained in the judgment of the Apex Court in **Jitendra Singh's case (Supra).**

68. Accordingly, the appeal of surviving appellant No. 7 (Saleem) is allowed as already mentioned in paragraph 55 here in above. Whereas, the appeal of appellant No. 5 (Brijendra Singh) is partly allowed to the extent indicated in paragraph 56 herein above and as below. The appellant no.5 (Brijendra Singh) who is on bail need not surrender. His sureties are discharged. The matter is remanded to the Juvenile Justice Board, Fatehgarh, District Farrukhabad constituted under the Juvenile Justice (Care and Protection of Children) Act, 2015 for determining the appropriate quantum of fine that should be levied on appellant no.5 (Brijendra Singh) and the compensation that should be awarded to the family of the victim, as per the law. The appellant no.5 (Brijendra Singh) shall cooperate in the proceedings in that regard and shall put in appearance before the Juvenile Justice Board, Fatehgarh, District Farrukhabad by 15th January, 2022.

69. Let the record of the court below as well as the record of Juvenile Justice Board, Fatehgarh, District Farrukhabad be sent back.

(2022)01ILR A533
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.01.2022

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, J.
THE HON'BLE OM PRAKASH TRIPATHI, J.

Criminal Appeal No. 3885 of 2010
connected with
Criminal Appeal No. 4528 of 2010

Kaluwa ...Appellant

Versus

State of U.P. ...Respondent

Counsel for the Appellant:
Sri Shiv Sagar Singh, Sri Noor Mohammad, Sri Jayant Prakash Singh, Sri Mohammad Zakir

Counsel for the Respondent:
A.G.A.

Criminal Law - Indian Evidence Act, 1872 - Section 3- Section 8- Direct evidence- Motive insignificant- As per the corroborated evidence of P.W.1- and P.W.-2, it is proved that incident was eye witnessed by both of them- It is a case of direct evidence and in the case of direct evidence, motive becomes insignificant- The evidence of the witnesses of the fact that injuries were inflicted by indiscriminate firing caused by the accused persons, is supported/ corroborated by medical evidence.

Settled law that where the evidence is direct and corroborated by other evidence and material, then motive loses its significance.

Criminal Law - Indian Penal Code, 1860- Section 34- Common Intention- So far as section 34 of I.P.C. is concerned, the act of accused persons were done in furtherance of common intention to kill the deceased Dalveer- They jointly dragged the deceased from kharanja and put him in the field of jwar and jointly began to fire on the corpus of the deceased- The act and conduct of the accused persons shows the common intention to kill the deceased Dalveer Singh.

Where all the accused persons have acted in concert in the commission of the offence , then the same establishes their common intention making them vicariously liable u/s 34 IPC. (Para 24, 29, 35, 40, 43, 44)

Criminal Appeal rejected. (E-3)

Judgements/ Case law relied upon:-

1. Pratap Singh & ors Vs. St. of UP 2021, SCC Online All 686

2. Abu Thaker Vs. St. of T.N, (2010) 5 SCC 91

3. Bipin Kumar Mondal Vs. St. of W.B, (2010) 12 SCC 91

4. Mohd. Rojali Ali & ors Vs. St. of Assam (2019) 19 SCC 567

5. Laltu Ghosh Vs. St. of W.B (2019) 15 SCC 344

(Delivered by Hon'ble Om Prakash Tripathi, J.)

1. Heard Sri Jayant Prakash Singh and Sri Mohammad Zakir, learned counsel for the appellants, Sri S.A. Murtaza, Additional Government Advocate on behalf of the State and perused the material on record.

2. The appellants have preferred these criminal appeals aggrieved by the judgment and order dated 22.05.2010 passed by Additional District & Sessions Judge, Court No. 2, Bulandshahr in Sessions Trial No. 1637 of 1999, under Section 302/34 IPC, arising out of Case Crime No. 222 of 1999, Police Station Sikarpur, District Bulandshahr, convicting and sentencing the appellants to undergo rigorous life imprisonment under Section 302/34 of IPC with a fine of Rs.5,000/- each, in default thereof, to undergo one year simple imprisonment, therefore, these appeals are heard and being decided together by this common judgement.

3. The prosecution case is as follows:

4. On 06.09.1999 in the morning at 10:00 a.m., the complainant Neeraj Singh, S/o Fem Singh, R/o Village Deeppur, Police Station Sahawar, District Etah filed a written report at Police Station Sikarpur with the prayer that his sister Rajeshwari, belongs to Village Manpur, married with

Dalveer Singh. Yesterday, he came to the house of his sister. Prior to the incident, Munesh and others targeted his brother-in-law, namely, Dalveer Singh by means of country made pistol. On 06.09.1999, the complainant, his sister and his brother-in-law were going to Dehli where the brother of Dalveer Singh was residing. When the aforesaid persons reached nearby the field of Gyan Singh at about 7:00 p.m., the accused persons namely, Munesh, Shanakar, Shashi and Kaluwa met, armed with country made pistols (Tamancha). Munesh threatened to brother-in-law that how dare he lodged the First Information Report against him and asked him to withdraw the case. His brother-in-law refused to withdraw the case. The aforesaid persons started indiscriminate firing upon Dalveer Singh as a result of which, he died on the spot.

5. On the basis of the written report, the police registered a case as Crime No. 222 of 1999, under Section 302 IPC and entry about registration of the case was made in the General Diary on 06.09.1999. Investigation of the case was taken over by the Sub-Inspector R.D. Pathak. He rushed to the spot and recorded the statement of the complainant Neeraj Singh and prepared the site plan.

6. The postmortem examination was conducted on the dead body of the deceased Dalveer Singh by Dr. B.K. Gaur on 07.09.1999 at 04:15 p.m. As per the post mortem report, the age of the deceased was about 35 years at the time of the death and possibility of death of the deceased was about one and half day prior to the date of the postmortem. After death of the deceased, stiffness was present in the lower part of the body of the deceased but stiffness had gone from upper part of the body. There was no mark of rottenness in the body of the deceased. On internal examination of the deceased, the doctor opined that the deceased died due to coma, shock and haemorrhage due to ante mortem injuries.

7. During investigation, the Investigating Officer recorded the statements of the witnesses. After completing all formalities of investigation, he submitted the charge sheet (Exhibit Ka.-16) against the appellants in the Court of Chief Judicial Magistrate, Bulandshahr, under Section 302 IPC and cognizance of offence was taken by the Magistrate. The case was committed to the Court of Sessions Judge by the Chief Judicial Magistrate and thereafter, the case was transferred to the Court of Additional District & Sessions Judge, Court No. 11, Bulandshahr. On 07.02.2000, charge was framed against the appellants under Section 302/34 IPC and the accused-appellants pleaded not guilty and claimed to be tried and thereafter trial was transferred to the Court of Additional Sessions Judge, Court No.2, Bulandshahr for trial.

8. In order to prove the charges framed against the appellants, the prosecution has examined Rajeshwari wife of the deceased (P.W.-1), the complainant, Neeraj Singh, (P.W.-2), Dr. B.K. Gaur, (P.W.-3), Ram Bilas Singh, (P.W.-4), Sub Inspector Surajpal Singh, (P.W.-5).

9. Eye witness P.W.-1, Rajeshwari, the wife of the deceased had deposed that about one and half year back, I, her husband Dalveer Singh and her brother Neeraj were going to Delhi, i.e., to the house of her brother-in-law (Jeth) Om

Prakash. When we reached at the kharanja of Village Naraich, accused Munesh, Shashi, Shankar and Kaluwa met, armed with country made pistols at 7:30 a.m. Munesh said to my husband that how dare you to lodge a criminal case against me. Her husband denied this fact then Munesh threatened that Police will carry you from here. They dragged my husband in the jwar field of Gyan Singh and killed my husband by fire arm from their country made pistols. I and my brother shouted but none came to help. My husband succumbed to death on the spot by fire arm injury and accused persons fled away from the scene of occurrence. Prior to 13 days before the incident, a quarrel took place among my husband and accused persons. In that quarrel my husband received fire arm injuries on his leg which was fired by the accused and due to this enmity, the accused persons committed murder of my husband.

10. P.W.-2 the complainant Neeraj, brother-in-law of the deceased (Bahnoi) had deposed that I, my brother-in-law Dalveer and my sister Rajeshwari were going to Delhi from Bhanpur. We reached at the kharanja of Village Naraich at about 7:30 a.m. where accused persons Munesh, Shashi, Shankar and Kaluwa met, armed with country made pistols. Accused Kaluwa is resident of Rampur and now living with the accused persons. They all said to my brother-in-law that how dare you lodge a criminal case against them and also asked my brother-in-law to withdraw the criminal case. When my brother-in-law refused, then they said that Police will lift you. Then all of them dragged away my brother-in-law in the field of Gyan Singh and all accused persons shot fire with country made pistols and killed my brother-in-law. We shouted but none was in the field except us and accused persons. My brother-in-law succumbed to death by fire arm injuries on the spot. Prior to 13 days before the incident, accused persons shot fire on my brother-in-law Dalveer and he received one fire arm injury and due to this enmity, they killed my brother-in-law. At the time of the incident, I and my sister intervened but the accused persons did not agree and they fled away from the spot after causing incident. The dead-body was lying on the spot. Then I wrote a report and went to the Police Station Sikarpur and lodged a report. My sister Rajeshwari remained near the dead body of the deceased.

11. In the cross-examination, eye witness P.W.-2 has stated that I would take vehicle from Karora. Accused Shashi and Munesh were wearing pant and shirts at the time of the incident. All the accused were armed with country made pistols. Accused dragged Dalveer about 35 paces. There were fields of jwar and arahar, where the deceased was dragged. All accused fired on Dalveer; his face was in the east direction. I could not tell that which accused fired on Dalveer from which side. Accused fired from all directions. Dalveer received fire-arm injuries on left ear, near the neck. Second fire arm was below the right eye. Third fire arm was also below the ear. Total eight fire arm injuries was received on the body of the deceased Dalveer. Accused Munesh and other accused loaded the cartridges before me. Accused fired on Dalveer from the distance of 2 feet. I went with the dead-body on tractor. Next day at 08:00 a.m. I went to Bulandshahr with Police personnel and brother of Dalveer who came from Delhi; I made a telephone to his brother from Sikarpur. When the accused dragged Dalveer from the kharanja, I intervened them but they threatened by their country made pistols. It

is wrong to say that he does not know the accused persons. Accused Munesh is resident of P.S. Soro, District Etah. I do serve in shoe factory in Delhi. I lodged the report of the incident. In the report, I have not stated that I came to bring my sister and brother-in-law. I came to the house of my sister prior two days prior to the date of the incident. My brother-in-law was wearing tahmad and vest. There were waters in the fields. We proceeded about half kms. The crop of arahar was small in size. Accused dragged the deceased Dalveer in the filed of arahar owned by Ghanshyam. We also moved with the deceased but the accused threatened and we stayed there and shouted but no one came there. When accused shot fire on my brother-in-law and fled away from the spot, then we went near my brother-in-law. At that time, my brother-in-law was wearing vest and tahmad. I found four empty cartridges near the dead-body of the deceased. The dead-body got covered by mud. I and my sister had not lifted the dead-body from the spot. The incident took place at 07:30 in the morning. I and my sister stayed half hours near the body and then I went to the police station and my sister remained near the dead-body and I wrote a written report myself near kharanja. I reached the police station at about 10:00 a.m. by feet. Sikarpur police station is at 4-5 km from the place of occurrence. I returned at about 11:30 a.m. with Police. The dead-body was sealed there at 04:30 p.m. to 05:45 p.m.

12. P.W.-3 Doctor B.K. Gaur had conduced the post mortem of the deceased Dalveer Singh on 07.09.1999 at 04:15 p.m. The age of the deceased was 35 years. He was a man of simple structure, rigour mortise was present in the lower portion of the body but passed away from the upper side of the body. There was no sign of rotting on the body of the deceased. Ante mortem Injuries were found on the body of the deceased which are as follows:

"1. Gun shot wound of entry 3 x 3cm x bone deep at the back of left side of neck, 5 cm behind left ear. Margin inverted, blackening all over around the wound were present.

2. Gun shot wound of exit 6 cm x 6 cm x bone deep right side of jaw.

3. Gun shot wound of entry 3 cm x 3 cm x bone deep left side of neck just adjacent to lower part of left ear. Blackening all around the wound were present. Margin inverted.

4. Gun shot wound of exit 6.5 cm x 6 cm x bone deep left side of upper part of face. 6 cm in front of right ear connecting injury no.3.

5. Gun shot wound of entry 3 cm x 3 cm x chest cavity deep front of chest upper part of 8 cm above left nipple. Blackening all around the wound were present.

6. Gun shot wound of entry 3 cm x 3 cm x bone deep back of left shoulder in upper part. Blackening all around the wound were present and 18 metal pellets were found in the wound.

7. Gun shot wound of exit 3 cm x 3 cm x muscle deep in upper part of left forearm. Blacking all around the wound were present.

8. Gun shot wound of exit 4 cm x 4 cm muscle deep upper part of left

forearm, inner side connecting the injury no. 6.

9. Gun shot wound of entry 4 cm x 4 cm x muscle deep in the abdomen, 2 cm below from the sternum."

13. Eyes of the dead-body were closed. Eye-ball of right eye came out due to injury. Mouth was raptured and upper jaw was fractured. Blood was oozing from the nose and mouth and cause of death is haemorrhage and excessive bleeding due to anti mortem injuries.

14. Post mortem report was prepared by the witness. The witness proved the post mortem report as Exhibit Ka-2. After post post mortem, 74 pellets were retrieved from the dead body of the deceased and three wedding piece were sealed and given in the custody of the Constable. Injuries on the body of the deceased is possible on 06.09.1999 about 07:00 a.m. It is wrong to say that death is not possible by anti mortem simple injuries.

15. P.W.-4 H.C.P. Ram Vilash Singh has stated that he has prepared Chik FIR on the basis of written report of the complainant Neeraj Singh and proved Chik FIR as Exhibit Ka-3 and also proved original GD as Exhibit Ka-4. Written report was brought by the complainant Neeraj. Jai Pal was also with him. I prepared original GD in about one and quarter hours. It is wrong to say that on the basis of written report of the complainant Neeraj, I have lodged a false report in ante time.

16. P.W.5 R.D. Pathak, Investigating Officer of the case has stated that the inquest report of deceased Dalveer was prepared by S.S.I. Ghanshyam on my direction and other relevant papers also prepared in the hand writing of Ghanshyam on my direction. I identified the signature of Ghanshyam and this witness proved the inquest report (Exhibit Ka-6), letter CMO (Exhibit Ka-7), letter R.I. (Exhibit Ka-8), Photo Naash (Exhibit Ka-9), Police Form-13 (Exhibit Ka-10). On the pointing of the complainant, spot map was prepared by me in my hand writing which is proved as Exhibit Ka-11. Plain soil and blood stained soil were taken from the place of occurrence and memo was prepared by Ghanshyam which is proved as Exhibit Ka-12 and two empty cartridges 12 bore were also recovered near the dead-body, recovery memo is proved as Exhibit Ka-13. On 01.10.1999 custody remand of the accused Shashi and Munesh were permitted and on 02.10.1999, their statements recorded and mentioned in CD and on the pointing out of accused Munesh, one country made pistol 12 bore was recovered by which, the murder of the deceased Dalveer was committed. On the pointing out of the accused Shashi, nothing recovered. Recovery memo was prepared at 10:15 a.m. by Bachoo Singh in my presence, which is exhibited as Exhibit Ka-14. Recovered country made pistol was sealed on the spot and case under Section 25 of Arms Act was lodged against the accused Munesh. Site plan of the recovery of country made pistol was prepared by me and proved as Exhibit Ka-15 and after collecting the entire evidence, witness submitted the charge sheet against Munesh, Shashi, Shankar and Kaluwa under Section 302 IPC and proved as Exhibit Ka-16. On 10.01.2000, articles recovered in this case were sent to Forensic Laboratory, Agra.

17. In the cross-examination, the witness P.W.-5 had stated that there was crop of jwar near place of occurrence. In some fields, crop of arahar was also there.

The incident took place in the field of arahar owned by Ghanshyam Singh near kharanja. I prepared site plan. The wife and brother-in-law of the deceased were going to Delhi. It is wrong to say that the incident took place in the field owned by some other person. There was no recovery from the accused Shankar and Kaluwa.

18. The statements of the accused persons under section 313 Cr.P.C. were recorded. Accused Shankar denied the prosecution story and stated that he has been falsely implicated in the case. The witnesses are interested one. My field and the field of the complainant are adjoining and middle common line was broken by tractor. Rajeshwari and Dalveer Singh abused me by my caste. The matter was solved in the Panchayat. Accused Kaluwa has stated that he has been falsely implicated. I belong to the Scheduled Caste and deceased belonged to Thakur Caste. Accused denied the prosecution story and stated that complainant Neeraj and Kaluwa are residents of same village. A quarrel took place among Neeraj, Kaluwa and me. P.W.-2, the complainant Neeraj left the village and started living in adjoining village. The deceased is real brother-in-law of the complainant Neeraj.

19. So far as the FIR is concerned, learned counsel for the appellants submitted that FIR was ante dated and ante time after due consultation.

20. P.W.-2, the complainant Neeraj, brother-in-law of the deceased had deposed that he wrote written report himself sitting on kharanja and on the basis of said report, FIR was lodged. Written report was proved by the witness as Exhibit Ka-1. He has lodged the report of the incident. I have not stated in the report that he had come to bring his sister and brother-in-law in Delhi. Although he has stated this fact to the Investigating Officer, if this fact is not written in his statement under Section 161 Cr.P.C., he does not know the reason for this. Paper and pencil was with me. Report was written near kharanja. I reached to the police station by foot which is about 4-5 kms from the place of occurrence. No suggestions have been given to this witness regarding lodging of the FIR ante dating and ante timing it.

21. On the basis of written report, P.W.-4 H.C.P. Ram Vilash Singh has lodged the FIR as Case Crime No. 222 of 1999, under Section 302 IPC (Exhibit Ka-3). He also proved original GD as Exhibit Ka-4. It is wrong to say that on the basis of written report, false case was registered in ante time. From the evidence, it is proved that incident took place on 06.09.1999 at 07:30 a.m. It is also evident that the complainant and the deceased are labourers and poor. So the complainant went to the police station by feet and reached police station at about 10:00 a.m. and the FIR was lodged at about 10:00 a.m. In the midway to the police station, there was heavy water in the river. Thus, it shows that the FIR was lodged promptly without consultation or legal advise. Natural facts were stated in the FIR. The complainant was the eye witness of the incident and it is evident from the written report that the name of the assailants, type of arms used by the accused persons were categorically disclosed in the written report. Thus, the submissions of the learned counsel for the appellants that the FIR is ante dated and ante time, has no force.

22. Learned counsel for the appellant submitted that there was no motive. The motive has been stated in brief that the

accused Munesh asked my brother-in-law that how dare you lodge the FIR against me and withdraw the same. When the deceased refused, the accused persons threatened that Police will lift you from this place and fired at him.

23. In the evidence, P.W.-1 Rajeshwari has also stated that prior to 13 days from the date of incident, there was quarrel in between my husband and accused. Fire arm injuries were received by my husband in the said quarrel. Due to this enmity, accused persons killed my husband. In the previous quarrel, no FIR has been lodged. It is also stated that there was no such injury on the leg of the deceased as stated by the witness.

24. As per the corroborated evidence of P.W.1- and P.W.-2, it is proved that incident was eye witnessed by both of them. From the evidence on record, it is also proved that the incident took place at 07:30 a.m., there was ample light on the spot to recognize the accused persons by the said witnesses. It is a case of direct evidence and in the case of direct evidence, motive becomes insignificant.

25. In support of above contentions, learned A.G.A. placed reliance on following decisions :

26. In ***P*ratap Singh and others vs. State of UP 2021, SCC Online All 686**, the Court held that :

"motive is not very relevant in a case of direct evidence, where it dependable ocular version is available. Once, there is evidence forthcoming on the basis of an eye witness account that is consistently narrated by multiple witnesses motive is hardly relevant. "

27. In **Abu Thaker vs. State of Tamil Nadu, (2010) 5 SCC 91**, the Court held that:

"It is settled legal proposition that even if the absence of motive and if allowed is accepted that is of no consequence and pales into insignificance when direct evidence establishes the crime, therefore, in case, there is direct, trustworthy evidence of witnesses as to commission of an offence, the motive part uses its significance. Therefore, if the genesis of motive of occurrence is not proved, the ocular testimony of the witnesses as to the occurrence could not be discarded only by reason of absence of motive, if otherwise the evidence is worthy of reliance."

28. In **Bipin Kumar Mondal Vs. State of West Bengal, (2010) 12 SCC 91**, the Court held that :

"motive is of no consequence and pales into insignificance when direct evidence establishes the crime. Motive is a thing which is primarily known to the accused himself and it may not be possible for the prosecution to explain it. Ocular testimony of the witnesses if reliable cannot be discarded only by the reason of the absence of motive."

29. Witnesses were present at the place of occurrence. Murder of the deceased Dalveer Singh has been committed by the accused persons before them. Thus, in the presence of direct and reliable evidence, the motive loses its importance. It is apparent from the record that there is no FIR lodged by the deceased against the accused persons. There is also no such report for the previous injuries received on the leg of the deceased. This

fact will not affect the prosecution case in the presence of eye witness. Thus, the submissions of the learned counsel for the appellants that murder cannot be caused without motive, has no force.

30. Post mortem of the dead-body of the deceased was conducted by Dr. B.K. Gaur (P.W.-3) on 07.09.1999 at 04:15 p.m. On the dead-body of the deceased, following ante mortem injuries were found :

"1. Gun shot wound of entry 3 x 3cm x bone deep at the back of the left side of the neck, 5cm behind left ear. Margin inverted, blackening all over around the wound were present.

2. Gun shot wound of exit 6 cm x 6 cm x bone deep right side of jaw.

3. Gun shot wound of entry 3 cm x 3 cm x bone deep left side of the neck just adjacent to lower part of left ear. Blackening all around the wound were present. Margin inverted.

4. Gun shot wound of exit 6.5 cm x 6 cm x bone deep left side of upper part of face. 6 cm in front of right ear connecting injury no.3.

5. Gun shot wound of entry 3 cm x 3 cm x chest cavity deep front of the chest upper part of 8 cm above left nipple. Blackening all around the wound were present.

6. Gun shot wound of entry 3 cm x 3 cm x bone deep back of the left shoulder in upper part. Blackening all around the wound were present and 18 metal pellets were found in the wound.

7. Gun shot wound of exit 3 cm x 3 cm x muscle deep in the upper part of left forearm. Blacking all around the wound were present.

8. Gun shot wound of exit 4 cm x 4 cm muscle deep upper part of left forearm, inner side connecting the injury no. 6.

9. Gun shot wound of entry 4 cm x 4 cm x muscle deep in the abdomen, 2 cm below from the sternum."

31. Cause of death was shock, hamerouge and excessive bleeding due to anti mortem injuries. Nine gun shot injuries were found on the body of the deceased. Injury nos. 1,3, 5 and 7 were entry wounds where blackening was found. This fact shows that fire arm injuries were inflicted on the body of the deceased from a very close range. Thus, the evidence of the witnesses of the fact that injuries were inflicted by indiscriminate firing caused by the accused persons, is supported/corroborated by medical evidence.

32. The main question before us is that whether the injuries received by the deceased was caused by the accused persons through fire arm or not?. From the post mortem report, it is proved that there was nine fire arm injuries on the body of the deceased.

33. P.W.-1 the wife of the deceased has supported the prosecution case and stated that she, his brother Neeraj were going to Delhi with her husband Dalveer Singh. When they reached in the Village Nairaich on the kharanja, accused Munesh, Shashi, Shankar and Kaluwa met, armed

with country made pistols. Munesh asked to my husband that how he dared to lodge criminal case against me. My husband forbade, then Munesh threatened that you will be lifted by the Police from this place. Accused dragged my husband in field of Gyan Singh and there were jwar crops in the field. The accused persons caused indiscriminate firing on my husband and he died on the spot. All the four accused fired. I was present on the spot.

34. P.W.-2 complainant Neeraj, brother-in-law of the deceased (Bahnoi) also supported the prosecution case and has stated that I, my brother-in-law Dalveer and my sister Rajeshwari were going to Delhi from Bhanpur. We reached at the kharanja of Village Naraich at about 7:30 a.m. where Munesh, Shashi, Shankar and Kaluwa met and armed with country made pistols. Accused Kaluwa is resident of Rampur and now is living with the accused persons. They all said to my brother-in-law that how dare you lodge a criminal case against them and also asked my brother-in-law to withdraw the criminal case, when my brother-in-law refused to withdraw the case, they said that Police will lift you. Then all of them dragged away my brother-in-law in the field of Gyan Singh and all accused persons shot fire with country made pistols and killed my brother-in-law. We shouted but none was in the field except us and accused persons. My brother-in-law succumbed to death by fire arm injuries on the spot. Prior to 13 days before the incident, accused persons shot fire on my brother-in-law Dalveer and he received one fire arm injury and due to this enmity, they killed by brother-in-law. At the time of the incident, I and my sister tried to intervene but the accused persons did not agree and after firing, the accused persons fled away from the spot. The dead-body was lying on the spot. Then I wrote a report and after writing a report, went to the Police Station Sikarpur and lodged a report. My sister Rajeshwari remained near the dead body of the deceased.

35. In the detailed cross-examination, there is no reason to discard the evidence of eye witnesses. There was no motive to falsely implicate the accused persons. The evidence of the witnesses of fact is cogent and credible and fully reliable. Their presence at the place of the occurrence is proved. Thus, from the evidence on record, it is proved beyond all reasonable doubts that in furtherance of common intention, the accused persons committed gruesome murder of the deceased Dalveer Singh.

36. Learned counsel for the appellants also submitted that P.W.1 is wife of the deceased and P.W.-2 is brother-in-law of the deceased both are the related witnesses so their evidence are not reliable.

37. In support of the above contentions, the learned A.G.A. placed reliance on the decisions in following cases :

38. In **Mohd. Rojali Ali and others vs. State of Assam (2019) 19 SCC 567**, the Court held that :

"A related witness cannot be said to be an interested witness merely by virtue of being a relative of the victim, a witness may be called interested only when he or she drags some benefit from result of litigation which is in the context of a criminal case would mean that witness has a direct or indirect interest in seeing accused punished due to prior e*nmity or other reasons and thus has a motive to falsely implicate the accused."*

39. In **Laltu Ghosh Vs. State of West Bengal (2019) 15 Supreme Court Cases 344,** the Court held that :

"Related witness cannot be said to be an interested witness merely by virtue of being the relative of the victim. The scrutiny of evidence of related witness should be more caution."

40. Both the witnesses of fact witnessed the occurrence, their evidence is supported by medical evidence. There is no other injuries except fire arm injuries. Thus, ocular evidence is supported by medical evidence. There is no grudge to falsely implicate the accused persons. Thus, the submissions of the defence that witnesses are related one and their evidence is not credible, is not tenable.

41. The defence taken by the accused Shankar is that the field of P.W.-1 and accused are adjoining and the boundary line of fields are broken by the tractor, then the wife of the deceased Rajeshwari and Dalveer Singh abused me with filthy language using my caste and the matter was solved in Panchayat. I belonged to the Scheduled Caste Community and accused belonged to Thakur Community, so they implicated falsely. No evidence has been adduced with regard to Panchayat.

42. Accused Kaluwa has stated that P.W.-2 Neeraj and Kaluwa belonged to the same village. A quarrel took place between them. The deceased is a real brother-in-law of Neeraj. He has been falsely implicated. No evidence has been adduced by the accused in defence. The next defence taken by the accused is that when the deceased went for natural call, some criminal persons committed his murder. This defence is not tenable in presence of reliable evidence of eye witnesses, so defence taken by the accused, is not probable.

43. So far as section 34 of I.P.C. is concerned, the act of accused persons were done in furtherance of common intention to kill the deceased Dalveer. It is very difficult to know the mental status of a person, common intention should be gathered by the act and conduct of the accused persons. All the accused persons Shankar and Kaluwa and other co-accused were hiding in the field of jwar, armed with deadly weapons i.e., country made pistols. They jointly dragged the deceased from kharanja and put him in the field of jwar and jointly began to fire on the corpus of the deceased. The deceased received nine fire gun shot injuries and consequently died on the spot. All the accused persons fled away from the place of occurrence after committing the murder of the deceased.

44. Thus, the act and conduct of the accused persons shows the common intention to kill the deceased Dalveer Singh. The place of occurrence is not disputed by the defence.

45. Thus, in view of the above discussion, we come to the conclusion that on the basis of fully reliable evidence of P.W.-1 and P.W.-2, the prosecution has been able to prove its case beyond all reasonable doubts. The accused Shanker and Kaluwa with other co-accused had committed the homicidal death of the deceased Dalveer Singh at the time, place and in the manner as alleged by the prosecution and the charge under Section 302/34 IPC is very well established against the accused Shankar and Kaluwa.

46. On the basis of above discussion, we are of the view that judgment and order of the trial Court dated 22.05.2010 passed by Additional Sessions Judge, Court No.2, Bulandshahr in Sessions Trial No. 1637 of 1999, arising out of Case Crime No. 222 of 1999, Police Station Sikarpur, District Bulandshahr, convicting and sentencing the appellants Shanker and Kaluwa to undergo rigorous life imprisonment under Section 302/34 IPC with fine of Rs.5,000/- each and in default to undergo, one year additional simple imprisonment by each, is liable to be confirmed and is hereby confirmed.

47. It is evident that accused Shashi died during trial and case against him was abated. Accused Munesh participated in the trial after framing the charge, but accused Munesh absconded and his file was separated from the present case as Sessions Trial No. 1637-A of 1999.

48. During trial, the accused appellant Shankar and Kaluwa remained in judicial custody. Accused are directed to serve out the remaining period of their sentence.

49. The appeals are devoid of merits and liable to be dismissed. The appeals are, accordingly, **dismissed.**

(2022)01ILR A544
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.01.2022

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, J.
THE HON'BLE OM PRAKASH TRIPATHI, J.

Criminal Appeal No. 4255 of 2006

Makrand Singh & Ors. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri Deshraj Garg, Sri Rajiv Lochan Shukla, A/D 0 103,Sri Arya Suman Pandey

Counsel for the Respondent:
A.G.A.

Criminal Law - Indian Evidence Act, 1872 - Section 3- Section 8- It is a case of direct evidence. In case of direct evidence the motive becomes insignificant.

Settled law that where there is direct evidence / ocular evidence of the occurrence, motive loses its significance.

Criminal Law - Indian Evidence Act, 1872- Section 3- Both witnesses were present on the spot. There is no evidence to disbelieve the evidence of PW-1 & PW-4 eye witnesses. Their evidence are supported by medical evidence. There is no other injury on the body of the deceased except firearm injuries. Thus ocular evidence is supported by medical evidence. PW-1 & PW-4 are fully reliable and credible witnesses. They have no enmity with the accused and there is no ground to implicate them falsely. The submission of defence that witnesses are related one is not tenable.

Where the testimony of the eye witnesses is credible and trustworthy and were naturally present on the spot, then the same cannot be disbelieved only on the ground that they were related witnesses.

Criminal Law - Indian Penal Code, 1860- Section 34- Common Intention- Injuries were inflicted by the accused on vital part of the deceased in furtherance of common intention of all the accused. After committing the gruesome incident, accused fled away from the scene of occurrence. In furtherance of common intention they hide themselves in the crop of "Jwar' with firearm and committed joint attack on the deceased and fled

away from the scene of occurrence. It proves the common intention of the accused. In furtherance of common intention accused inflicted firearm injuries on the deceased jointly which is the cause of death of Suresh. The act of accused persons were done in furtherance of common intention to kill the deceased Suresh. It is very difficult to note the mental status of a person. Common intention should be gathered by the act and conduct of the accused persons.

Where all the accused persons have acted in concert and in furtherance of common intention in the commission of the offence, then the same makes each of them vicariously liable u/s 34 IPC.

Arms Act, 1959- Section 25/27 - I.O. of the crime under Section 25 Arms Act is junior to the I.O. of the main case. In such situation fair investigation of Section 25 Arms Act is not possible by junior officer of the same police station.

Where the investigating officer of the case under the Arms Act is junior to the Investigating Officer of the main case and is of the same police station, then no fair investigation is possible.

Criminal Law - Code of Criminal Procedure, 1973- Section 100 (4) - Independent witness has also not been produced regarding search and recovery. The provision under Section 100(4) Cr.P.C. is not complied with in this case by the recovery officer. Conviction on the basis of statements of two police officials alone is not sustainable.

Non compliance of the provisions of Section 100 (4) of the CrPc by the prosecution renders the alleged recovery of the fire arms vitiated and conviction on the basis of such recovery, which was effected without obtaining any independent witnesses, is unsustainable in law. (Para 31, 50, 51, 60, 63, 64)

Accordingly Criminal Appeal under Arms Act allowed while Appeal u/s 302/34 IPC rejected. (E-3)

Judgements/ Case law relied upon:-

1. Pratap Singh & ors vs. St. of U.P. 2021, SCC Online All 686

2. Abu Thaker Vs. St. of T.N, (2010) 5 SCC 91

3. Bipin Kumar Mondal Vs. St. of W.B, (2010) 12 SCC 91

4. Mohd. Rojali Ali & ors. Vs. St. of Assam (2019) 19 SCC 567

5. Laltu Ghosh Vs. St. of W.B (2019) 15 SCC 344

(Delivered by Hon'ble Om Prakash Tripathi, J.)

1. Heard Shri Rajiv Lochan Shukla, learned counsel for the appellants and Shri A.N. Mulla, learned A.G.A. for the State and perused the material on record.

2. The appellants have preferred this criminal appeal aggrieved by judgment and order dated 27.07.2006 passed by Additional Sessions Judge/ Fast Track Court IInd Court No. 7, Banda, in Session Trial No. 86/2004 arising out of Case Crime No. 198 of 2003 (under Section 302/34 I.P.C.), Session Trial No. 87 of 2004 arising out of Case Crime No. 210 of 2003 (under Section 25/27 Arms Act), Session Trial No. 88 of 2004 arising out of Case Crime No. 202 of 2003 (under Section 25 Arms Act), Session Trial No. 89 of 2004 arising out of Case Crime No. 203 of 2003 (under Section 25 Arms Act), Session Trial No. 90 of 2004 arising out of Case Crime No. 204 of 2003, (under Section 30 Arms Act) Police Station -

Baberu, District- Banda convicting and sentencing the appellants to undergo imprisonment for life under Section 302/34 I.P.C. with a fine of Rs. 5000/- each and in default of payment of fine to undergo six months additional rigorous imprisonment, convicting and sentencing the appellant nos. 1, 2 & 4 under Section 25 of Arms Act to undergo two years rigorous imprisonment and fine of Rs. 1000/- each and in default of payment of fine to undergo two months additional rigorous imprisonment and appellant no. 3 Ramchandra under Section 30 of Arms Act to undergo three months imprisonment. All the sentences shall run concurrently.

3. The prosecution case is as follows:

4. Virendra Singh, the complainant lodged the first information report on 06.10.2003 at Police Station- Baberu, District- Banda alleging therein that on 06.10.2003 at 6:00 p.m. his son Suresh Singh, Sughar Singh S/o Chandan Singh R/o Vibhar Thok, Kasba Baberu and Other relatives were coming to their village. On the way (near to "Puliya') accused Makrand Singh S/o Shiv Kumar, Ramjeet, Ramkaptan, Rishikesh S/o Chandrabali came with arms in their hands. Everyone fired with their own weapons, which hit Suresh, after being shot, Suresh fell in a pool of blood and died in agony. Then the accused fled away from the scene of occurrence.

5. On the basis of the written report (Exhibit Ka-1), the police registered Case Crime No. 198 of 2003, under Section 302 I.P.C. Investigation of the case was taken over by Inspector Jai Shankar Pandey (PW-10). He rushed to the spot and recorded the statements of the witnesses under Section 161 Cr.P.C. and prepared a map of the site. The postmortem of the dead body has been done after "Panchayatnama'.

6. During investigation, recovery has been made from the possession of accused persons. On 09.10.2003 at 11:00 a.m. S.H.O. Jai Shankar Pandey (PW-10) along with his police personnel caught two person namely Ramjeet Singh and Rishikesh Singh both S/o Chandrabali Singh. One factory made Rifle AB01/4150 (315 bore) with three live cartridges have been recovered from the possession of Ramjeet Singh. One country made pistol and two live cartridges (315 bore) have been recovered from the possession of accused Rishikesh Singh. On the pointing of Ramjeet and Rishikesh Singh, one licensee rifle (315 bore) has been recovered from the possession of Ramchandra Singh.

7. On 22.10.2003, one S.B.B.L. Gun (12 bore), two live cartridges have been recovered from the possession of accused Makrand Singh.

8. On the basis of aforesaid recovery, Sections 25 & 25/27 of Arms Act have been made upon accused Ramjeet Singh, Rishikesh Singh and Makrand Singh respectively.

9. The postmortem examination of the dead body of the deceased Suresh Singh was conducted by Dr. S.P. Gupta (PW-5) on 07.10.2003. As per the post mortem report, the deceased was about 38 years old. On internal examination of the deceased, the doctor opined that the deceased died due to haemorrhage and shock as a result of Ante-Mortem Firearm Injury. Ante-mortem injuries are as follows:-

(i) The firearm wound of entry of 3cm x 3cm, bone deep on right side of neck. 05Cm away from lower part of right ear. Margin inverted. Blackening present.

(ii) The firearm wound of exit of 5cm x 3 cm, bone deep on left side of neck including 1cm of lobule of left ear. Connected to injury no. 1. Margin everted.

(iii) The firearm wound of entry 2cm x 2 cm, bone deep on left side of neck, 5cm away from injury no. 2. Margin inverted. Blackening present.

(iv) The firearm wound of exit of 4cm x 4cm bone deep right side of head just behind right ear. Margin inverted connected to injury no. 3. On section right temporal, right parietal and occipital bone fractured.

(v) The entry wound of fire arm size 2cm x 2cm, muscle deep on upper part of back of chest in right scapular region. Margin inverted. Blackening present.

(vi) Fire arm wound of entry 3cm x 3cm bone deep right shoulder, 01 cm away from end of right clavicle. Margin everted and connected to injury no. 5. On section right collar bone fractured.

(vii) Fire arm wound of entry 3cm x 3cm bone deep on left side of chest 13 cm away from left axilla & 12cm away from left nipple. Margin inverted. Direction from left to right. Rib fractured on section 6th and 7th .

10. After collecting evidence, Investigating Officer submitted charge sheet under Section 302 I.P.C. against all accused and accused Makrand Singh under Section 25/27 Arms Act, Ramjeet Singh under Section 25 Arms Act, Rishikesh under Section 25 Arms Act, Ramchandra under Section 30 Arms Act.

11. Thereafter committal proceeding took place and the case of four accused Makrand Singh, Ramjeet Singh, Ram Kaptan and Rishikesh were committed to court of session where they were registered as Sessions Trial Nos. 86/2004, 87/2004, 88/2004, 89/2004, 90/2004. After that all these connected sessions trials were made over to the court of Sessions Judge, Banda for trial and disposal of the cases. On 25.03.2004, the trial court was prima facie satisfied with the case against the accused therefore charges under Sections 302/34 I.P.C. were framed against all the accused namely Markand, Ramjeet Singh, Ram Kaptan and Shrikesh. Charge under Section 25 of Arms Act were framed against accused Makrand Singh, Ramjeet Singh, Shrikesh Singh and charge under Section 30 of Arms Act was framed against Ram Chandra Singh. The charges were read over and explained to the accused who pleaded not guilty and claimed to be tried.

12. In order to prove the guilt of the accused and substantiate charges against them the prosecution examined Virendra Singh (complainant) (PW-1), Head Constable Harprasad (PW-2), Jatrem (PW-3), Sughar Singh (PW-4), Dr. S.P. Gupta (PW-5), Rakesh Singh (PW-6), Sub-Inspector Rajdeo Singh (PW-7), Sub Inspector R. S. Gaur, (PW-8), Constable S.V. Dwivedi (PW-9), Inspector Jaishankar Pandey (PW-10).

13. Prosecution has relied on the documentary evidences as (i) Written Report Ex. Ka-1, (ii) F.I.R. Kayami G.D.

Ex. Ka-2, (iii) Kayami G.D. Ex. Ka-3, (iv) F.I.R. Ex. Ka-4, (v) Kayami G.D. Ex. Ka-5, (vi) Postmortem Report Ex. Ka-6, (vii) Inquest Report Ex. Ka-7, (viii) Letter R.I. Ex. Ka-8, (ix) Letter of C.M.O. Ex. Ka-9, (x) Challan Lash Ex. Ka-10, (xi) Photo Lash Ex. Ka-11, (xii) Sample Seal Ex. Ka-12, (xiii) Blood stained & Plain Earth Ex. Ka-13,(xiv) Recovery memo of Blood Stained "Angochha' & "Chappal' Ex. Ka-14, (xv) Recovery memo of Blood Stained "Angochha' & "Chappal' Ex. Ka-15, (xvi) Recovery memo of Empty Cartridge Ex. Ka-16, (xvii) Recovery memo of one pair black colour "Chappal' Ex. Ka-17, (xviii) Recovery memo of one pair white "Chappal' Ex. Ka-18, (xix) Recovery memo of Rifle, Tamancha & Cartridge & Arrest of Accused Ex. Ka-19, (xx) Recovery memo of search of house of victim Ex. Ka-20, (xxi) Spot Map Ex. Ka-21, (xxii) Recovery memo of SBBL Gun, Cartridge & Arrest of Accused Ex. Ka-22, (xxiii) F.I.R. Ex. Ka-23, (xxiv) Kayami G.D. Ex. Ka-24, (xxv) Spot Map Ex. Ka-25, (xxvi) Charge Sheet Ex.a-26, (xxvii) Sanction Order of D.M. Ex. Ka-27, (xxviii) Charge Sheet Ex. Ka-28, (xxix) Sanction Order of D.M. Ex. Ka-29, (xxx) Charge Sheet Ex. Ka-30, (xxxi) Sanction Order of D.M. Ex. Ka-31, (xxxii) Charge Sheet Ex. Ka-32, (xxxiii) Spot Map Ex. Ka-33, (xxxiv) Spot Map Ex. Ka-34, (xxxv) Charge Sheet Ex. Ka-35, (xxxvi) Spot Map Ex. Ka-36, (xxxvii) Report of Vidhi Vigyan Prayogshala Ex. Ka-37, Ka-38, Ka-39.

14. After completion of evidence of the prosecution all incriminating facts and materials were put to the appellants under Section 313 Cr.P.C. They denied the fact and materials and stated that they have been falsely implicated. Virendra Singh (complainant) was forcibly ploughing the land of his brothers Vijay Bahadur Singh, Ghanshyam Singh and Surendra Singh, in which we had duly taken legal possession by buying land of Vijay Bahadur Singh and Surendra Singh long before the murder. Due to which Virender Singh (complainant) started to feel very jealous. For this reason they have been falsely implicated. We are innocent. The witnesses have given evidence falsely due to enmity. False recovery of incriminating materials have been shown but no witness has been examined in defence.

15. PW-1 Virendra Singh (Complainant) (eye witness of incident) had deposed on oath that the murder of my son Suresh Singh took place prior to one year and 20 days from today. Prior to the murder of Suresh Singh, murder of Chandrabali Singh took place three years ago. Accused began to make suspicion on my son Suresh Singh. Deceased Suresh Singh, I, Satyendra Singh, Sughar Singh S/o Chandan Singh, Jatrem Singh R/o Bamraula, P.S.-Marka were coming to their village at 6:00 p.m. When Suresh deceased came near "Puliya', Makrand Singh S/o Shiv Kumar Singh, Ramjeet Singh S/oChandrabali Singh, Ram Kaptan Singh S/o Chandrabali and Rishikesh Singh S/o Chandrabali Singh appeared with weapons. Ramjeet has taken rifle of his brother Ramchandra, rest accused were armed with firearm. Seeing my son, accused Ramjeet exhorted that enemy found today, so kill him; then all the accused fired together on the body of Suresh Singh. The incident took place on 06.10.2003 at 6:00 p.m. My Son Suresh Singh got injured by the shot of the accused, he fell down and died on the spot. Accused fled away after hitting my son. Written report was written by Jagdish Singh on my dictation who met me in Baberu. After writing the report Jagdish read-over to me, then I put my signature on

the report. I, Daljeet and Rakesh went to police station at about 8:30 or 8:45 p.m. in the night. Witness has identified his signature on the written report which has been exhibited as Exh. Ka-1. I do not remember that inquest report was prepared on the same day or next day. I also put my signature on the inquest report. Postmortem took place on the next date. Relevant evidence in cross examination will be discussed later on.

16. PW-2 Head Constable Harprasad, P.S.-Atarra, District-Banda, formal witness had proved the Chik F.I.R. as exhibit Ka-2 and Kayami G.D. Ka-3. It is also stated by the witness that on 06.10.2003 when he was Head Moharir at P.S.-Baberu at 9:45 p.m. Virendra Singh S/o Cheda Singh, his son Rakesh and Daljeet Singh came with written report and on the basis of written report, I lodged Case Crime No. 198/2003 under Section 302 I.P.C. Witness has also proved Chik F.I.R. 129/2003, Crime No. 202, 203 of 2003 under Section 25 Arms Act and Crime No. 204/03 under Section 30 Arms Act. On the basis of recovery memo prepared by S.I. Jai Shankar Pandey the witness proved the said Chik F.I.R. as exhibit Ka-4 and Kayami G.D. Exh. Ka-5. In the cross examination the witnesses stated that it is wrong to say that entire preparation of record was made by me as ante-dated and ante-timed, after lodging the report Kotwal forthwith proceeded towards the place of occurrence. Complainant also went with S.H.O. in his jeep. The complainant and his companions came to the police station by the vehicle. In the F.I.R. date 08.10.2003 has been shown under the signature of Circle Officer and dated 13.10.2003 is endorsed under the signature of first A.C.J.M.

17. PW-3 Jatrem stated in examination-in-chief that Virendra Singh is the father of the deceased Suresh Singh. Virender Singh is not alive. The incident took place about prior to 1½ years. Cheda Singh was the son of Virendra Singh. I was not on the spot and have not seen the murder of Suresh Singh. It is wrong to say that I have seen the incident that on 06.10.2003 at 6:00 p.m. near Puliya Ramjeet, Makrand, Rishikesh and Ram Kaptan had murdered my brother-in-law Suresh Singh by rifle and the witness was declared hostile by the prosecution and denied the statement made under Section 161 Cr.P.C.

18. PW-4 Sughar Singh (eye witness of the incident) had deposed on oath that deceased Suresh Singh was son of my brother-in-law Virendra Singh. The incident took place on 06.10.2003 at 6:00/6:15 p.m., I went at the house of Virendra Singh on the date of incident. Cheda Singh father of Virendra Singh, was going to "Gaya" so I reached at his house on 06.10.2003 about 6:00 p.m. I, Suresh Singh, Virendra Singh, Jatrem were coming back to Parsauli. We three were walking together and deceased Suresh Singh was in front of us when deceased Suresh Singh reached near "*Puliya'* there was crop of "*Jwar'* in the adjoining field and there was ''*Baboo*l' on the road. Four people came out from bush of "*Babool'* namely Makarand Singh, Ramjeet, Ram Kaptan and Rishikesh Singh. Seeing Suresh Singh, Ramjeet shouted that enemy found today, so kill him, then all the accused fired together on the body of Suresh Singh. Suresh Singh injured by the shot of the accused fell down

and died on the spot. Accused fled away after hitting Suresh Singh. Seeing this incident, we shouted loudly. When we shouted, the accused again fired towards us twice. While running away, two pairs of slippers of the accused were left on the spot. Jatrem is the brother-in-law of the deceased.

19. PW-5 Dr. S.P. Gupta stated that on 07.10.2003 I was working on the post of surgeon in District Hospital Banda. My duty was in postmortem that day. The dead body of Suresh Singh S/o Virendra Singh Thakur R/o Parsauli, P.S.- Baberu, District-Banda, was brought before me by Constable Saieuddin, P.S.- Baberu in a bundle of clothes with a seal. The age of deceased was about 38 years and the probable time after death was a day. The body structure of the deceased was normal. Eyes and mouth were closed. After death, the rigor mortis has passed away from the neck while it was present in the upper and lower limbs. Injuries on the body of the deceased has been mentioned previously.

20. Relevant portion of evidence in cross examination shall be mentioned during the discussion.

21. PW-6 Rakesh Singh S/o Virendra Singh has stated that the incident took place on 06.10.2003. Chandravali Singh was murdered three years ago. On the said date, my brother Suresh Singh was coming to his village from Purwahar at around 6:00 p.m. with my relative Jatrem, Sughar Singh. On the way near "Puliya' my villager Makrand Singh, Ramjeet, Ram Kaptan and Rishikesh were carrying firearm in their hands. Ramjeet has taken rifle of brother Ramchandra and seeing my brother Suresh Singh, Ramjeet shouted that enemy found today, so kill him; then all the accused fired together on the body of Suresh Singh. My brother Suresh Singh, injured by the shot of the accused, fell down and died on the spot. Accused fled away after hitting my brother. Relevant portion of cross examined shall be discussed later on.

22. PW-7 witness Rajdeo Singh S.I., is formal witness. He prepared and proved Panchayatnama Ex.Ka-7, letter R.I. Ex. Ka-8, letter C.M.O. Ex. Ka-9, Challan Lash Ex. Ka-10, Photo Lash Ex. Ka-11 and sample seal Ex. Ka-12. The witness has also collected plain earth and blood stained earth from the spot proved as Ex. Ka-13, recovery memo of Angochha and Chappal has been prepared and proved as Ex. Ka-14, recovery memo of one cartridge 12 bore prepared on the spot on 07.10.2003 proved by the witness as Ex. Ka-15, recovery memo of three empty cartridges 315 bore prepared and proved as Ex. Ka-16 from the spot witness as prepared recovery memo of Chappal black colour and proved as Ex.Ka-17. Recovery memo of one pair white chappal plastic prepared and proved as Ex. Ka-18. Recovery memo of the search of the house of victim by S.H.O. Vijai Shankar Pandey was prepared and proved by the witness as Ex. Ka- 19 & 20. This was the witness of recovery of (Alakatal) and proved the recovery memo of the Alakatal as Ex. Ka-19. The witness also proved one pair white plastic chappal material Ex. Ka-1, one pair black colour chappal material Ex. Ka-2. The witness also proved one factory made Rifle 315 bore and 3 live cartridges as material Ex, Ka-3 to 6.

23. PW-8 S.I. R.S. Gaur was witness of recovery and had accompanied on 09.10.2003 at 8:45 a.m. Accused Ramjeet Singh was arrested with factory made rifle 315 bore AB01-4150 and 3 live cartridges

315 bore. Other accused Rishikesh was also arrested on the same day later on bearing with one Tamancha 315 bore having in the left side of his pant and two live cartridges 315 bore. Ramjeet stated that recovered rifle and cartridges belong to my brother Ramchandra who is retired military man. Recovery memo was prepared on the spot and proved by the witness as Ex. Ka-19. The site plan of recovery place has been prepared by Inspector Jai Shankar Pandey whose writing and signature is acquainted by the witness and he had proved the said map as Ex. Ka-21 and on the basis of said recovery Crime No. 202, 203, 204 of 2003 under Section 25 & 30 of Arms Act has been registered.

24. On 22.10.2003 witness was in the company of Inspector Jai Shankar Pandey and Constable Wahiuddin, Constable Dharmendr Singh and Driver Shiv Ram Singh.

25. On 23.10.2003 at 1:45 a.m. arrested Makrand Singh with one SBBL Gun and in the left pocket two live cartridges. The accused had also confessed that he used this gun in commission of the murder of Suresh Singh. Recovery memo of arrest and recovered articles were proved as Exh. Ka-22. F.I.R. of the said case has been also proved as Exh. Ka-23 and G.D. as Exh. Ka-24. Spot map as Exh. Ka-25, Charge sheet as Exh. Ka-26.

26. Prosecution sanction Exh. Ka-27, Charge sheet of Session Trial No. 88 of 04 proved as Exh. Ka-28, prosecution sanction as Exh. Ka-29, charge sheet Exh. Ka-30. Prosecution sanction Exh. Ka-31, charge sheet of Session Trial No. 90/04 proved as Exh. Ka-32, spot map relating to Session Trial No. 86/04 as Exh. Ka- 33, recovery memo of gun and spot map proved as Exh. Ka- 34 & 35.

27. Constable S.V. Dwivedi PW-9 deposed on oath and he has proved spot map of the recovery of Crime No. 207/2003 as Exh. Ka-36.

28. PW-10 Inspector J.S. Pandey Investigating Officer of Crime No. 198/2003 under Section 302 I.P.C. has collected evidence. Recovery memos were already proved as Exh. Ka- 13 to 18. Recovery memo of country made Tamancha was prepared on 09.10.2003 and exhibited as Exh. Ka-19, Spot map as Exh. Ka- 21. On 23.10.2003 Makrand Singh was arrested with SBBL Gun 12 Bore with two live cartridges. Recovery memo was proved as Exh. Ka- 22, Spot map of the recovery was also proved as Exh. Ka- 34, Evidence of witnesses Jagat Prem and Shiv Nagar were recorded. The recovered articles were sent to Vidhi Vigyan Prayogshala, Agra for examination and on the basis of evidence collected charge sheet was submitted to the court which was proved by the witnesses exhibited as Exh. Ka-35.

29. So far as the F.I.R. is concerned learned counsel for appellants submitted that F.I.R. was lodged ante dated & ante time and was lodged after due consultation.

30. Complainant PW-1 father of the deceased had deposed that this F.IR. was written by Jagdish Singh on my dictation in Kasba Baberu, Jagdish had read over the written "Tehrir' to him and I endorsed my signature on it. Written report was exhibited Exh. Ka- 1. Written report was prepared on my dictation addressed to Kotwal Sahab, Baberu. I do not know the

second designation of the Kotwal Sahab. On this point it is submitted that in the written report "Prabhari Nirikshak' has been mentioned. This contradiction will come in the category of minor contradictions. Statement of the witness was recorded after one year from the date of incident. In the statement witness stated that when I endorsed on the written report, there were other member of the public and police personnel were present. In police station it is quite natural that members of the public and police personnel are always present. It is immaterial that where the signature was endorsed on the written report. PW-2 Head Constable Har Prasad has given in his statement that on 06.10.2003 no other cognizable case has been registered in Police Station- Baberu. On the basis of written report this witness prepared F.I.R. and proved as Exh. Ka-2 and this witness also proved Kayami G.D. as Exh. Ka-3. The statement of the witness that except this no other cognizable case has been registered in P.S.- Baberu on the said date, does not denote itself that F.I.R. has been lodged ante dated or ante time. Incident took place on 06.10.2003 at 6:00 p.m. report was lodged on the same day at 20:45 p.m. Distance of the police station is about 16 Kms. from the place of occurrence. PW-6 Rakesh Singh also stated in this statement that when he and his father went to lodge report to the police station, Kotwal Sahab was there and they discussed with him regarding F.I.R. After discussion with Kotwal Sahab my father dictated the written report to Jagdish and taking the Tehrir, Kotwal proceeded from Kotwali after taking him and his father in the Jeep. It is quite natural that after the incident complainant and their family members become fearful and after consolation they proceeded for lodging F.I.R. at the police station. The contention of learned counsel that complainant reached the police station very late i.e. at 8:30 or 8:45 p.m. has no force in the present case. Deceased was 38 years old and after the murder of younger son, father complainant consoled himself and lodged F.I.R. within 2:45 hrs. It shows that F.I.R. was lodged promptly without seeking legal advice. Natural facts were stated in the F.I.R., complainant was also eye witness of the case and it is evident from the written report that name of the assailants, type of the arms bearing and used by each and every accused has been categorically stated in the "Tehrir'. There was no exaggeration. The submission of learned counsel that F.I.R. is ante time and ante dated has no force.

31. Learned counsel for appellants submitted that there was no motive to cause the incident. In the F.I.R. motive has been stated in brief that prior to this incident murder of Chandrabali Singh father of the accused took place and accused created suspicion about my son Suresh Singh with regard to his involvement in regard to the murder of Chandrabali Singh. 193 (Kha) certified copy of the F.I.R. by which it is apparent that on 26.12.2000 at about 6:00 p.m. some unknown person had committed the murder of my father Chandrabali Singh S/o Rambaksh when he was sitting before bonfire (Alava). Ramjeet Singh has lodged this F.I.R. and also stated that he and his brother Ramkaptan and Rishikesh Singh were irrigating their field. 194 (Kha) shows that in the said case final report has been submitted by the police. In the statement under Section 313 Cr.P.C. accused had stated that complainant had cultivated the land of his brother Vijay Bahadur Singh, Ghanshyam and Surendra Singh by force which has been purchased by the accused from Ran Vijay Bahadur Singh and Surendra Singh much prior from the date of

incident due to this complainant was enemical with the accused and falsely implicated. Photostat copy of "Bainama' has been filed as Paper No. 188(Kha) to 192 (Kha). The papers are not admissible in evidence due to photostat copy but from the said papers it is evident that on 02.01.1992, 22.10.1998, 16.09.1997, 17.09.1997 & 27.02.2002 sale deeds were executed in favour of the accused persons except Makrand Singh by Indrajeet Singh, Surendra Singh and Ranvijay Singh. Brothers of complainant had not filed any complaint before the competent authority that his brother Virendra Singh had forcibly cultivated their lands. Complainant had also not filed any civil suit for any relief before civil court. No criminal complaint has been filed by the complainant against the accused. It shows that complainant had no grievance due to execution of sale deed by brothers in favour of the accused and the submission of the accused that due to these sale deeds complainant became enemical and falsely implicated them in this case has no force. Complainant had lodged F.I.R. against the persons who had actually caused the murder of his son, Makrand Singh S/o Shiv Kumar. He had no sale deed in his favour, from the brothers of complainant. Ramjeet, Rishikesh, Ramchandra, Ramkaptan had taken sale deeds from the brothers of the complainant. He had also opportunity to falsely implicate Ramchandra whose rifle was used in committing the crime by his brother Ramjeet but the name of Ramchandra had not been shown in the name of assailants. With regard to motive trial court also arrived at the conclusion that accused persons had suspicion on Suresh Singh for the murder of Chandrabali and in this connection CID Officers has called complainant at Allahabad and stated that you and your son are going to be implicated in the murder of Chandrabali Singh. From the evidence on record it is proved by the cogent reliable evidence of the eye witness that incident took place at 6:00 p.m. There was ample light on the spot to recognize the accused by witnesses. It is a case of direct evidence. In case of direct evidence the motive becomes insignificant. It is coincident that death of Chandrabali took place at 6:00 p.m. Death of Suresh also took place at 6:00 p.m. In support of his contention learned A.G.A. has placed reliance on following rulings:-

32. In ***Pratap Singh and others vs. State of UP 2021, SCC Online All 686***, the Court held that :

"motive is not very relevant in a case of direct evidence, where it dependable ocular version is available. Once, there is evidence forthcoming on the basis of an eye witness account that is consistently narrated by multiple witnesses motive is hardly relevant. "

33. In ***Abu Thaker Vs. State of Tamil Nadu, (2010) 5 SCC 91,*** the Court held that :

"It is settled legal proposition that even if the absence of motive and if allowed is accepted that is of no consequence and pales into insignificance when direct evidence establishes the crime, therefore, in case, there is direct, trustworthy evidence of witnesses as to commission of an offence, the motive part uses its significance. Therefore, if the genesis of motive of occurrence is not proved, the ocular testimony of the witnesses as to the occurrence could not be discarded only by reason of absence of

motive, if otherwise the evidence is worthy of reliance."

34. In ***Bipin Kumar Mondal Vs. State of West Bengal, (2010) 12 SCC 91,*** the Court held that :

"motive is of no consequence and pales into insignificance when direct evidence establishes the crime. Motive is a thing which is primarily known to the accused himself and it may not be possible for the prosecution to explain it. Ocular testimony of the witnesses if reliable cannot be discarded only by the reason of the absence of motive."

35. From the evidence of the PW-1 Virendra Singh, PW-4 Sughar Singh, it is evident that they were present at the time of occurrence. Murder of Suresh Singh has been committed by the accused before them. They have witnessed the occurrence. Thus in the presence of direct and reliable evidence motive losses its importance. In the cross examination of PW-6 he stated that it is wrong to say that for wife of Suresh, Ashok and his companions had committed murder of Suresh Singh at any time in the night. It has also been stated in the statement that the wife of Suresh Singh had fled away from the house. I do not know that Ashok had married her. Suresh had two sons, they are left at my house. I do not know that how many sons begotten by her from Ashok. This defence has also not been stated during the statement under Section 313 Cr.P.C. So this defence will not help the accused. It is also proved that complainant has no reason to implicate the accused falsely in this case. He would have opportunity to falsely implicate Ramchandra in the list of assailant but he had not mentioned the name of Ramchandra whose licensee rifle has been used in the crime. Only actual facts has been stated in F.I.R. Motive to commit this crime is proved. Thus the submission of learned counsel that they have been falsely implicated in the case and had no motive to kill deceased is not tenable.

36. The postmortem report examination was conducted on the body of the deceased Suresh aged 38 years by Dr. S.P. Gupta, Motilal Nehru Zila Chikitsalaya, District Hospital, Allahabad on 07.10.2003. Ante mortem injuries were as follows:-

i) The firearm wound of entry of 3cm x 3cm, bone deep on right side of neck. 05Cm away from lower part of right ear. Margin inverted. Blackening present.

(ii) The firearm wound of exit of 5cm x 3 cm, bone deep on left side of neck including 1cm of lobule of left ear. Connected to injury no. 1. Margin everted.

(iii) The firearm wound of entry 2cm x 2 cm, bone deep on left side of neck, 5cm away from injury no. 2. Margin inverted. Blackening present.

(iv) The firearm wound of exit of 4cm x 4cm bone deep right side of head just behind right ear. Margin inverted connected to injury no. 3. On section right temporal, right parietal and occibital bone present.

(v) The entry wound of fire arm size 2cm x 2cm, muscle deep on upper part of back of chest in right scapular region. Margin inverted. Blackening present.

(vi) Fire arm wound of entry 3cm x 3cm bone deep right shoulder, 01 cm away from end of right clavicle. Margin

everted and connected to injury no. 5. On seclon right collar bone fractured.

(vii) Fire arm wound of entry 3cm x 3cm bone deep on left side of chest 13 cm away from left axilla & 12cm away from left nipple. Margin inverted. Direction from left to right. Rib fractured on section 6th and 7th .

37. The cause of death was excess bleeding and shock due to antemortem firearm injuries. It is wrong to say that there is no possibility of death of the deceased on 06.10.2003 at 6:00 p.m. There was no mud on the clothes of the dead body of the deceased. On the basis of blackening it can be said that firearm injury has been inflicted from a distance of three feet.

38. From the perusal of report from Vidhi Vigyan Prayogshala exhibit Ka-37 it has been mentioned that both blood stained soil and plain soil are same in their physical merits. It has been mentioned in exhibit Ka-38 there is report that on blood stained soil and plain soil, Angochha, Chappal, Kurta, Baniyan, Underwear, Kalawa, Chaddi, blood stains were found on major parts. On kurta, Tahmad, Baniyan, Underwear blood stains were found in large area. On Kurta, Tahmad, Baniyan, Underwear, Kalawa human blood was found. It has been mentioned in exhibit Ka-39 that there is sign of firing pin on the cartridges recovered and examined. There is comparative lack of sign of firing pin on the cartridges recovered with SBBL Gun. There is also lack of merits on the recovered cartridges TC-4, TC-5. Recovered cartridges EC-2 and EC-3 have been fired by rifle and cartridges EC-4 has been fired by country made pistol. Thus, on the said report, it is apparent that human blood was found on the clothes of the deceased and it is also clear that rifle and country made pistol has been used in commission of the crime. In injury no. 1, 3 and 5 margin inverted and blackening present shows that cartridges fired from very short distance from the accused. These facts also support the prosecution case.

39. The main question before us is that whether accused Makrand Singh, Ramjeet Singh, Ramkaptan, Rishikesh had committed the murder of Suresh in furtherence of common intention by firearm.

40. PW-1 complainant (eye witness) father of the deceased had deposed that murder of my son Suresh Singh took place prior one year and 20 days from today. Deceased Suresh Singh, I, Satyendra Singh, Sughar Singh and Jatrem P.S.-Marka R/o Bamraula were coming to their village at 6:00 p.m. when Suresh Singh came near "Puliya' then Makrand Singh, Ramjeet Singh, Ramkaptan and Rishikesh appeared with firearm, Ramjeet had taken rifle of his brother Ramchandra; rest accused were armed with firearm. Seeing my son, Ramjeet exhorted that enemy found today, so kill him, then all the accused fired on the body of the Suresh Singh. The incident took place on 06.10.2003 at 6:00 p.m. My son Suresh Singh was injured by the shot of accused persons. He fell down and died on the spot. Accused fled away after hitting my son.

41. PW-4 Sughar Singh eye witness of the incident had deposed that Suresh was son of my brother-in-law Virendra Singh. He went to the house of Virendera Singh on the date of incident. Virendra Singh had returned from "Gaya' so I went to his

house. On 06.10.2003 about 6:00 p.m. I, Suresh Singh, Virendra Singh, Jatrem were coming back to Parsauli. We all three were walking together and deceased Suresh Singh in front of us when deceased Suresh reached near "Puliya' there was crop of Jwar in the adjoining field and there was a Babool tree on the road. Four people came out from the bush of the Babool, namely Makrand Singh, Ramjeet, Ramkaptan and Rishikesh. Ramjeet exhorted that enemy found today, so kill him, then all the accused fired on the body of Suresh Singh. Suresh Singh injured by the shot of the accused fell down and died on the spot. Accused fled away after hitting Suresh Singh. Seeing this incident we shouted loudly. When we shouted, accused again fired twice while running away. Two pairs of slippers of the accused were left on the spot. Jatrem is the brother-in-law of the deceased.

42. PW-6 Rakesh Singh has also stated that the incident took place on 06.10.2003. On the said date my brother Suresh Singh was coming to his village from Purvahar at around 6:00 p.m. with Jatrem, Sughar Singh. When they reached near "Puliya', Makrand Singh, Ramjeet Singh, Ramkaptan, Rishikesh were carrying fire arm in their hands. Ramjeet had taken rifle of brother Ramcandra and seeing my brother Suresh Singh, Ramjeet shouted that enemy found today, so kill him, then all the accused fired on the body of the Suresh Singh. My brother was injured by shot of the accused. He fell down and died on the spot. Accused fled away after hitting my brother.

43. Relevant portion from the evidence of cross examination of PW-1-my son Suresh Singh had no goods with him. After the murder of Suresh, I remained on the spot for about 15 minutes. Villagers came on the spot within five minutes after firing, name is not remembered. Villagers did not saw the incident but saw the dead body of the deceased. Before exhortation and killing how many fires were shot was not remembered. Accused had given abuses which has not been mentioned in the report. I saw that accused fired on the deceased from distance about 3-4 Gatha. Accused hide themselves about 3-4 Gatha from the road, one Gatha is about four hands. My son Suresh Singh did not receive gun shot injury over the "Puliya' but in the West of the "Puliya' I, and Sughar Singh were moving along each other and Jatrem was behind us. All the accused fired from the place where they have hidden themselves in the field. Prior to the murder of Suresh Singh, my younger brother was also murdered. I have not seen the wound on the body of the Suresh. When Suresh Singh received firearm injury, his leg was in the water and mud and rest of the body was in dry area. After receiving firearm injury Suresh Singh fell on the ground and his stomach was on the earth. I have not seen the number of the rifle. Makrand belongs to different family. There is no dispute and enmity with the family of Makrand Singh.

44. In the cross examination of PW-4 he stated that I am "Samadhi' of Virendra Singh complainant. My son Janak Singh is married with Vandana, younger sister of Suresh five years ago. Virendra Singh had gone to "Gaya' for performing post death rituals of his father, prior one month from murder, and returned to the village after 26-27 days. Prior to one day from the murder, Maikoo told him that Virendra Singh returned to Parsauli from Gaya. Next day he visited Parsauli and on the same day murder of Suresh Singh took place. Rakesh Singh also told him that Virendra Singh

returned from "Gaya' in addition to Maikoo. I reached Parsauli on the residence of my Samdhi. I visited Purva from Parsauli on foot which is about six "farlang' from Parsauli. After the death of Virendra Singh, Rakesh Singh is doing "Pairvi' of the litigation. After the murder of Suresh Singh his wife went with Ashok Singh with one son. When I, Suresh and Virendra Singh were going, assailants came from my left side and they fired on the Suresh from field of "Jwar'. I heard eight fire in one time and two fire later on. Assailants hide themselves in the field of "Jwar'. Deceased fell in the water. Mud and water covered his whole body. I have seen the injuries of the deceased. One entry wound in right ear and exit wound in left parital. Second fire was in the left side of the abdomen and back. After incident I, Jatrem and Virendra Singh went to the house of Virendra Singh Parsauli. None was present near the dead body. Rakesh Singh has made phone to the police station at about 8:00 p.m. and about 9:00 p.m. police came to Parsauli. It is wrong to say that Ramjeet, Makrand and Rishikesh had not committed the murder of Suresh Singh on the said place and time. It is wrong to say that I have not seen the occurrence.

45. It is submitted by defence that witness PW-4 was a chance witness. It is true that witness PW-4 is Samdhi of PW-1 but the occasion for coming of the witness at the home of the complainant is natural as after visiting "Gaya', relatives generally come to meet the person who visited "Gaya'. In this connection presence of the witness on the place of occurrence is quite natural. Witness has given very natural evidence and he has seen the place of occurrence. He has no enemity with the accused. He had no reason to give false evidence against the accused. He is neither interested nor chance witness. His presence on the place of occurrence is proved by cogent evidence. In the long cross examination there is nothing aganst the witness by which his evidence could not be relied upon.

46. PW-1 is father of the deceased and complainant. His presence on the spot is also proved by cogent evidence. Presence of PW-4 is also proved on spot at the time of occurrence.

47. Learned A.G.A. placed reliance on the following decision in the case of related witness:-

48. In ***Mohd. Rojali Ali and others vs. State of Assam (2019) 19 SCC 567***, the Court held that :

"A related witness cannot be said to be an interested witness merely by virtue of being a relative of the victim, a witness may be called interested only when he or she drags some benefit from result of litigation which is in the context of a criminal case would mean that witness has a direct or indirect interest in seeing accused punished due to prior enmity or other reasons and thus has a motive to falsely implicate the accused."

49. In ***Laltu Ghosh Vs. State of West Bengal (2019) 15 Supreme Court Cases 344,*** the Court held that :

"Related witness cannot be said to be an interested witness merely by virtue of being the relative of the victim. The scrutiny of evidence of related witness should be more caution."

50. Both witnesses were present on the spot. There is no evidence to disbelieve the evidence of PW-1 & PW-4 eye witnesses. Their evidence are supported by medical evidence. There is no other injury on the body of the deceased except firearm injuries. Thus ocular evidence is supported by medical evidence. PW-1 & PW-4 are fully reliable and credible witnesses. They have no enmity with the accused and there is no ground to implicate them falsely. The submission of defence that witnesses are related one is not tenable.

51. Injuries were inflicted by the accused on vital part of the deceased in furtherence of common intention of all the accused. After committing the gruesome incident, accused fled away from the seen of occurrence. In furtherence of common intention they hide themselves in the crop of "Jwar' with firearm and committed joint attack on the deceased and fled away from the scene of occurrence. It proves the common intention of the accused. In furtherence of common intention accused inflicted firearm injuries on the deceased jointly which is the cause of death of Suresh.

52. It is also submitted by learned counsel for defence that dead body of the deceased was carried from the place of occurrence to Ramleela ground, Baberu and thereafter it was taken to police station Baberu and thereafter to Banda for postmortem. This fact was told by PW-4 in this cross examination that dead body was brought to Ramleela ground Baberu, on a tractor. Sister of Suresh came there and began weeping after seeing the dead body at about 10:30 to 11:00 p.m. Later on, police carried the dead body to police station and in the morning at 7:00 a.m. dead body was carried to Banda by the same tractor.

53. In the cross examination of PW-1, there is no such evidence or suggestion made by the defence. There is also no question put forth to PW-6 in cross examination. Inquest report was made by PW-7 S.I. Raj Deo Singh who had prepared "Panchnama' from 7:00 a.m. to 9:00 a.m. in which the position of the dead body, position of clothes and injuries on the body have been stated. Suggestion was made before this witness that dead body was carried to Baberu and thereafter to police station which was denied by the witness. PW-10 S.I. Jai Shankar Pandey has also stated in the cross examination that there was disturbance at the place of occurrence and force was deployed. He did not come back to the police station on the same day as force was deployed on the spot and near the dead body. I have not picked up the dead body from the place of occurrence "Panchayatnama' was prepared on the spot and proved by the PW-7.

54. In the light of the said evidence on record, the contention of learned counsel for appellant that dead body was carried to police station Baberu, Ramleela Maidan at 10:30 -11:00 p.m. and thereafter carried to police station and dead body was kept in the police station through out the night and in the morning at 7:00 a.m. dead body was carried to Banda is not believable and this will not affect the case of prosecution

55. Learned counsel for the appellants challenged the place of occurrence. Spot map of the case has been prepared by the I.O. PW-10 who has proved this paper and stated that on 07.10.2003 on the pointing of complainant, he visited the spot and prepared the site plan exhibited as Ka-33. On the spot inquest report was also prepared and plain soil and blood stained soil, blood stained "Chappal' &

"Angochha', three cartridges 315 bore were taken/recovered. Recovery memo were also prepared from the spot. In the cross examination witness has described the location of the dead body and stated that there is public pathway near canal which is in the North & West. I had shown the place from where the accused had fired as word "A' word "B' and "C'. At place "B' all the accused has fired on the deceased. Distance from "A' to "B' is ten steps and "A' to "C' six steps. Witnesses from where they saw the incident is shown by word "E'. "Puliya' is near to place "A'. The witnesses have given correct topography of the place of occurrence. Witnesses of fact had also corroborated the evidence of I.O. on the point of site plan. On the basis of credible evidence the submission of defence that site plan is concocted or prepared as an after thought, has no force.

56. Learned counsel for defence had submitted some contradictions and omissions in statement of the witness PW-1. He has stated in his cross examination that fact of abusing by the accused has not been written in F.I.R. but was told to I.O.; that accused were hidden in the field of Jwar and Arhar is not stated in the F.I.R.; Suresh had received injuries on which place of the body is not told by the witness. At the time of "Panchaytnama' the cloth of the deceased was wet but at the time of postmortem report it was dry. Accused had fired twice. These contradictions are of minor nature and will not affect the case of prosecution.

57. The defence taken by the accused is that one Ashok had illicit relationship with the wife of deceased Suresh. She left the house of Suresh after the death of Suresh and went in the company of Ashok. Ashok has enmity with Suresh so Ashok and his companions killed Suresh and threw the body of the deceased on the spot. There is no evidence on record that Ashok had committed murder of the Suresh in presence of eye witnesses. This defence is based on assumption.

58. Next defence is that accused had purchased the land of uncle of the deceased which was in possession of the deceased and deceased was taking the benefit of the land and due to this enmity complainant has falsely implicated them in this crime. This fact was previously discussed but there is no evidence on record that brother of the complainant had ever made any complaint against the complainant regarding forceful dispossession of land of their shares. Their brother and complainant had not filed any civil suit or complaint against the accused regarding the sale deed which has been executed in 1992, 1997, 1998 & 2002. Complainant has full opportunity to implicate falsely other family members of the accused but has not done so. He named only those persons who are actually involved in the crime. Thus this defence is not reliable and has no force. From the evidence on record it is not shown that eye witnesses had not intervened at the time of incident. This does not create any doubt on the presence of the witnesses on the spot. Every person has its own reactions when the witnesses are seeing the murder of their son and relative by the accused through use of firearm. No prudent man will intervene in such situation. Statement of the witnesses PW-1 & PW-4 completely find support from the medical evidence on record. Witnesses had no previous enmity with the accused persons so as to falsely implicate them in the present case. Nothing has been

brought to our notice by which it can be said that these witnesses were not present at the time of the alleged occurrence and they have deposed against the accused persons due to some particular reason. From their corroborated evidence their statements is fully reliable and we hold that the presence of the witnesses at the time of alleged occurrence is proved. It is also proved that the occurrence was committed by all the accused persons at the time, place and in the manner as alleged by these witnesses.

59. In the present case complainant PW-1 and PW-4 Sughar Singh are the natural witnesses. In long cross examination nothing adverse came out against the prosecution. Both the witnesses who were present on the spot witnessed the occurrence and promptly lodge the F.I.R. There is no ground to discard the evidence of PW-1 & PW-4 eye witnesses. The witnesses are not interested and their testimony is fully reliable.

60. So far as Section 34 I.P.C. is concerned the act of accused persons were done in furtherence of common intention to kill the deceased Suresh. It is very difficult to note the mental status of a person. Common intention should be gathered by the act and conduct of the accused persons. All the accused persons Makrand Singh, Ramjeet Singh, Ramkaptan and Rishikesh hide themselves in the field of "Jwar' & "Arhar' armed with deadly weapons, Tamancha, Rifle and Gun. They jointly began to fire on the deceased, consequently he died on the spot and all the accused persons fled away from the scene of the occurrence after committing the gruesome crime. The act and conduct of the accused persons shows their common intention to kill Suresh Singh. It is a coincidence that the murder of Suresh Singh took place at 6:00 p.m. and the murder of Chandrabali Singh also took place at 6:00 p.m. Thus on the basis of the said act and conduct of the accused persons it is clear that they succeeded in their common intention to kill the deceased Suresh Singh. Every accused participated actively in committing the murder. The shortcoming in the investigation shown by the defence will not affect the case of the prosecution.

61. Thus in view of the above discussion we come to the conclusion that from the fully reliable evidence of PW-1 Virendra Singh and PW-4 Sughar Singh the prosecution has been able to prove its case beyond all reasonable doubts. The accused Makrand Singh, Ramjeet Singh, Ramkaptan and Rishikesh had committed the murder of Suresh Singh at the time, place and in the manner as alleged by the prosecution and the charge under Section 302/34 of the Indian Penal Code is very well proved beyond all reasonable doubts against all of them.

62. So far as the crime under Section 25/27 Arms Act against Makrand Singh, Section 25 Arms Act against Ramjeet Singh and Rishikesh is concerned, it is submitted by the defence that recovery made by the prosecution is false and fabricated. From the evidence on record it is apparent that on 09.10.2003 a factory made rifle 315 bore with three live cartridges 315 bore were recovered from the possession of Ramjeet and one Tamancha 315 bore and two live cartridges 315 bore has been recovered from the possession of Rishikesh. The recovery memo has been prepared by PW-7. There was no public witness at the time of recovery. All witnesses were police personnal. On 23.10.2003 one SBBL Gun, two live cartridges were recovered from

Makrand Singh, 12 Kms. away from Parsauli. Recovery memo was prepared in the light of torch and jeep. At the time of recovery no public witness was present; all the witnesses were police personnel. The reason shown in the recovery memo is that due to terror and fear of the accused and it being a lonely area no body was ready/available to witness the recovery. There is no weapon recovered from the custody of Ramkaptan. It is also alleged that recovery weapons were not send for ballistic expert. Generally it is natural conduct of criminal that after committing, he hides or throws the weapon of crime to finish the evidence against him. It is not expected that he will carry the weapon of crime which was a factory made rifle and tamancha along with live cartridges after two days of the occurrence. Makrand Singh was arrested on 23.10.2003 that is about 15 days after the incident with SBBL Gun alleged to be used in the crime, which is again not practically possible and believable. In such recoveries independent witnesses are required. In absence of public witness recovery of the weapons and cartridges from the accused is not believable. After arrest accused told that these weapons were used in the murder of Suresh Singh. Such sort of disclosure statements are not admissible in evidence. Trial courts reasoning for believing the evidence of witnesses that police personnel are not interested witnesses; they had no enmity with the accused, is not tenable in the present circumstances.

63. During trial, from the evidence of PW-7 it is evident that only factory made rife, three cartridges have been produced before the court which was recovered from Ramjeet on 09.10.2003. Country made tamancha and two live cartridges recovered from Rishikesh has not been produced before court. SBBL Gun, two cartridges alleged to be recovered from Makrand Singh were also not produced before the trial court by the prosecution. PW-8 is also the police personnel witness of recovery, he also stated in his statement that alleged rifle, tamancha, cartridges has not been produced before the court. Gun and cartridges recovered from Makrand Singh has also not produced before the witness in the court. So the fact that Tamancha and two cartridges were recovered from the Rishikesh and SBBL Gun and two cartridges recovered from Makrand could not be believed. These weapons of the murder have also not been produced by the I.O. PW-10 in court. Thus it cannot be said that the said weapons were in working condition. I.O. of the crime under Section 25 Arms Act is junior to the I.O. of the main case. In such situation fair investigation of Section 25 Arms Act is not possible by junior officer of the same police station. Independent witness has also not been produced regarding search and recovery. Section 100(4) Cr.P.C. lays down that:-

"Before making a search under this Chapter, the officer or other person about to make it shall call upon two or more independent and respectable inhabitants of the locality in which the place to be searched is situate or of any other locality if no such inhabitant of the said locality is available or is willing to be a witness to the search, to attend and witness the search and may issue an order in writing to them or any of them so to do."

64. The provision under Section 100(4) Cr.P.C. is not complied with in this case by the recovery officer. Conviction on

the basis of statements of two police officials alone is not sustainable, as held in Sans Pal Singh Vs. Delhi reported in 1998 SCC Criminal 641. Charge under Section 25/27, 25Arms Act is not proved beyond reasonable doubt.

65. On the basis of above discussion we are of the view that the conviction under Sections 25/27 Arms Act and 25 Arms Act is manifestly erroneous and illegal. So the conviction of Makrand Singh under Section 25/27 Arms Act, Rishikesh under Section 25 Arms Act, Ramjeet under Section 25 Arms Act is set aside.

66. On page 15 and 21 of the impugned judgment, month of June has been typed inadvertently which should be read as month of October because the incident took place on 06.10.2003.

67. Conviction and sentence of accused Makrand Singh, Ramjeet Singh, Rishikesh under Section 25 Arms Act, two year rigorous imprisonment and Rs. 1000/- fine each, in default thereof to undergo two months additional rigorous imprisonment is hereby set aside. The appeal under Section 25 Arms Act is accordingly allowed.

68. On the basis of above discussion, we are of the view that judgment and order of the trial court dated 27.07.2006 passed by Additional Sessions Judge/F.T.C. 2nd Court No. 7, Banda in Session Trial No. 86/2004 arising out of Case Crime No. 198/2003, Police Station- Baberu, District-Banda convicting and sentencing the appellant to go rigorous life imprisonment under Section 302/34 I.P.C. with a fine of Rs. 5000/- each in default thereof to undergo six month additional rigorous imprisonment by each is hereby confirmed.

69. During appeal appellants Makrand Singh, Ramjeet Singh, Ramkaptan and Rishikesh remained in judicial custody, accused are directed to serve out the remaining period of sentence.

70. The appeal under Section 302/34 I.P.C. is devoid of merits and **dismissed accordingly.**

(2022)01ILR A562
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.12.2021

BEFORE

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

Criminal Appeal No. 4718 of 2018
&
Criminal Appeal No. 4859 of 2018

Niranjan Singh ...Appellant
Versus
State Of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Yogesh Kumar Srivastava, Sri Dileep Kumar, Sri Rajrshi Gupta, Sri Noor Muhammad

Counsel for the Opposite Party:
A.G.A., Sri Gaurav Kakkar

Death of deceased was a homicidal death-assailants made fire towards complainant Bobby with intention to kill him but complainant saved himself by running towards roof from staircase and fire hit the mother of the complainant, Tanushree, due to which she sustained injury, hence, the meticulous analysis of entire evidence available on record permits us to form the opinion that appellants were having no intention at all to kill the mother of the complainant.

Dying declaration of deceased-Tanushree also suggests that appellants came to kill the complainant and not his mother but she sustained bullet injury accidentally. Hence, in this occurrence, the intention to kill or to cause such bodily injury to the deceased-Tanushree is missing.

there was no intention of appellants to kill the deceased or to cause such bodily injury to the deceased which was inflicted to her.

cause of death of the deceased was septicemia shock which was due to septicemia in entire body- the direct result of death of deceased is development of infection in whole body due to the injury sustained in the occurrence that caused septicemia. in the case in hand, from the angle of septicemia also, offence would be punishable under Section 304 Part II of IPC.

the death of the deceased was not premeditated. Appellants had no intention to cause death of the deceased and she died due to septicemia in whole of her body which was not the direct result of the injury sustained in the accident. The instant case falls within the purview of culpable homicide not amounting to murder.

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

1. Both these appeals have been preferred by the appellants against the judgment and order dated 7.8.2018, passed by learned Additional Sessions Judge, Fast Track Court No.1, Firozabad in Sessions Trial No. 7 of 2016 (State of Uttar Pradesh v. Bangali Babu and others) arising out of Case Crime No.142 of 2015, under Sections 452, 506, 302 read with Section 34 of Indian Penal Code, 1860 (in brevity 'IPC'), Police Station Pachokhara, District Firozabad, whereby, accused-appellants, Bangali Babu and Pinki alias Ramakant have been convicted and sentenced under Section 302 read with Section 34 of IPC for life imprisonment and fine of Rs.50,000/- each. They were further directed to undergo 1 year simple imprisonment in case of default of fine. Accused-appellant, Niranjan Singh, was convicted and sentenced under Section 302 of IPC for life imprisonment and fine of Rs. 50,000/-. He was further directed to undergo 1 year simple imprisonment in case of default of fine. All the accused-appellants namely, Bangali Babu, Niranjan Singh and Pinki alias Ramakant were further convicted and sentenced under Section 452 of IPC for rigorous imprisonment of 7 years and fine of Rs.5,000/- each. They were further directed to undergo 6 months simple imprisonment in case of default of fine. They were also convicted and sentenced under Section 506 (Part 2) of IPC for 7 years rigorous imprisonment and fine of Rs.5,000/- each and they were directed to further undergo 6 months simple imprisonment in case of default of fine. All the sentences were directed to run concurrently.

2. Brief facts giving rise to this appeal are that a written report (Ex.Ka.1) was submitted by the complainant, Bobby alias Nar Singh Pal at Police Station Pachokhara, Firozabad with the averments that in the night of 30.3.2015 at about 10.00 p.m., complainant's mother Tanushree and daughter, Kumari Shalini were sleeping in the house on separate cots. Light was on. On that time residents of same village, Bangali Babu, s/o Bachha Singh, Niranjan Singh s/o Bangali Babu and Pinki alias Ramakant, s/o Singh Pal Singh entered the house by opening the main gate with country made pistol in their hands. Just entering the house, Bangali Babu fired at the complainant with intention to kill him but he saved himself and climbed on the roof using staircase and screamed from

there. Gunshot was fired at the mother of the complainant, Tanushree, with intention to kill her which hit in her stomach. On hearing the screaming of complainant and noise of fires, many people gathered on the spot who saved complainant and others. All the accused persons ran away after giving life threat to the complainant. The complainant took his injured mother, Tanushree, to the Police Station but his report was not lodged in Police Station and she was sent to District Hospital, Agra where she was medically examined and was referred to S.N. Medical College, Agra but looking to the serious condition of his mother, the complainant admitted her mother in Akash Hospital, Agra, where she was treated.

3. On this written report, First Information Report was registered at Police Station Pachokhara on 2.4.2015 under Sections 307, 452 & 504 of IPC. During treatment, Tanushree, the mother of the complainant, succumbed to the injuries after two months of the occurrence.

4. Investigation was taken up by S.I. Vijendra Kumar Singh. He visited the spot, prepared site plan and recorded statements of witnesses under Section 161, Cr.P.C. Medical examination of injured mother of the complainant was conducted and medical report was prepared. During course of investigation, dying declaration of Tanushree was recorded. After two months of the occurrence, Tanushree died due to septicemia which took place due to injury caused to her in the occurrence. After the death of the injured Tanushree, case was converted into Section 302 of IPC. Postmortem of the deceased was conducted after inquest report and postmortem report was prepared. After completing investigation, charge-sheet was submitted by Investigating Officer against the accused persons Bangali Baba, Niranjan Singh and Pinki alias Ramakant under Section 452, 506 & 302 IPC. The case being triable exclusively by the Court of Sessions was committed to the Court of Sessions by the competent Magistrate for trial.

5. Learned Trial Court framed charges against all the accused persons under Sections 452, 302 read with 34, and 506 of I.P.C. Accused persons denied the charges and claimed to be tried.

6. To bring home charges, prosecution produced following witnesses:

1.	Bobby@ Nar Singh Pal	PW1
2.	Pushpa Devi	PW2
3.	Shalini Yadav	PW3
4.	Dr. Alok Kumar	PW4
5.	Dr. Dharmveer Singh	PW5
6.	Vijendra Kumar Singh	PW6
7.	Krishna Pal Singh	PW7
8.	Kamlesh Singh	PW8

7. In support of ocular testimony of the witnesses, prosecution filed following documentary evidence

1.	F.I.R.	Ex.Ka.9
2.	Written Report	Ex.Ka.1
3.	Statement of Tanushree	Ex.Ka.6
4.	Panchayatnama	Ex.Ka.11
5.	Postmortem Report	Ex.Ka.3
6.	Site Plan	Ex.Ka.4
7.	Charge-sheet	Ex.Ka.8

8. After completion of prosecution evidence, statements of accused persons were recorded under Section 313 of Cr.P.C., in which they had told that false evidence was led against them and they were implicated falsely due to enmity with the complainant. Six witnesses, namely, Mishri Lal, D.W.1, Hari Vilas, D.W.2, Vinod Kumar, D.W.3, Gopal Singh, D.W.4, Dharmendra Singh @ Dharmveer, D.W.5, and Pushpendra Singh, D.W.6,were examined in defence.

9. Heard Sri Rajarshi Gupta and Sri Yogesh Kumar Srivastava, learned Advocate for accused-appellants, Sri Gaurav Kakkar, learned counsel for the complainant and learned A.G.A. for the State.

10. Learned counsel for the appellants submitted that First Information Report of this case was lodged after the delay of three days which is not explained either in the F.I.R. itself or in the statement of complainant. Learned counsel submitted that delay of 3 days in lodging F.I.R in such type of case clearly shows that it was lodged after consultation to implicate the appellants falsely due to previous enmity between parties, hence, delay in lodging F.I.R. is fatal to the prosecution case.

11. Learned counsel for the appellants further submitted that perusal of written report (Ex. Ka.1) shows that it is dated as 2.4.2015 which means that it was written by the complainant on 2.4.2015 while the alleged occurrence took place on 30.3.2015.

12. Learned counsel for the appellants next submitted that medical evidence of this case does not match with the averments of F.I.R. and the evidence of so called eye-witnesses. In F.I.R. it is specifically stated that fire was made at the mother of the complainant with intention to kill her which hit in her stomach. Same statements were given by P.W.1, P.W.2, and P.W.3 but the medical examination of deceased-Tanushree which was conducted by Dr. Alok Kumar who was examined as P.W.4 speaks otherwise. He has described the injury of deceased-Tanushree as "lacerated wound size 1 x 1 c.m. in the lower side of the stomach'. He has specifically stated that there is no blackening and tattooing around the wound and further in cross examination, he has stated that it is correct that at the time of medical examination he did not find any gunshot injury on the body of the injured-Tanushree.

13. Learned counsel for the appellants vehemently argued that the aforesaid statement of P.W.4, Dr. Alok Kumar, has shattered the prosecution case because no gunshot injury was found by the doctor on the body of injured-Tanushree while prosecution has brought specific case that a fire was made towards Tanushree with intention to kill her which hit in her stomach, hence, there are serious contradictions in ocular testimony and medical evidence which go to the root of the case and it is proved that entire story of prosecution is fabricated just to implicate accused persons falsely due to ongoing previous enmity between them.

14. Learned counsel for the appellant also submitted that six witnesses were examined by the accused persons in defence. Their statements also indicate that there was previous enmity between complainant and the accused persons but Trial Court did not consider this aspect.

Learned counsel for the appellants further submitted that injured-Tanushree died after two months of the occurrence due to septicemia, hence, cause of death was not hitting the bullet if prosecution case is to be believed for a while. It is argued that Dr. Dharmveer Singh, P.W.5, was produced by prosecution who conducted the postmortem of the deceased who has stated in examination in chief that cause of death of the deceased was septicemia shock which was due to septicemia in entire body.

15. Learned counsel for the appellant also argued that injured-Tanushree was discharged from the hospital after 12 days of treatment. In cross-examination also Dr. Dharmveer Singh, P.W.5, has affirmed his opinion that deceased died due to septicemia.

16. After above arguments, learned counsel for the appellants has submitted that he is not inclined to argue further on merit of appeal but prayed for reduction of sentence for the reasons of aforesaid arguments.

17. Learned A.G.A. submitted that delay in lodging the F.I.R. is explained that his report was not lodged by the police just after the date of occurrence, hence, delay cannot be fatal to the prosecution case. It is further submitted by learned A.G.A. that there are eye witnesses in this case namely P.W.1, son of deceased, P.W.2, daughter-in-law of deceased, P.W.3, grand daughter of deceased. Since the incident is of 10 O'Clock in the night, the presence of all these three eye-witnesses was natural on the spot, hence their testimonies cannot be disbelieved on the ground that they are family members of the deceased.

18. Learned A.G.A. next submitted that deceased made dying declaration before her death in which she has named all the three accused persons and it was also stated by her that she sustained bullet injury in the occurrence. Learned A.G.A. stated that the bullet was recovered from the body of the deceased-Tanushree at the time of her medical examination and it was collected by the Investigating Officer from Akash Hospital, Agra where she was treated. Hence, it cannot be said that there was no gunshot injury on the body of deceased-Tanushree.

19. Learned Counsel for the appellants again reiterated that he was not arguing for clean acquittal of the appellants but sentence awarded to them must be reduced in view of the above arguments made by him. He has again reiterated that this case does not fall within the ambit of Section 302 of IPC and does not travel beyond the scope of Section 326 I.P.C. or Section 304 of I.P.C.

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

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

"26. Once the prosecution has brought home the evidence of the presence

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

22. Considering the evidence of the witnesses and also considering the medical evidence including post mortem report, there is no doubt left in our mind about the guilt of the present appellants. However, the question which falls for our consideration is whether, on reappraisal of the peculiar facts and circumstances of the case, the conviction of the appellant under Section 302 of I.P.C. of the Indian Penal Code should be upheld or the conviction deserves to be converted under Section 304 Part-I or Part-II of the Indian Penal Code. It would be relevant to refer Section 299 of the Indian Penal Code, which read as under:

***"299. Culpable homicide**: Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide."*

23. The academic distinction between "murder' and "culpable homicide not amounting to murder' has always vexed the Courts. The confusion is caused, if Courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Section 299 and 300 of I.P.Code. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

Section 299	**Section 300**
A person commits culpable homicide if the act by which the death is caused is done-	Subject to certain exceptions culpable homicide is murder is the act by which the death is caused is done.
INTENTION	
(a) with the intention of causing death; or	(1) with the intention of causing death; or
(b) with the intention of causing such bodily injury as is likely to cause death; or	(2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
KNOWLEDGE	**KNOWLEDGE**
(c) with the knowledge that the act is likely to cause death	(4) with the knowledge that the act is so

	immediately dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

24. In the case in hand, deceased-Tanushree was first examined by Dr. Alok Kumar who was produced as P.W.4. He has mentioned following injury on the person of injured-Tanushree at the time of medical examination:

"Lacerated wound size 1 x 1 c.m. right side 5 c.m. below navel."

He has also mentioned in medical report (Ex.Ka.2) that no blackening or tattooing was present around the wound.

25. Learned counsel for the appellants has vehemently argued that there was no blackening or tattooing around the wound of the injured-Tanushree which shows that there was no gunshot injury but, we are not in agreement with learned counsel for the appellants regarding this argument because if fire is made from a distance of more than 6 ft., there is no possibility of blackening or tattooing as is the case of prosecution that fire was made towards Tanushree from distance. Although Dr. Alok Kumar, P.W. 4, has also suggested in his statement that there was no gunshot injury on the body of the deceased but it is possible that this statement was made by P.W.4, due to absence of blackening or tattooing around the wound. It cannot be ruled out that the deceased sustained bullet injury as bullet was collected by Investigating Officer from Akash Hospital, Agra where deceased-Tanushree was examined and treated further.

26. Hence, we reached to the conclusion that injured sustained bullet injury but at the very same time after perusing the evidence of P.W.1, P.W.2 & P.W.3, threadbare as well as considering averments made in First Information Report, it is transpired that assailants made fire towards complainant Bobby with intention to kill him but complainant saved himself by running towards roof from staircase and fire hit the mother of the complainant, Tanushree, due to which she sustained injury, hence, the meticulous analysis of entire evidence available on record permits us to form the opinion that appellants were having no intention at all to kill the mother of the complainant. Dying declaration of deceased-Tanushree also suggests that appellants came to kill the complainant and not his mother but she sustained bullet injury accidentally. Hence, in this occurrence, the intention to kill or to cause such bodily injury to the deceased-Tanushree is missing.

27. Hence, on considering the principle laid down by the Apex Court in the case of **Tuka Ram and others v. State of Maharashtra (2011) 4 SCC 250** and in the case of **B.N. Kavadakar and another v. State of Karnataka, 1994 Supp. (1) 304**, we are of the considered opinion that offence would be punishable under Section 304 Part II of IPC from the angle that there was no intention of appellants to kill the deceased or to cause such bodily injury to the deceased which was inflicted to her.

28. Another angle in this case is that the death of the deceased took place after

two months of the occurrence and the postmortem report (Ex.Ka.3) shows that cause of death was septicemia shock. Postmortem of deceased was conducted by Dr. Dharmveer Singh, P.W.5. He has stated in his statement that cause of death of the deceased was septicemia shock which was due to septicemia in entire body. This opinion was also affirmed by P.W.5 in his cross examination. Evidence in this regard shows that deceased-Tanushree survived for two months after the occurrence. Hence, we are of the opinion that the direct result of death of deceased is development of infection in whole body due to the injury sustained in the occurrence that caused septicemia.

29. In **Bengai Mandal alias Begai Mandal vs. State of Bihar** [(2010) 2 SCC 91], incident occurred on 14.7.1996, while the deceased died on 10.8.1996 due to septicemia caused by burn injuries. The accused was convicted and sentenced for life imprsonment under Section 302 IPC, which was confirmed in appeal by the High Court, but Hon'ble The Apex Court converted the case under Section 304 Part-II IPC on the ground that the death ensued after twenty-six days of the incident as a result of septicemia and not as a consequence of burn injuries and, accordingly, sentenced for seven years' rigorous imprisonment.

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

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

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

*"12. In fact, in the case of **Krishan vs. State of Haryana reported in (2013) 3 SCC 280,** the Apex Court has held that it is not an absolute principle of law that a dying declaration cannot form the*

sole basis of conviction of an accused. Where the dying declaration is true and correct, the attendant circumstances show it to be reliable and it has been recorded in accordance with law, the deceased made the dying declaration of her own accord and upon due certification by the doctor with regard to the state of mind and body, then it may not be necessary for the court to look for corroboration. In such cases, the dying declaration alone can form the basis for the conviction of the accused. But where the dying declaration itself is attended by suspicious circumstances, has not been recorded in accordance with law and settled procedures and practices, then, it may be necessary for the court to look for corroboration of the same.

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

14. However, we have also not lost sight of the fact that the deceased had died after a month of treatment. From the medical reports, it is clear that the deceased suffered from Septicemia which happened due to extensive burns.

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

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

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

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

20. There is also evidence on record to prove and establish that the action of the appellant to throw the burning tonsil was preceded by a quarrel between the deceased and the appellant. From the aforesaid evidence on record it cannot be said that the appellant had the intention that such action on her part would cause the death or such bodily injury to the

deceased, which was sufficient in the ordinary course of nature to cause the death of the deceased. Therefore, in our considered opinion, the case cannot be said to be covered under clause (4) of Section 300 of IPC. We are, however, of the considered opinion that the case of the appellant is covered under Section 304 Part II of IPC."

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

33. On overall scrutiny of the facts and circumstances of this case coupled with medical evidence and the opinion of medical officers and considering the principle laid down by the Courts in above referred case laws, we are of the considered opinion that in the case in hand, from the angle of septicemia also, offence would be punishable under Section 304 Part II of IPC.

34. From the upshot of the aforesaid discussion, it appears that the death of the deceased was not premeditated. Appellants had no intention to cause death of the deceased and she died due to septicemia in whole of her body which was not the direct result of the injury sustained in the accident. The instant case falls within the purview of culpable homicide not amounting to murder. Hence, entire evidence on the record and position of law in this regard permit us to convert the conviction and sentence of all the accused-appellants from the offence punishable under Section 302 of IPC into offence punishable under Section 304 Part II of IPC.

35. The conviction and sentence of accused-appellants under Section 302 read with Section 34 of IPC is converted into offence punishable under Section 304 Part II read with Section 34 of IPC and, therefore, we convict and sentence the accused-appellants for 10 years rigorous imprisonment and Rs.10,000/- fine each. They shall further undergo 1 year simple imprisonment in case of default of fine. Conviction and sentence of all accused-appellants for rest of the offences shall remain intact. All the sentences shall run concurrently.

36. In this way, appeal is liable to be partly allowed. Accordingly, the appeal is partly allowed as modified above. Record and proceedings be sent back to the Trial Court forthwith.

(2022)01ILR A571
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.01.2022

BEFORE
THE HON'BLE SYED AFTAB HUSAIN RIZVI, J.

Criminal Revision No. 1154 of 2021

Tarun Pandit ...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Ankit Krishna

Counsel for the Opposite Parties:
G.A., Sri Siddharth Khare

A. Criminal Law -Code of Criminal Procedure, 1973-Sections 397/401 & 125 - Hindu Marriage Act, 1955 - Section 24-application-issue of overlapping jurisdiction-in the present case divorce petition has been filed by the husband which is being contested by the wife who preferred an appeal and also not accepted the permanent alimony u/s 25 of Act 1955-recovery of maintenance under both the sections 125 Cr.P.C. and 24 of Hindu Marriage Act, shall not be allowed-However, there is no bar to seek maintenance both u/s 125 Cr.P.C. or Hindu Marriage Act but court will have to adjust or set off the amount awarded in previous proceedings-Since she can not accept the amount of permanent alimony while the appeal is pending she has no sufficient financial resources, she comes in the category of destitute-Hence, maintenance order passed u/s 125 Cr.P.C. does not suffer from any illegality of infirmity.(Para 1 to 16)

B. Where successive claims for maintenance are made by a party under different statutes, the Court would consider an adjustment or set-off, of the amount awarded in the previous proceedings, while determining whether any further amount is to be awarded in the subsequent proceeding.(Para 8)

C. Claim for maintenance under the first part of Section 125 Cr.P.C. is based on the subsistence of marriage while claim for maintenance of a divorced wife is based on the foundation provided by Explanation (b) to Sub-section (1) of Section 125 Cr.P.C..If the divorced wife is unable to maintain herself and if she has not remarried, she will be entitled to maintenance allownce.(Para 11)

The revision is dismissed.(E-6)

List of Cases cited:

1. Rakesh Malhotra Vs Krishna Malhotra (2020) Cri.L.R. SC 209

2. Palla Shanti Kiran Vs St. of A.P. (2020) 4 ALT 329

3. Sudhir Kumar Vs St. of Raj. (1996) Crl.L.R. Raj. 315

4. Rajnesh Vs Neha CRLA No. 730 of 2020

5. Vishal Prajapati Vs Smt. Monika Prajapati Ist Appl. No. 70 of 2020

6. Surendra Kumar Bhansali Vs The Judge Family Court & anr. (2004) AIR Raj. 257

7. Har Charan Singh Vs Kamal Preet Kaur (2005) 3 RCR (Civil) 808

8. Nirmal Kumar Vs St. of U.P. (2000) 41 A Cr.C. 661

9. Rohtas Singh Vs Ramendri (Smt.) & anr. (2000) 3 SCC 180

(Delivered by Hon'ble Syed Aftab Husain Rizvi, J.)

1. This criminal revision is directed against the judgment and order dated 4.3.2021 passed by Additional Special Judge, Family Court, Gautam Budh Nagar in Criminal Misc. Case No. 653 of 2013 Smt. Sneha Vs. Tarun Pandit. By the impugned order the learned court below has allowed the maintenance application U/s 125 Cr.P.C. of O.P. No. 2 Smt. Sneha Pandit and has awarded Rs. 25,000/- per month as maintenance to her from the date of filing of the application.

2. I n brief the facts are that O.P. No. 2 Smt. Sneha Pandit moved an application for maintenance U/s 125 Cr.P.C. against revisionist Tarun Pandit with the allegations that her marriage was

solemnized with opposite party on 22.11.2009 and she performed her marital obligations after the marriage. After sometime of the marriage the behaviour of opposite party was not cordial with her and he started to mentally and physically torture her. Making certain other allegations it was further stated that opposite party has left her at her maternal house and since 30.11.2013 she is living with her father. The opposite party is ignoring her and not maintaining her and is not ready to keep her with him and has deserted her. She has no source of income while opposite party is Squadron Leader in Air Force and his salary is Rs. 80,000/- per month. On the aforesaid ground Rs. 40,000/- as maintenance allowance per month was claimed by O.P. No. 2.

The revisionist (opposite party) filed his reply in which he admitted the marriage but denied rest of the allegations and further submitted that the applicant herself without any just cause is living separately from her husband and it is she who has deserted the opposite party. Revisionist (opposite party) has also made certain allegations against the applicant and stated that she is responsible for the whole affairs and she does not want to live with opposite party. It is further alleged that applicant has falsely shown her address of NOIDA Gautam Budh Nagar. In fact applicant and her parents live at house no. D-84 Saket Colony, District Meerut and that is their permanent address. The address mentioned in the application is false. The applicant has filed the application with false facts concealing the real facts and has not come with clean hands. The learned court below after taking evidence and hearing arguments of the parties by the impugned judgment and order has allowed the application and awarded the maintenance allowance.

3. One of the grounds on which the impugned judgment and order has been challenged is that the revisionist (opposite party) has taken specific objections regarding jurisdiction of the court at Gautam Budh Nagar but the court below has not recorded any finding regarding jurisdiction of the court at Gautam Budh Nagar. The learned counsel for the revisionist contended that in para 11 and 12 of the objections filed by the opposite party there are specific objections and it is alleged that O.P. No. 2 was living with her parents in their house at 84 D, Saket Colony, Meerut and not at Gautam Budh Nagar. This objection has also found support from the order dated 29.8.2016 passed by the Additional Principal Judge, Family Court, Meerut in proceeding U/s 24 of the Hindu Marriage Act filed by the O.P. No. 2. The court below recorded the specific finding that O.P. No. 2 was residing at 84 D, Saket Colony, Meerut and not at Gautam Budh Nagar. The said finding has never been challenged by the O.P. No. 2 before any higher authority and the same has attained the finality. Therefore, the court at Gautam Budh Nagar has no jurisdiction to entertain the petition U/s 125 Cr.P.C. and the judgment and order is without jurisdiction, illegal and deserves to be set-aside. Learned counsel also contended that entire criminal proceedings were also initiated by O.P. No. 2 at Meerut and not at Gautam Budh Nagar. This clearly shows that O.P. No. 2 was residing permanently at Meerut and not at Gautam Budh Nagar but just to harass and pressurize the revisionist and his family members proceeding U/s 125 Cr.P.C. was

deliberately initiated at Gautam Budh Nagar.

Learned counsel for the O.P. No. 2 submitted that a perusal of the objections filed by the revisionist against the application U/s 125 Cr.P.C. would reflect that no precise objection was taken before the court below that the application U/s 125 Cr.P.C. is not maintainable at District Gautam Budh Nagar as it lacks jurisdiction. In para 11 it is stated that opposite party has deliberately filed the application U/s 125 Cr.P.C. at District Gautam Budh Nagar only in order to harass the revisionist, however, in fact, she is resident of District Meerut. Therefore, there was no occasion for the court below to deal with the objection of the jurisdiction before it. Learned counsel further contended that in para 10 of the counter affidavit the respondent has mentioned in detail and brought on record the material to demonstrate that she has been residing at district Gautam Budh Nagar. In fact, the respondent was undergoing a course in J.P. Institute of Information Technology at District Gautam Budh Nagar. Learned counsel further submitted that the finding of the trial court in proceeding U/s 24 of the Hindu Marriage Act dated 29.8.2016 is based on medical certificate issued by the doctor in District Meerut. In fact, on a visit to District Meerut for a date in the case the respondent fell ill and she has to consult a doctor there. On the basis of the same the court mentioned about her residence which is un-consequential. There was no occasion to arrive to a conclusion that the respondent was residing in District Meerut and the respondent has already brought on record a number of documents to demonstrate otherwise.

From the perusal of the objections of revisionist (opposite party) filed against the application U/s 125 Cr.P.C. it appears that there is no specific plea that the court at Gautam Budh Nagar lacks jurisdiction. In para 11 of objections only it has been alleged that address mentioned in the application is false and applicant does not reside there. She and her parents are permanent resident of District Meerut and application has been moved at Gautam Budh Nagar to harass the opposite party and her family. It also appears that point of jurisdiction has not been sincerely raised before the trial court and due to this the trial court has not dealt with it. Further an application U/s 125 Cr.P.C. can be moved at a place where applicant is temporarily residing. It has been alleged in counter affidavit that applicant is temporarily residing at Gautam Budh Nagar and pursuing a course in J.P. Institute of Information Technology at Gautam Budh Nagar. So the ground that court at Gautam Budh Nagar lacks jurisdiction has no force.

4. Another ground on which the impugned judgement and order has been challenged is that Family Court, Meerut which is the competent court in divorce petition U/s 13 of Hindu Marriage Act has granted divorce decree in favour of the revisionist and has also awarded Rs. 25 lacs as permanent alimony U/s 25 of the Hindu Marriage Act while passing the decree of divorce and hence, no maintenance U/s 125 Cr.P.C. can be awarded and application is not maintainable. Learned counsel for the revisionist vehemently contended that in divorce petition no. 1614 of 2013 U/s 13 of Hindu Marriage Act the competent court has passed the divorce decree dated 21.2.2016 and while passing the decree has also awarded permanent alimony of Rs. 25 lacs, which has duly been deposited by the revisionist in the court on 20.3.2018. Thus, O.P. No. 2 has Rs. 25 lacs at her disposal and can not be said to without financial

resources and her condition is not of a destitute. There is no question of non sustenance. The court below has not considered it. Though the appeal against divorce decree is pending but the said order has not been stayed. The court below lost its sight in not considering the legal preposition that a divorced wife can claim maintenance U/s 25 of the Hindu Marriage Act and not U/s 125 Cr.P.C. When a divorce decree U/s 13 of the Hindu Marriage Act is passed the wife of such annulled married can claim maintenance U/s 25 of Hindu Marriage Act. It is only such court which passed the divorce decree who is alone competent to grant maintenance U/s 25 of the Hindu Marriage Act. Hence, the impugned order is absolutely illegal, arbitrary and against the said principal of law. Learned counsel placed reliance on the following citations:

1. Rakesh Malhotra Vs. Krishna Malhotra 2020 Cri.L.R. (SC) 209

2. Palla Shanti Kiran Vs. State of Andhra Pradesh 2020 (4) ALT 329

3. Sudhir Kumar Vs. State of Rajasthan 1996 Cri.L.R. (Rajasthan) 315

4. Rajnesh Vs. Neha Criminal Appeal No. 730 of 2020

5. Vishal Prajapati Vs. Smt. Monika Prajapati First Appeal No. 70 of 2020 decided on 30.9.2021

6. Surendra Kumar Bhansali Vs. The Judge Family Court and another 2004 AIR (Rajasthan) 257

7. Har Charan Singh Vs. Kamal Preet Kaur 2005 (3) RCR (Civil) 808

8. Nirmal Kumar Vs. State of U.P. 2000 (41) A Cr.C. 661

5. Learned counsel for the O.P. No. 2 contended that respondent is entitled to maintenance U/s 125 Cr.P.C. despite the fact that competent court granted divorce and has also given permanent alimony of Rs. 25 lacs U/s 25 of the Hindu Marriage Act because the judgment dated 21.2.2018 granting divorce has not attained finality. Respondent has filed an appeal which is pending and will be considered proceeding in continuation. Further respondent has not accepted the amount of alimony and same is lying in the court below. There is no occasion to accept the alimony as it would amount to accepting the decree of divorce. It is also contended that respondent has never requested or filed an application U/s 25 of the Hindu Marriage Act to claim permanent alimony and the court has granted it on its own volition. Learned counsel further contended that even a divorced wife is entitled for maintenance U/s 125 Cr.P.C. and cite**d Rohtas Singh Vs. Ramendri (Smt.) and another (2000) 3 SCC 180 and Swapan Kumar Banerjee Vs. State of West Bengal and others AIR 2019 SC 4748.** Learned counsel also contended that the case law of Palla Shanti Kiran Vs. State of Andhra Pradesh (Supra) and Rakesh Malhotra Vs. Kiran Malhotra (Supra) relied on by the counsel of the revisionist do not apply on the present case. In case of Palla Shanti Kiran (Supra) the marriage was declared void/annulled U/s 14 of Hindu Marriage Act and once marriage has been declared void there was no occasion to consider the contesting parties to have been married at all and in that circumstances it was held that the applicant was not entitled for maintenance U/s 125 Cr.P.C. as there was no husband

and wife relationship while in Rakesh Malhotra (Supra) the wife therein had accepted the amount of permanent alimony, hence, it was held that she is not entitled for maintenance. Learned counsel contended that in the present case respondent has never accepted the amount of permanent alimony.

6. It is undisputed that petition U/s 13 of Hindu Marriage Act for divorce was filed by the revisionist and it is being contested by the O.P. No. 2. The trial court has allowed the petition, passed the decree of divorce and has also awarded permanent alimony of Rs. 25 lacs. The revisionist has deposited the amount in the court below but the O.P. No. 2 has not accepted the decree or permanent alimony and has filed an appeal against it and has also not withdrawn the amount of permanent alimony. The amount of permanent alimony is lying deposited with the court below. In the case of Rakesh Malhotra (Supra) the Hon'ble Supreme Court in para 9, 11, 16 and 17 has made the following observations:

"9. The basic issue that arises for consideration is whether after grant of permanent alimony under section 25 of the Act, a prayer can be made before the Magistrate under Section 125 of the Code for maintenance over and above what has been granted by the Court while exercising power under Section 25 of the Act.

11. At the stage of passing a decree for dissolution of marriage, the Court thus considers not only the earning capacity of the respective parties, the status of the parties as well as various other issues. The determination so made by the Court has an element of permanency involved in the matter. However, the Parliament has designedly kept a window open in the form of subsections (2) and (3) in that, in case there be any change in circumstances, the aggrieved party can approach the Court under sub-section (2) or (3) and ask for variation/modification.

16. Since the Parliament has empowered the Court under Section 25(2) of the Act and kept a remedy intact and made available to the concerned party seeking modification, the logical sequitur would be that the remedy so prescribed ought to be exercised rather than creating multiple channels of remedy seeking maintenance. One can understand the situation where considering the exigencies of the situation and urgency in the matter, a wife initially prefers an application under section 125 of the Code to secure maintenance in order to sustain herself. In such matters the wife would certainly be entitled to have a full-fledged adjudication in the form of any challenge raised before a Competent Court either under the Act or similar such enactments. But the reverse cannot be the accepted norm.

17. In the circumstances, we allow these appeals, set aside the view taken by the High Court and direct that the application preferred under Section 125 of the Code shall be treated and considered as one preferred under Section 25(2) of the Act."

7. There is fine distinction between the facts of the two cases. In the case of Rakesh Malhotra it was the wife who has filed petition of dissolution of marriage under Section 13 of Hindu Marriage Act and on her petition a decree was passed and while passing the decree the court also awarded permanent alimony, which was accepted by the wife. While in the present

case divorce petition has been filed by the husband. It is being contested by the wife who has preferred an appeal and also has not accepted the permanent alimony which is lying deposited in the court below.

8. I n the case of Rajnesh Vs. Neha on the issue of overlapping of jurisdiction in grant of maintenance the Hon'ble Supreme Court has held as Under:

(a) Issue of overlapping jurisdiction

To overcome the issue of overlapping jurisdiction, and avoid conflicting orders being passed in different proceedings, it has become necessary to issue directions in this regard, so that there is uniformity in the practice followed by the Family Courts/District Courts/Magistrate Courts throughout the country. We direct that:

(i) where successive claims for maintenance are made by a party under different statutes, the Court would consider an adjustment or set-off, of the amount awarded in the previous proceeding/s, while determining whether any further amount is to be awarded in the subsequent proceeding:

(ii) it is made mandatory for the applicant to disclose the previous proceeding and the orders passed therein, in the subsequent proceeding;

(iii) if the order passed in the previous proceeding/s requires any modification or variation, it would be required to be done in the same proceeding."

The Hon'ble Apex Court has thus held that a wife can make a claim for maintenance under different statutes. There is no bar to seek maintenance both under the protection of Women against Domestic Violence Act, 2005 and Section 125 of the Cr.P.C., or under Hindu Marriage Act."

9. In Vishal Prajapati Vs. Smt. Monika Prajapati (Supra) rulings relied on by the learned counsel for the revisionist a Division Bench of Allahabad High Court has followed the aforesaid principle laiddown by Hon'ble Apex Court and has held that the court would consider an adjustment or set of the amount awarded in previous proceedings.

So there is no bar to seek maintenance both U/s 125 Cr.P.C. or Hindu Marriage Act but the court will have to adjust or set of the amount awarded in previous proceedings.

10. In Surendra Kumar Bhansali Vs. The Family Judge Court and another (Supra) it has been held that pendency of appeal does not preclude wife from filing of application U/s 25 of the Hindu Marriage Act. While in Har Charan Singh Vs. Kamal Preet Kaur (Supra) it has been held that court can grant maintenance and permanent alimony to wife without specific application. In Nirmal Kumar Vs. State of U.P. (Supra) it has been held that recovery of maintenance under both the sections U/s 125 Cr.P.C. and 24 of Hindu Marriage Act shall not be allowed.

In this case the O.P. No. 2 (wife) has not withdrawn the amount of permanent alimony awarded under section 25 of the Hindu Marriage Act, hence, there

is no question of any adjustment or recovery under both the orders.

11. In Rohtash Singh Vs. Ramendri (Supra) it has been held by the Apex Court that :

"Claim for maintenance under the first part of Section 125 Cr.P.C. is based on the subsistence of marriage while claim for maintenance of a divorced wife is based on the foundation provided by Explanation (b) to sub-section (1) of Section 125 Cr.P.C. If the divorced wife is unable to maintain herself and if she has not remarried, she will be entitled to maintenance allowance.

A woman has two distinct rights for maintenance. As a wife, she is entitled to maintenance unless she suffers from any of the disabilities indicated in Section 125(4). In another capacity, namely, as a divorced woman, she is again entitled to claim maintenance from the person of whom she was once the wife. A woman after divorce becomes a destitute. If she cannot maintain herself or remains unmarried, the man who was once her husband continues to be under a statutory duty and obligation to provide maintenance to her."

12. Applying the aforesaid preposition of law on the present set of facts it is clear that as O.P. No. 2 (wife) has not accepted the amount of alimony as she has challenged the divorce decree in appeal and appeal is pending and in that circumstances she can not accept the amount of alimony. So it can not be said that she has sufficient financial resources as permanent alimony has been awarded to her. At present she has no source of income and financial support to maintain her and comes in the category of destitute. The learned trial court has dealt with the aforesaid point in its judgment and has categorically recorded the finding that applicant (O.P. No. 2) has no source of income and unable to maintain herself and has awarded the maintenance allowance. Hence, the impugned order does not suffer from any illegality or infirmity. There is no perversity in the impugned order.

13. Another ground on the basis of which the impugned order has been challenged is that the court below has directed the revisionist to pay maintenance from the date of filing of application i.e. since 30.10.2013. In doing so the court below has completely lost its sight to the admitted fact that O.P. No. 2 had been paid Rs. 18,900/- as maintenance from the salary of revisionist by his department, the Indian Air Force. Learned counsel contended that the court below has not given any reason for award of maintenance from the date of filing of application. Once the O.P. No. 2 had been paid maintenance @ Rs. 18,900/- per month from the salary of revisionist up to March, 2018 there was no justification for the court below to award maintenance from the date of application i.e. since 30.10.2013. Learned counsel submitted that on this ground the order of court below is perverse, illegal and not sustainable.

14. This argument has also no force. In the impugned order it is provided that if any amount of maintenance has been paid by the opposite party to the applicant the same shall be adjusted and rest amount will be paid in two months. It is undisputed that O.P. No. 2 has been paid Rs. 18,900/- as maintenance from the salary of revisionist up to March, 2018. After passing of divorce decree the revisionist has deposited the amount of permanent alimony in the trial

court and amount of maintenance which was being paid from the salary of the revisionist, has been stopped. The O.P. No. 2 has not withdrawn the amount of alimony and it is lying deposited in the court below as the O.P. No. 2 has challenged the decree of divorce in appeal which is pending. After March, 2018 no amount of maintenance is being paid by the revisionist. The trial court has already made provision of adjustment of the amount of maintenance earlier paid. So there is no illegality or infirmity on this count also.

15. From the above discussion it is clear that the impugned order does not suffer from any infirmity or illegality. It is also not perverse. There is no sufficient ground to set-aside the impugned order. The revision is liable to be dismissed.

16. Accordingly, the Criminal Revision is **dismissed.**

(2022)01ILR A579
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.12.2021

BEFORE

THE HON'BLE SYED AFTAB HUSAIN RIZVI, J.

Criminal Revision No. 1238 of 2015

Dr. Kalawati Shukla ...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Sheshhadri Trivedi, Sri Raj Kumar Singh

Counsel for the Opposite Parties:
G.A., Sri Aditya Kumar Yadav, Sri Vishnu Gupta, Sri D.P. Singh

A. Criminal Law - Code of Criminal Procedure, 1973-Sections 397/401 & Indian Penal Code, 1860-Sections 419, 420, 504, 506-challenge to-summoning order-revisionist committed cheating in the garb of providing employment to opposite party-learned Magistrate has taken cognizance under section 190(1)(a) by treating the application of section 156(3) Cr.P.C. as a complaint case but thereafter he passed the order for investigation-Registration of F.I.R. was not required as the Learned Magistrate had already taken cognizance under section 190(1)(a) of the Cr.P.C.- in pursuance of the order of investigation final report was submitted against which the complainant filed protest petition-Learned court below could not have resorted to both the provisions simultaneously-the procedure adopted by the court below is illegal and vitiated in the eyes of law.(Para 1 to 9)

B. It is settled principle of law that under section 202 Cr.P.C. the Magistrate either himself inquire into the matter or direct that an investigation to be made by police or such other person he deems fit but he cannot simultaneously proceed in both the manners-Learned Magistrate should have only taken into consideration the evidence produced u/s 200 and 202 Cr.P.C. ignoring the final report and protest petition and then should have passed any order either to summon the accused or dismiss the complaint.(Para 6)

The revision is allowed. (E-6)

List of Cases cited:

1. Irshad Khan & ors Vs St. of U.P. & anr.(2013) LawSuit (All) 3146

2. Ramprabesh Rai Vs Bishun Mandal (1981) CrLJ 139

3. Vadilal Panchal Vs Dattatraya (1960) AIR SC 1113

(Delivered by Hon'ble Syed Aftab Husain Rizvi, J.)

1. Heard learned counsel for the revisionist, learned counsel for the opposite party no.2 and learned Standing Counsel for the State-respondent.

2. This criminal revision has been filed against the order dated 13.02.2015 passed by learned Chief Judicial Magistrate, Jaunpur in Criminal Case No.26 of 2014 (Virendra Kumar Yadav Vs. State), under Sections 419, 420, 504 and 506 I.P.C., Police Station- Kotwali, District- Jaunpur. By the impugned order, the learned Magistrate has taken cognizance for the offence under Sections 419, 420, 504 and 506 I.P.C. against the revisionist/accused Dr. Kalawati Shukla and has issued summon to her.

3. The facts of the case in brief are that the opposite party no.2 filed an application under Section 156(3) Cr.P.C. alleging therein that the applicant is an educated unemployed youth. His maternal uncle- Raj Bahadur Yadav a milkman was supplying milk at the house of opposite party- Dr. Kalawati Shukla. She said to Raj Bahadur Yadav that if there is any unemployed educated youth in his family then she can employ him as there are vacancies in the Family Health Department and she being Chief Medical Officer Badaun has influence in the department, but for this he has to pay Rs.3/- lacs. Knowing this fact from Raj Bahadur Yadav, applicant informed his father and uncle who after selling their land on 24.05.2010 and taking some loan arranged Rs.3/- lacs and the same was paid on 03.06.2010 at 05 p.m. at the house of Dr. Kalawati Shukla in presence of witnesses Ram Chandra, Dev Nath and Raj Bahadur Yadav. He also appeared in the examination held on 12.06.2010 but could not get employment. When he asked about this from Dr. Kalawati Shukla, she threatened him and refused to pay back the money. In the manner, she has cheated the applicant. Learned Magistrate on the aforesaid application directed that the matter be treated as a complaint case and the application was registered as a complaint. The Statement of applicant was recorded under Section 200 Cr.P.C. Two witnesses were examined under Section 202 Cr.P.C.. Thereafter, the learned Magistrate on 10.09.2013 directed the S.H.O. Kotwali, Janupur to investigate the matter and submit the report. In pursuance of that order an F.I.R. bearing Crime No.1222 of 2013 under Sections 419, 420, 504, 506 I.P.C. was registered at P.S. Kotwali and matter was investigated by the police. After completion of the investigation a final report was submitted on 17.12.2013. Applicant filed a protest petition against the final report. By the impugned order, learned Magistrate rejected the final report and taking cognizance of the offence has summoned Dr. Kalawati Shukla to face trial for the offence under Sections 419, 420, 504, 506 I.P.C.

4. Learned counsel for the revisionist contended that the impugned order is absolutely illegal, arbitrary and perverse. Initially, the learned Magistrate passed the order to register the application under Section 156(3) Cr.P.C. as a complaint case and adopted the procedure prescribed under Sections 200 and 202 Cr.P.C. but thereafter, the learned Magistrate adopted a novel procedure not prescribed anywhere in the Code of Criminal Procedure. Learned counsel further contended that Section 202 of the Cr.P.C. contemplates that on receipt

of a complaint of an offence the Magistrate may postpone the issue of process against the accused and either inquire into the case himself or direct an investigation by a police officer. However, in the present case, the learned Magistrate has first enquired the matter himself and thereafter directed for investigation. The learned Court below could not have resorted to both the provisions simultaneously and could have taken recourse only to one of the provisions. Thus, the procedure adopted by the learned Court below is illegal and vitiated in the eyes of law. Learned counsel further contended that as per the provisions of Chapter XV of the Code, cognizance of offence can be taken by the Magistrate only in accordance with Section 190(1)(a) or Section 190(1)(b) of the Code. Initially the learned Magistrate has taken cognizance under Section 190(1)(a) by treating the application of Section 156(3) Cr.P.C. as a complaint case but thereafter he passed the order for investigation. The learned Magistrate on the final report adopting the procedure prescribed under Section 190(1)(b) has again taken cognizance of the offence. He committed serious illegality in placing reliance upon the statement of witnesses earlier recorded by him under Sections 200 & 202 Cr.P.C. while taking cognizance on the final report/protest petition and summoning the accused/revisionist. Learned counsel further contended that while taking cognizance under Section 190(1)(b) of the Code, the Magistrate can act only upon the statements of witnesses recorded by the police in the case diary and it was not permissible for him at that stage to make use of any other material. Learned counsel placed reliance in the case of **Irshad Khan and others Vs. State of U.P. and another 2013 LawSuit (All) 3146.**

5. Learned counsel for the opposite party no.2 supported the impugned order and submitted that on the basis of material available the learned Magistrate has passed the summoning order. The revisionist has committed offence by cheating the opposite party no.2 to pay Rs.3/- lacs in the garb of providing employment to him. There is no illegality or infirmity in the impugned order.

6. It is undisputed that the application under Section 156(3) Cr.P.C. filed by the opposite party no.2 was treated as a complaint and the learned Magistrate directed the complainant to produce his evidence. Witnesses were examined under Sections 200 & 202 Cr.P.C.. At this stage, the learned Magistrate vide order dated 10.09.2013 observed that in the circumstances of the present case the investigation by the S.H.O. Kotwali is required and directed him to investigate the matter and submit a report.

It is settled principle of law that under Section 202 Cr.P.C. the Magistrate either himself inquire into the matter or direct that an investigation to be made by by police or such other person he deems fit but he cannot simultaneously proceed in both the manners. When the learned Magistrate has inquired the matter himself under Section 202 Cr.P.C. he was not required to order for the investigation. In pursuance of the order of investigation after registration of an F.I.R. matter was investigated and final report was submitted by the police against which the complainant filed protest petition.

7. It is clear that order of investigation passed by learned Magistrate was under the purview of Section 202 Cr.P.C.

Registration of F.I.R. was not required as the learned Magistrate has already taken cognizance under Section 190(1)(a) of the Cr.P.C. It is settled principle of law that Magistrate who has entrusted the investigation under Section 202 Cr.P.C. is not bound by the report of the investigation.

It has been held in the Case of **Ramprabesh Rai Vs. Bishun Mandal, 1981 CrLJ** 139 by the Division Bench of Patna High Court that the Magistrate who entrusted investigation under Section 202 Cr.P.C. may disagree with the report of investigation and take cognizance.

In **Vadilal Panchal Vs. Dattatraya AIR 1960 SC 1113,** it has been held that this Section does not mean that the Magistrate is bound to accept the result of the inquiry or investigation or that he must accept any plea that is setup on behalf of the person complained against. The Magistrate must apply his judicial mind to the materials on which he has to form his judgment.

So, the Magistrate was not bound by the final report submitted by the police after investigation. Once he has taken cognizance under Section 190(1)(a) Cr.P.C. he may have taken into consideration the evidence under Sections 200 & 202 Cr.P.C. only which was available on record to pass any order of summoning. From the impugned order it appears that the learned Magistrate while taking cognizance has taken into consideration all the materials available on the record i.e. evidence under Sections 200 & 202 Cr.P.C., the evidence collected during investigation and objections of complainant filed against the final report. He may have ignored the police report and protest petition submitted against it and should have only taken into consideration the evidence produced under Sections 200 & 202 Cr.P.C. and then should have passed any order either to summon the accused under Section 204 Cr.P.C. or dismiss the complaint under Section 203 Cr.P.C.. So, the impugned order is not sustainable.

8. As the impugned order of summoning dated 13.02.2015 suffers from material illegality, it is hereby set aside with a direction to the learned Magistrate to proceed in accordance with the procedure prescribed in Chapter XV of the Code. Learned Magistrate will give an opportunity to the complainant to produce any other evidence under Section 202 Cr.P.C. if he so desires. After taking into consideration the evidence and material available on record under Sections 200 & 202 Cr.P.C., if the learned Magistrate comes to the conclusion that a prima facie case is made out then he may proceed under Section 204 Cr..P.C. and issue process and if he comes to the conclusion that there is no sufficient ground, he may dismiss the complaint under Section 203 Cr.P.C.

9. The criminal revision is **allowed,** accordingly. The learned Magistrate to proceed further in the light of the directions made in this order.

(2022)01ILR A582
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.12.2021

BEFORE

THE HON'BLE AJAI KUMAR SRIVASTAVA-I, J.

Criminal Revision No. 2632 of 2021

Dhruv Karan Singh ...Revisionist
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Revisionist:
Sri Saurabh Singh

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

A. Criminal Law-Code of Criminal Procedure, 1973-Section 397/401 & 156(3) -revisionist moved application u/s 156(3) which was treated as complaint-revisionist contended that the application filed u/s 156(3) was to allow with a direction to the Station House Officer concerned for registration of FIR regarding the matter-application filed u/s 156(3) Cr.P.C. can be treated as complaint u/s 200 Cr.P.C. and no separate complaint is required to be filed-Magistrate has to always apply his mind on the allegations-application which constitute cognizable offence but makes a defective prayer, such application will not cease to be a complaint nor can the Magistrate refuse to treat it as a complaint even though there be no prayer seeking trial of the known or unknown accused-Thus, application filed u/s 156(3) as a complaint cannot be said to be illegal.(Para 1 to 13)

The revision is dismissed. (E-6)

List of Cases cited:

1. Sukhwasi Vs St. of U.P. (2008) Cri LJ 452

2. Lalita Kumari Vs Govt. of U.P. & anr. (2014) 2 SCC 1

3. Smt. Neeb Devi Vs St. of U.P. & ors.(2010) Cri LJ 2354

4. Yogendra Singh Vs St. of U.P. (2005) 51 ACC 890 : (2005 All LJ 1518 (Alld),

5. Mathuri @ Vishveswaranand Vs Swami Sachchidanand Harishakshi (2001) Suppl ACC 957 SC

(Delivered by Hon'ble Ajai Kumar Srivastava-I, J.)

1. Heard learned counsel for the revisionist, learned A.G.A for the State and perused the record.

2. The instant criminal revision is directed against the judgment and order dated 27.08.2021 passed by learned Additional Civil Judge (J.D.), Court No.7/Judicial Magistrate, Agra in Misc. Application No.1317 of 2021, under Section 156 (3) Cr.P.C. "Dhrub Karan Singh vs. Vipin Tiwari and others", Police Station Nai Ki Mandi, District Agra, whereby the learned Additional Civil Judge (J.D.), Court No.7/Judicial Magistrate, Agra has treated the aforesaid Misc. Application No.1317 of 2021 as the complaint case without considering the records, which is illegal and arbitrary.

3. B rief facts are that the revisionist has moved an application under Section 156 (3) Cr.P.C. for registration and investigation of the case which was heard and disposed of by Additional Civil Judge (J.D.), Court No.7/Judicial Magistrate, Agra vide impugned order dated 27.08.2021, whereby the learned Magistrate has directed that the application filed under Section 156 (3) Cr.P.C. to be treated as complaint by placing reliance on the law laid down by Division Bench of this Court in **Sukhwasi vs. State of Uttar Pradesh; 2008 Cri LJ 452.**

4. Foremost submission of learned counsel for the revisionist is that the impugned order is not sustainable in the eyes of law, insofar as the same is against the law laid down by the Hon'ble Apex Court in the case of **Lalita Kumari vs. Government of Uttar Pradesh and another, reported in 2014 (2) SCC 1.** He, thus, submitted that the only option

available to the learned Magistrate was to allow the application filed under Section 156 (3) Cr.P.C. with a direction to the Station House Officer concerned for registration of F.I.R. regarding the matter. The learned Magistrate was not competent to direct that the application filed under Section 156 (3) Cr.P.C. be treated as complaint. The impugned order is thus, patently illegal which would cause miscarriage of justice, therefore, the same is liable to be quashed.

5. Per contra, learned A.G.A. has supported the impugned order and has pointed out that the grievance of the revisionist has not gone unattended by the court below. The court below after taking into consideration the entire gamut of the facts and circumstances of the case has rightly decided to treat the application filed by the revisionist under Section 156 (3) Cr.P.C. as a complaint. The revisionist shall still have an opportunity to prove his case before the court below. His further submission is that in **Lalita Kumari (supra)** Hon'ble the Apex Court has not referred, discussed and overruled the law laid down by the Division Bench of this Court in **Sukhwasi (supra).** Therefore, the impugned order cannot be termed to be illegal and no miscarriage of justice would be caused by the impugned order.

6. The scope and ambit of law laid down by the Hon'ble Supreme Court in **Lalita Kumari (supra)** can be ascertained from para no.6 of the judgment, which is quoted hereinbelow :

"6) Therefore, the only question before this Constitution Bench relates to the interpretation of Section 154 of the Code and incidentally to consider Sections 156 and 157 also."

(Emphasis supplied)

7. In case of **Lalita Kumari (supra)** the controversy revolved around the registration of F.I.R in cognizable cases by the Police Officer. However, it did not dwelve upon scope and ambit of power vested in Magistrate by virtue of provision of Section 156 (3) Cr.P.C. which is, for ready reference, quoted hereinbelow :

"156. Police officer' s power to investigate cognizable case.

(2) .....

(3) Any Magistrate empowered under section 190 may order such an investigation as above- mentioned."

8. In **Sukhwasi (supra**) the Division Bench of this Court in paragraph nos.6, 7, 8 & 9 has held as under:

"6. It will also be noticed that the law was, and has always been, that if a cognizable offence is made out, the Police are bound to register the First Information Report. In case, the Police do not register the First Information Report, there is provision under Section 154(3) Cr.P.C. to send an application to Superintendent of Police, who shall direct the registration of a First Information Report, if a cognizable offence is disclosed. There was as such, no need for an authority in this regard being given to the Magistrate. That, this has been done and such authority as given to the Magistrate indicates, that this has been done, because the Magistrate will bring to bear upon the matter a judicial and judicious approach, which will be necessarily implication be selective. That gives a clear inkling to the intention of the legislature, that the Magistrate may

consider the feasibility and propriety, of passing an order of registration of the First Information Report.

7. The matter may be looked into from another angle, and that is, in Section 154(3) Cr.P.C. where the Superintendent of Police has been given the authority for registration of First Information Report, the word used is 'shall' Section 143(3) Cr.P.C. is as hereunder

"154. Information of cognizable cases ?

(1)

(2)

(3) Any person aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in sub-section (1) may send the substance of such information, in writing, and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence shall either investigate the case himself or direct an investigation to be made, by any police officer subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an officer incharge of the police station in relation to that offence."

8. In Section 156 (3) Cr.P.C. the word used is 'May' Section 156(3) Cr.P.C. is as follows;

156. Police Officer's power to investigate cognizable case?

(1)

(2)

(3) Any Magistrate empowered under Section 190 may order such an investigation as above-mentioned.

9. The use of the word 'shall' in Section 154(3) Cr. P.C: and the use of word 'May' in Section 156(3) Cr.P.C. should make the intention of the legislation clear. If the legislature intended to close options for the Magistrate, they could have used the word 'shall' as has been done in Section 154(3) Cr.P.C. Instead, use of the word 'May' is, therefore, very significant, and gives a very clear indication, that the Magistrate has the discretion in the matter, and can, in appropriate cases, refuse to order registration."

9. While adverting to the issue, as to whether the learned Magistrate can treat an application file**d under Section 156 (3) Cr.P.C. as a complaint, the Division Bench in** Sukhwasi (supra) in parapraph nos.13 and 14 has held as under :

"13. It is clear from the judgment of the Supreme Court in the case Suresh Chandra Jain v. State of Madhya Pradesh, 2001 (42) ACC 459 : ((2001) 2 SCC 628 : AIR 2001 SC 571), that a Magistrate has the authority to treat an application under Section 156(3) Cr.P.C. as a complaint. This will become clear from the reference in the said report to the case of Gopal Das Sindhi v. State of Assam, AIR 1961 SC 986, in which the following observations were made: (Para 7)

"If the Magistrate had not taken cognizance of the offence on the complaint filed before him, he was not obliged to examine the complainant on oath and the

witnesses present at the time of filing of the complaint. We cannot read the provisions of Section 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 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."

14. It becomes clear from the said underlined portion that the Magistrate has the authority to treat an application under Section 156(3) Cr.P.C. as a complaint. Hon'ble Mr. Justice Vinod Prasad has also referred to the case of Suresh Chand Jain ((2001) 2 SCC 628 : AIR 2001 SC 571), 'supra' and has extracted the following portion therefrom in order to take a different view: (para 7) :?

"Section 156, falling within Chapter XII, deals with powers of the police officers to investigate cognizable offences. True, Section 202 which falls under Chapter XV, also refers to the power of a Magistrate to "direct an investigation by a police officer". But the investigation envisaged in Section 202 is different from the investigation contemplated in Section 156 of the Code."

10. It is, thus, abundantly clear that in view of law laid down by the Division Bench of this Court in **Sukhwasi (supra)**, it cannot be said that a Magistrate, while entertaining an application filed under Section 156 (3) Cr.P.C. cannot treat the same to be a complaint.

11. In the aforesaid context, assistance can also be taken from a judgment rendered by this Court in **Smt. Neeb Devi vs. State of U.P. and Ors. 2010 Cri LJ 2354,** wherein a challenge was made to an order passed by the Magistrate treating the application moved under Section 156 (3) Cr.P.C. as a complaint. In **Smt. Neeb Devi (supra)**, in paragraph nos.6, 7 & 8 it has been observed as under :

"6. I have considered over the respective arguments. In this reference a Full Bench decision of this High Court in Ram Babu Gupta v. State of U.P., 2001 (43) ACC 50 : (2001 All LJ 1587) may be referred in which the Hon'ble High Court held as under:

"Coming to the second question noted above, it is to be at once stated that a provision empowering a Court to act in a particular manner and a provision creating a right for an aggrieved person to approach a Court or authority, must be understood distinctively and should not be mixed up. While sections 154, 155, sub-sections (1) and (2) of 156 Cr. P.C. confer right on an aggrieved person to reach the police, 156(3) empowers a Magistrate to act in a particular manner in a given situation. Therefore, it is not possible to hold that where a bare application is moved before Court only praying for exercise of powers under Section 156(3) Cr. P.C. it will remain an application only and would not be in the nature of a complaint. It has been noted above that the Magistrate has to always apply his mind on the allegations in the complaint where he may use his powers under Section 156(3) Cr.

P.C. In this connection, it may be immediately added that where in an application, a complaint states facts which constitute cognizable offence but makes a defective prayer, such an application will not cease to be a complaint nor can the Magistrate refuse to treat it as a complaint even though there be no prayer seeking trial of the known or unknown accused. The Magistrate has to deal with such facts as constitute cognizable offence and for all practical purposes even such an application would be a complaint."

7. Moreover, this court in the case of ***Yogendra Singh v. State of UP, 2005 (51) ACC 890 : (2005 All LJ 1518) (Alld),*** *has held that application filed under Section 156(3) Cr. P.C. can be treated as complaint under Section 200 Cr. P.C. and no separate complaint is required to be filed.*

8. In the case of ***Joseph Mathuri @ Vishveswaranand v. Swami Sachchidanand Harishakshi, 2001 (Suppl) ACC 957 (SC),*** *the application was moved by the complainant under section 156(3) Cr. P.C. before the Magistrate for directing the police to register the case against the appellant. In that matter Hon'ble Apex Court has held that there was nothing wrong if the application was directed to be treated as complaint."*

12. In view of what has been discussed above, the impugned order passed by learned Additional Civil Judge (J.D.), Court No.7/Judicial Magistrate, Agra, whereby he has treated the application filed under Section 156 (3) Cr.P.C. as a complaint, cannot be said to be illegal. No material irregularity has been committed by the learned trial Court while passing the impugned order either. Therefore, the present revision lacks merit an

13. In view of the aforesaid discussion, the present revision is **dismissed.**

(2022)01ILR A587
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.01.2022

BEFORE

THE HON'BLE OM PRAKASH TRIPATHI, J.

Criminal Revision No. 2921 of 2018
connected with
Criminal Revision No. 2922 of 2018

Pratima Singh ...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Rajiv Lochan Shukla, Sri Anand Pati Tiwari, Sri Chandra Shekhar Rai, Sri Ravi Kant Shukla

Counsel for the Opposite Parties:
A.G.A., Sri Suresh Chandra Pandey

A. Criminal Law-Code of Criminal Procedure,1973-Section 397/401, 125-enhancement of maintenance-husband is unemployed-Hence, maintenance cannot be enhanced-trial court rightly appreciated the ground of maintenance and evidence.(Para 1 to 13)

The revision is dismissed. (E-6)

List of Cases cited:

1. Rajnesh Vs Neha & anr. (2021) 2 SCC 324

2. Kurvan Ansari @ Kurvan Ali & anr. Vs Shyam Kishore Murmu & anr.,Civil Appeal No. 6902 of 2021

3. Bina Devi Vs St. of U.P. (2010) SCC Online All 236

(Delivered by Hon'ble Om Prakash Tripathi, J.)

1. Heard learned counsel for the revisionist, learned counsel for opposite party no. 2 and learned AGA for the State.

2. Criminal Revision No. 2921 of 2018 has been preferred against the order dated 18.04.2016 passed by the learned Principal Judge, Family Court, Mirzapur in Miscellaneous Case No. 220 of 2014 (Pratima Singh Vs. Pankaj Singh @ Dablu Singh), under Section 125 Cr.P.C, Police Station Kachhawan, District Mirzapur, whereby the learned court has rejected the prayer of revisionist for grant of maintenance of Rs.8000/- per month from opposite party no. 2 and has granted monthly maintenance of Rs.2000/- per month from the date of order.

3. Criminal Revision No. 2922 of 2018 has been preferred against the order dated 18.04.2016 passed by the learned Principal Judge, Family Court, Mirzapur in Miscellaneous Case No. 220 of 2014 (Pratima Singh Vs. Pankaj Singh @ Dablu Singh), under Section 125 Cr.P.C, Police Station Kachhawan, District Mirzapur, whereby, the learned trial court has allowed the maintenance of Rs.2000/- per month to the opposite party no. 2 from the date of order.

4. As both the revisions have been preferred against the order dated 18.04.2016, so both the revisions are decided by a common judgment.

5. The main grounds for the Criminal Revision No. 2921 of 2018 is that impugned order is illegal arbitrary and against the evidence on record. Revisionist has no source of income and she is unable to maintain herself and is totally dependent on her parental family. Opposite Party No. 2 was earning Rs.15,000/- per month by doing a private job in Delhi. On the basis of surmises and conjectures, trial court has fixed the income of opposite party no. 2 as Rs.6000/- per month. Opposite party no.2 is a graduate and was working in a private job. Notional income of Rs.6000/- per month has been fixed without any basis. No distinction has been drawn in respect of skilled and unskilled labour. Revisionist has always been and presently desirous to live with opposite party no. 2 as his wife and it is opposite party no. 2 who is not willing to keep and maintain the revisionist legally wedded wife. Maintenance amount is too less. Maintenance amount should be enhanced.

6. The main ground for Criminal Revision No. 2922 of 2018 is that impugned order is illegal, arbitrary and against the weight of evidence on record. Revisionist has no source of income and was unable to maintain himself and is totally dependent on his parental family. Learned court below has clearly ignored the fact that opposite party no. 2 was earning Rs.5000/- per month by doing private job as sewing, embroidering and beauty parlour. In her statement admitted by opposite party no. 2 that revisionist is already graduate and unemployed and also stated she had no knowledge regarding income of the revisionist and also stated that she has not filed any case for maintenance, same was not considered by the court below. Income of the revisionist of Rs.6000/- per month fixed is illegally.

7. From the perusal of impugned order, it is admitted fact that Pratima Singh is legally wedded wife of Pankaj Singh.

8. The main point argued before this Court is that amount of maintenance of Rs.2000/- per month is very meagre whereas, the other side submitted that it is beyond the capacity of the husband as he is unemployed and not an earning hand. On the basis of evidence on record, trial court had adjudicated that husband of the revisionist Pratima Singh is not doing any service but he has agriculture farming, he is a young man and on the basis of daily wage Rs. 200/- per day is Rs.6000/- assessed the monthly income of the husband and keeping in mind the economical and social status of the parties Rs.2,000/- per month awarded as maintenance by the husband to the wife. The averment alleged by Pankaj Singh that revisionist is working in sewing, embroidering and beauty parlour and earning Rs.5000/- per month. Her father has 10 bigha kheti and is a Postman earning Rs.7000/- per month but such fact was not alleged even in examination-in-chief of Pankaj Singh. So, this fact is not proved and court has come to conclusion that wife is unable to maintain herself. Wife is living at the house of his father i.e. her parental home from 24.03.2010, she is a graduate lady and not doing any service and no source of income, unable to maintain herself. Revisionist Pratima Singh is ready to reside with her husband but husband is not ready to reside with her because she has lodged an FIR under Section 498A IPC against him and his father and in the said case, they were detained in jail. Revisionist's husband is the only son of his father. It is also submitted by the husband that his mother is suffering from cancer and she was under treatment. The husband has said in his statement that wife had filed a case against him and his father for which he was detained in jail, so he refused to reside with her. Service of Pankaj Singh in Delhi through private job is also not proved.

9. Learned counsel for the revisionist also submitted the order of Ministry of Labour and Employment dated 30.09.2016, 19.09.2013, in which, daily wages of the skilled and unskilled persons has been classified. This is a revision, revisional Court has very limited powers only to adjudge the illegality and impropriety of the impugned order and has no power to re-appreciate the evidence. Learned trial court has rightly adjudicated amount of maintenance as Rs.2000/- per month. So it is not proper to enhance the amount of maintenance from Rs.2000/- to Rs.8000/- per month as the husband is unemployed and has limited earning. So far as the submission of the husband that maintenance amount of Rs.2000/- per month is very excessive and liable to be set aside is also not tenable because keeping in mind the present inflation hike price of the goods, it is very difficult to manage even fooding of the revisionist. Thus, the maintenance amount of Rs.2000/- per month is not liable to be minimized or enhanced.

10. The next submission before this Court is that maintenance has been passed to be provided from the date of the order i.e. 18.04.2016. The trial court has emphasized that this petition for maintenance has been rejected on 16.07.2014 against which revision has been filed before this Court. Notice issued to opposite party no.2, opposite party no.2 had submitted his objection promptly. In fact application for maintenance has been filed initially as Misc. Case No. 91 of 2010 before Munsif Mirzapur on 12.08.2010. Application was dismissed ex-parte on

16.07.2014, in revision, the impugned order was set aside. This shows that the journey of the maintenance application started from 12.08.2010 and up till now no amount of maintenance has been paid to the revisionist, which is very disgraceful.

11. Learned counsel appearing for Pratima Singh submitted that in ex-parte order dated 05.04.2011, Rs.2500/- awarded as maintenance per month, although this order has been set aside, later on, being ex-parte will not help Pratima Singh.

12. Learned counsel appearing for revisionists has relied upon the following judgments of the Supreme Court which are as under :

i.) Rajnesh vs. Neha and Another (2021) 2 SCC 324

ii.) Kurvan Ansari @ Kurvan Ali & Anr. Vs. Shyam Kishore Murmu & Anr. Civil Appeal No. 6902 of 2021 SC decided on 16th November, 2021, in which, claim was awarded from the date of petition in a motor accident claim. The facts of the said case is not similar to this case.

i**ii.) In Bina Devi Vs. State of UP 2010 SCC OnLine All 236**. The court had held that maintenance is to be paid from the date of application, the court must record reasons. If the order is silent, it will be effective from the date of order, for which reasons need not be recorded. The Court held that Section 125(2) Cr.P.C is prima facie clear that maintenance shall be payable from the date of the order. Thus, this Court is of the view that maintenance should be paid from the date of the order not from the date of application.

13. On the basis of above discussion, this revisional court is of the opinion that evaluation of finding of the trial court is not suffering from any illegality manifest error. Trial court has not overlooked the grounds of maintenance and evidence, as such, no interference is called for in the impugned order by this revisional court. Both the revisions are devoid of merit and is liable to be dismissed.

14. Both Criminal Revision No. 2921 of 2018 and Criminal Revision No. 2922 of 2018 are dismissed and impugned order dated 18.04.2016 is confirmed.

(2022)01ILR A590
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.12.2021

BEFORE

THE HON'BLE SYED AFTAB HUSAIN RIZVI, J.

Criminal Revision No. 3150 of 2021

Firoz ...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Rakesh Kumar Verma

Counsel for the Opposite Parties:
A.G.A., Sri Mukesh Joshi

A. Criminal Law -Code of Criminal Procedure,1973-Section 397/401 & Negotiable Instrument Act,1881-Section 138-applellate court dismissed the appeal and has also cancelled the bail granted to the appellant-accused during the pendency of appeal-accused granted bail subject to condition that he will deposit 50% of the amount-After getting released he moved an application for modification of order which was rejected-appellate court dismissed the appeal simply on the

ground that accused failed to comply the order-appeal has not been decided on merits-the condition of depositing 50% of the amount of fine was imposed in bail during appeal, so the appeal itself cannot be dismissed on this ground-the order dismissing the appeal suffers from manifest illegality and cannot be sustained.(Para 1 to 8)

The revision is allowed. (E-6)

(Delivered by Hon'ble Syed Aftab Husain Rizvi, J.)

1. Heard learned counsel for the revisionist and learned A.G.A. for the State-respondent.

2. This Criminal Revision has been filed against the impugned judgment and order dated 27.10.2021 passed by learned Additional Sessions Judge, Court No.10, Moradabad in Criminal Appeal No.31 of 2021 (Firoz Vs. Mohd. Irfan & Others) arising out of Case No.7723 of 2017 (Ifran Vs. Firoz) under Section 138 of N.I. Act, Police Station- Kanth, District- Moradabad. By the impugned judgment and order, learned Appellate Court has dismissed the appeal and has also cancelled the bail granted to appellant-accused during the pendency of appeal.

3. In brief the facts of the case are that on the complaint of opposite party no.2 revisionist(accused) was tried under Section 138 of N.I. Act in complaint case no.7723 of 2017 (Ifran Vs. Firoz). After conclusion of the trial revisionist(accused) was held guilty for charge under Section 138 of N.I. Act and convicted and sentenced to two years simple imprisonment and fine of Rs.1,30,000/- vide judgment and order dated 24.03.2021. It was also directed that out of the fine, complainant will be entitled to receive Rs.1,25,000/- as compensation and remaining Rs.5,000/- will be deposited in the State Head as fine. Aggrieved by the aforesaid judgment and order of conviction the revisionist(accused) filed a Criminal Appeal No. 31 of 2021. The learned Appellate Court admitted the appeal and enlarged the revisionist (accused) on bail subject to condition that he will deposit half of the amount imposed as fine within a month. Thereafter, revisionist (accused) moved an application dated 25.05.2021 before the Appellate Court for modification of the order dated 12.05.2021 to the extent that a direction be issued to deposit 20% of amount of fine instead of 50%. This application was dismissed by the Appellate Court vide order dated 19.07.2021 and matter was posted for hearing on 04.08.2021. By the impugned order dated 27.10.2021 the Appellate Court dismissed the criminal appeal on the ground that appellant (accused) has failed to comply the order dated 12.05.2020 and deposit half amount of fine.

4. Learned counsel for the revisionist contended that in a similar matter between the same parties, the Appellate Court while admitting the appeal and enlarging the accused(appellant) on bail has directed to deposit 20% of amount of fine but in the present case the Appellant Court has given a direction to deposit 50% of amount of fine. The appellant moved an application before the Appellate Court to modify the order in accordance with the order passed in other Criminal Appeal No. 32 of 2021 but the learned Appellate Court without properly considering the matter rejected the application. Learned counsel for the appellant further contended that learned

Appellate Court has also dismissed the appeal on the ground that 50% of amount of fine as directed has not been deposited, without affording any opportunity to the appellant to submit arguments on the merits of the appeal, hence the impugned order is arbitrary and illegal. Learned counsel also submitted that revisionist(accused) is ready and willing to deposit 50% of the amount of fine as directed by the Appellate Court vide order dated 12.05.2021.

5. Learned counsel for the opposite party no.2 submitted that revisionist(accused) was enlarged on bail subject to condition that he will deposit 50% of the amount of fine within a month but after being set at liberty instead of depositing fine while enjoying liberty he moved an application for modification of the aforesaid order just to linger the matter. This application was also rejected by the Appellate Court on 19.07.2021 but even then the revisionist(accused) has not made any compliance of the order dated 12.05.2021 and misused his bail. Learned counsel further contended that as revisionist(accused) is not in jail, his prayer for bail cannot be considered..

6. It is undisputed that vide order dated 12.05.2021 revisionist(accused) was admitted to bail subject to condition that he will deposit 50% of the amount of fine within a month. After getting released the revisionist(applicant) moved an application before the Appellate Court to modify the aforesaid order which was rejected. It is also clear from the perusal of the impugned order that the Appellate Court has dismissed the appeal simply on the ground that accused/appellant has failed to comply the order dated 12.05.2021 and to deposit amount of fine as directed. The appeal has not been heard and decided on merits. The condition of depositing 50% of the amount of fine was imposed in bail during appeal, so the appeal itself cannot be dismissed on this ground. At the most, Appellate Court can do was to cancel his bail but the learned Appellate Court has dismissed the appeal on this ground. So, the impugned order dismissing the appeal suffers from manifest illegality and cannot be sustained. The revision is liable to be allowed.

7. Considering the submissions of learned counsel for the revisionist that he is ready to deposit 50% of the amount of fine it is directed that if within 15 days from today the revisionist (accused) appears before the Appellate Court and shows his willingness to deposit the amount in pursuance of the order dated 12.05.2021 the Appellate Court will permit him to deposit the amount of fine. Failing which, the Appellate Court may consider for cancellation of his bail during the pendency of the appeal.

8. The Criminal Revision is **allowed** and order dated 27.10.2021 is set aside. The Appellate Court shall restore the appeal to its original number and after affording opportunity of hearing to the parties will decide the criminal appeal in accordance with law.

(2022)01ILR A592
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 16.12.2021

BEFORE

THE HON'BLE J.J.MUNIR, J.

First Appeal From Order No. 169 of 2019

Avadh Ram Shukla Chela of Late Nirmal Kumar Panigrahi ...Appellant

Versus

Viraganand Chela of Sri Sita Ram Das Onkar Nath & Anr. ...Respondents

Counsel for the Appellant:

Sri Rakesh Kumar Srivastava, Jyostana Srivastava

Counsel for the Respondents:
Sri Jai Prakash Singh, Mayank Pathak

A. Civil Law -Indian Succession Act, 1925-Section 372, 384 & 388-challenge to-succession certificate-certificate granted in favour of first respondent who entitles to receive a sum of Rs. 42,07,656.82 that was property of deceased-appellant contests the claim of first respondent in appeal u/s 384 of the Act-the Act is a self contained Code-succession certificate, its grant, refusal or revocation, are all remedies spelt out by the Act-Section 388 of the Act is not governed by the general scheme of division of original and appellate jurisdiction under the Code of Civil Procedure-Part-X generally confers original jurisdiction on the District Judge u/s 371 of the Act and postulates an appeal to the High Court u/s 384 of the Act-Section 388 of the Act carves out an exception, empowering the State Government to invest original jurisdiction of the District Judge to grant a succession certificate with a Court of a grade inferior to the District Judge, who would then exercise functions of a District Judge-It is explicit that wherever the jurisdiction of the District Judge under Part-X is invested by the State Government in a Court inferior to the District Judge, the appeal envisaged under section 384(1) of the Act would lie to the District Judge and not the High Court-Thus, the appeal does not lie to this Court and the forum of appeal is not governed by the value of the subject matter of succession, or the valuation of the succession petition-Appeal is not cognizable by this Court, but by the District Judge.(Para 1 to 21)

The appeal is disposed of. (E-6)

List of Cases cited:

1. Prem Chand Vs Sunil Kumar & ors. (1990) AWC 593 All

2. Dy. Inspector General, Group Centre, C.R.P.F. Vs Smt Rakesh Devi & ors.

(Delivered by Hon'ble J.J. Munir, J.)

1. Heard Mr. Rakesh Kumar Srivastava, learned Counsel for the appellant and Mr. D.K. Pathak, learned Senior Advocate assisted by Mr. Mayank Pathak, learned Counsel appearing on behalf of the first respondent.

2. A succession certificate has been granted in favour of respondent no. 1 by the Civil Judge (Senior Division)/ FTC, Faizabad under Section 372 of the Indian Succession Act, 1925 (for short, 'the Act'). The succession certificate aforesaid, granted vide order dated 18.3.2019, entitles the first respondent to receive a sum of Rs. 42,07,656.82 that was property of the deceased Nirmal Kumar Panigrahi. The appellant, who contests the claim of the first respondent to the grant of succession, has preferred this appeal under Section 384 of the Act.

3. A preliminary objection has been raised by Mr. D.K. Pathak, learned Senior Advocate assisted by Mr. Mayank Pathak, learned Counsel appearing on behalf of the first respondent to the effect that this appeal is not cognizable by this Court, but by the learned District Judge, in view of the proviso to sub-section (2) of Section 388 of the Act.

4. Learned Counsel for the appellant, on the other hand, submits that the valuation of the succession petition under

Section 372 of the Act is Rs. 42,07,656.82. He submits, on the strength of a Notification dated 05.02.2016 (for short, 'the Notification'), issued by this Court under sub-section (1)(b) of Section 21 of the Bengal, Agra and Assam Civil Courts Act, 1887 as amended by the U.P. Civil Laws Amendment Act, 2015, that an appeal from a decree or order not only in an original suit but in any proceeding, where the decree or order was made before or after the publication of the Notification and the value of the suit does not exceed Rs. 25 lacs, would lie to the District Judge. He submits that the consequence of this notification is that in all matters, where the value of the original suit or other proceedings decided by a Court inferior to that of the District Judge, is above Rs. 25 lacs, the appeal would lie to the High Court. It is, therefore, urged that the present succession petition and the proceedings arising therefrom, even if not a suit, falls within the definition of 'proceedings', where the decree or order is made and its valuation exceeds Rs. 25 lacs. As such, by dint of Section 21(1)(b) of the Bengal, Agra and Assam Civil Courts Act, 1887 as amended by the U.P. Act No. 14 of 2015 and the Notification of this Court dated 05.02.2016, the order impugned passed by the learned Civil Judge is appealable to this Court and not the District Judge.

5. Succession certificates are governed by Part X of the Act and Sections 371 and 372 of the Act provide:

"371. Court having jurisdiction to grant certificate.--The District Judge within whose jurisdiction the deceased ordinarily resided at the time of his death, or, if at that time he had no fixed place of residence, the District Judge, within whose jurisdiction any part of the property of the deceased may be found, may grant a certificate under this Part.

372. Application for certificate.--(1) Application for such a certificate shall be made to the District Judge by a petition signed and verified by or on behalf of the applicant in the manner prescribed by the Code of Civil Procedure, 1908, for the signing and verification of a plaint by or on behalf of a plaintiff, and setting forth the following particulars, namely:--

(a) the time of the death of the deceased;

(b) the ordinary residence of the deceased at the time of his death and, if such residence was not within the local limits of the jurisdiction of the Judge to whom the application is made, then the property of the deceased within those limits;

(c) the family or other near relatives of the deceased and their respective residences;

(d) the right in which the petitioner claims;

(e) the absence of any impediment under Section 370 or under any other provision of this Act or any other enactment, to the grant of the certificate or to the validity thereof if it were granted; and

(f) the debts and securities in respect of which the certificate is applied for.

(2) If the petition contains any averment which the person verifying it knows or believes to be false, or does not

believe to be true, that person shall be deemed to have committed an offence under Section 198 of the Indian Penal Code.

(3) Application for such a certificate may be made in respect of any debt or debts due to the deceased creditor or in respect of portions thereof."

6. Section 384 of the Act, which is about an appeal from orders granting succession, refusing or revoking a certificate, provides:

"384. Appeal.--(1) Subject to the other provisions of this Part, an appeal shall lie to the High Court from an order of a District Judge granting, refusing or revoking a certificate under this Part, and the High Court may, if it thinks fit, by its order on the appeal, declare the person to whom the certificate should be granted and direct the District Judge, on application being made therefor, to grant it accordingly, in supersession of the certificate, if any, already granted.

(2) An appeal under sub-section (1) must be preferred within the time allowed for an appeal under the Code of Civil Procedure, 1908.

(3) Subject to the provisions of sub-section (1) and to the provisions as to reference to and revision by the High Court and as to review of judgment of the Code of Civil Procedure, 1908, as applied by Section 141 of that Code, an order of a District Judge under this Part shall be final."

7. A conjoint reading of Sections 371, 372 and 384 of the Act would show that the original jurisdiction to entertain and decide a petition for the grant of a succession certificate has been conferred by the Act upon the District Judge, within whose jurisdiction, the deceased ordinarily resided at the time of his death, and if he has no determined place of residence, the District Judge, within whose jurisdiction, any part of his property, may be found.

8. The order of the District Judge granting, refusing or revoking a succession certificate is appealable to this Court under the Act. Section 388 of the Act, however, empowers the State Government by Notification in the Official Gazette to invest any Court, inferior in grade, to a District Judge with power to exercise the functions of a District Judge under Part X. Section 388 of the Act reads:

"388. Investiture of inferior Courts with jurisdiction of District Court for purpose of this Act.--(1) The State Government may, by notification in the Official Gazette, invest any Court inferior in grade to a District Judge with power to exercise the functions of a District Judge under this Part.

(2) Any inferior Court so invested shall, within the local limits of its jurisdiction, have concurrent jurisdiction with the District Judge in the exercise of all the powers conferred by this Part upon the District Judge, and the provisions of this Part relating to the District Judge shall apply to such an inferior Court as if it were a District Judge:

Provided that an appeal from any such order of an inferior Court as is mentioned in sub-section (1) of Section 384 shall lie to the District Judge, and not to the

High Court, and that the District Judge may, if he thinks fit, by his order on the appeal, make any such declaration and direction as that sub-section authorises the High Court to make by its order on an appeal from an order of a District Judge.

(3) An order of a District Judge on an appeal from an order of an inferior Court under the last foregoing sub-section shall, subject to the provisions as to reference to and revision by the High Court and as to review of judgment of the Code of Civil Procedure, 1908, as applied by Section 141 of that Code, be final.

(4) The District Judge may withdraw any proceedings under this Part from an inferior Court, and may either dispose of them or transfer them to another such Court established within the local limits of the jurisdiction of the District Judge and having authority to dispose of the proceedings.

(5) A notification under sub-section (1) may specify any inferior Court specially or any class of such Courts in any local area.

(6) Any Civil Court which for any of the purposes of any enactment is subordinate to, or subject to the control of, a District Judge shall, for the purposes of this section, be deemed to be a Court inferior in grade to a District Judge."

9. The State Government, in exercise of powers under sub-section (1) of Section 388 of the Act, have issued a notification investing all Civil Judges in the State (which would now bear reference to the Civil Judge of the Senior Division) with power to exercise the functions of the District Judge under Part X of the Act.

10. The relevant Notification published in the U.P. Gazette, dated March 19, 1955 reads:

"Judicial Deptt. no. 4516(i)/VII-900(8)-53, dated March 11, 1955] 33 [Published in the U.P. Gazette, dated March 19, 1955, Part I, p. 341

In supersession of all previous notifications on the subject, and in exercise of the powers conferred by sub-section (1) of Section 388 of the Indian Succession Act, 1925 (Act XXXIX of 1925), the Governor of Uttar Pradesh is pleased to invest all Civil Judges in the State with power to exercise the functions of a District Judge under Part X of the said Act, within the local limits of their respective jurisdiction as Civil Judge."

11. There is another notification on the subject also issued on March 19, 1955. It reads:

"Judicial Deptt.no.4516(iv)/VII-900(8)-53, dated March 11, 1955] 36 [Published in the U.P. Gazette, dated March 19, 1955, Part I, p. 342

In supersession of all previous notifications on the subject, and in exercise of the powers conferred by sub-section (1) of Section 388 of the Indian Succession Act, 1925 (Act XXXIX of 1925), the Governor of Uttar Pradesh is pleased to invest all Munsifs in the State with power to exercise the functions of a District Judge under Part X of the said Act, within the local and pecuniary limits of their respective jurisdiction as Munsifs."

12. By the later Notification, powers of the District Judge under Part X of the

Act have been invested by the State Government with all Munsifs in the State within the local and pecuniary limits of their respective jurisdictions. It must be remarked here that Munsifs have since long been re-designated as Civil Judges of the Junior Division and any reference to a Munsif would now bear reference to Civil Judges of the Junior Division.

13. The Notification issued by the High Court on 5th February, 2016, whereon the learned Counsel for the appellant Mr. Rakesh Kumar Srivastava heavily places reliance, reads:

"HIGH COURT OF JUDICATURE AT ALLAHABAD

Notification No. 35/IVg-27, Dated: Allahabad: 05.02.2016

In exercise of the powers conferred by sub-section 1(b) of Section 21 of the Bengal, Agra and Assam Civil Courts Act, 1887 as amended by the Uttar Pradesh Civil Laws (Amendment) Act, 2015 (U.P. Act No. 14 of 2015), the High Court is pleased to direct that an appeal from a decree or order of a Civil Judge where the value of the Original suit in which, or in any proceeding arising out of which the decree or order was or is made whether instituted or commenced before or after the date of publication of this notification in Official Gazette did not or does not exceed twenty five lakhs rupees for purposes of filing appeals shall lie to the District Judges.

By order of the Court,
(Sheo Kumar Singh-I)
Registrar General

No. 2289 /IVg-27 Allahabad Dated 05.02.2016"

14. The thrust of the submission of Mr. Srivastava is that the Forum of appeal, after amendment of sub-section (1) of Section 21 of Bengal, Agra and Assam Civil Courts Act, 1887, would be this Court from an order of the Civil Judge (Senior Division) granting a succession certificate, where the valuation of the petition is Rs. 25 lacs or more. He emphasizes that the pecuniary limitation on the jurisdiction of the District Judge to hear appeals from the decrees or the orders made by the Civil Judge (Senior Division) is limited to the value where it does not exceed Rs. 25 lacs. All other decrees and orders would be appealable to this Court, if the Civil Judge passes them in suits or proceedings where the value exceeds Rs. 25 lacs. It emphasized that this is not confined to suits alone, but any other proceedings where the Civil Judge (Senior Division) passes a decree or order, whether instituted or commenced before or after publication of Notification dated 05.2 2016.

15. This Court must remark that the submission of learned Counsel for the appellant is based on a misreading of the Notification. The clear phraseology of the Notification shows that it bears reference to original suits, wherein an order or decree is made or in any proceedings arising from the suit where the decree or order is made. The other part or class of cases bear reference to proceedings, arising out of suits and not statutory proceedings under Special Acts. The Notification has no application, in the opinion of this Court, to a petition for succession under the Act which are statutory proceedings and by no

means, a suit. A suit is well-known to be a proceeding that commences on the presentation of a plaint. It is brought to enforce civil rights of a party, where there is no remedy provided by Statute or is not barred by law, expressly or implicitly. A succession petition, by contrast, is a statutory proceeding postulated under the Act, which is a special statute, creating rights and liabilities, and also providing remedies. Succession certificate, its grant, refusal or revocation, are all remedies spelt out by the Act and by no means suits, which the Civil Court is entitled to take cognizance of in the exercise of its inherent jurisdiction to try all causes of a civil nature.

16. Quite apart, the Act is a self contained Code and Section 388 of the Act is not governed by the general scheme of division of original and appellate jurisdiction under the Code of Civil Procedure. Part-X generally confers original jurisdiction on the District Judge under Section 371 of the Act and postulates an appeal to the High Court under Section 384 of the Act. Section 388 of the Act carves out an exception, empowering the State Government to invest original jurisdiction of the District Judge to grant a succession certificate with a Court of a grade inferior to the District Judge, who would then exercise functions of a District Judge under Part-X. The proviso to sub-section (2) of Section 388 of the Act makes it explicit that wherever the jurisdiction of the District Judge under Part-X is invested by the State Government in a Court inferior to the District Judge, the appeal envisaged under sub-section (1) of Section 384 of the Act would lie to the District Judge and not the High Court. The emphasis in the phraseology of the proviso where it says "*and not to the High Court*" makes it pellucid that wherever jurisdiction of the District Judge is invested in a Court inferior in grade to the District Judge, the appeal envisaged under Section 384 (1) of the Act would lie to the District Judge and not to this Court. It would be noticed that the forum of appeal, in case of conferment of powers of a District Judge on a Court of inferior jurisdiction, is not subject to any kind of a clause about valuation of the succession petition. It is free from valuation.

17. The dichotomy in the forum of appeal envisaged under Section 21(1)(b) of the Bengal, Agra and Assam Civil Courts Act, 1887 between the District Judge and the High Court dependent upon valuation of the suit or other proceedings arising out of the suits tried by the Courts inferior to the Court of the District Judge is foreign to the scheme of the Act. In this connection, reference may be made to the decision of a Division Bench of this Court sitting at Allahabad in **Prem Chand vs. Sunil Kumar and Others; 1990 AWC 593** All, where the same question that is involved here arose. In that case also, an appeal under Section 384 of the Act had been instituted before this Court against an order rejecting an application for revocation of the succession certificate granted to the respondents to the appeal and also an order extending the grant of succession certificate to some other assets. The preliminary objection taken was about the maintainability of the appeal, saying that the powers of the District Judge conferred on the Civil Judge under Section 388(1) of the Act was without reference to valuation of the claim vis-a-vis the forum of appeal.

18. The Division Bench upheld the objection and opined that in a case where powers under Section 388(1) of the Act to

grant or revoke succession certificate are conferred to a Court inferior to that of a District Judge, the forum of appeal envisaged is the District Judge and that is dehors the valuation of the petition. In **Prem Chand** *(supra),* it was held:

"3. Part X of the Succession Act deals with matters relating to grant of succession certificate and contains Sections 370 to 390 in that part. Under Section 372 an application for grant of a Succession Certificate ordinarily lies before the District Judge within whose territorial jurisdiction the deceased ordinarily resided or part of his property was situate. Section 384 deals with the forum where the appeal in such cases shall lie. It is, however, of significance that the section is prefaced with the words, 'subject' to other provisions of this part. Thus, although in the ordinary circumstances an appeal against order passed in proceedings in this Chapter shall lie to the High Court but this is hedged by the condition that there is no other provision contrary to this or which may provide otherwise.

4. Section 388 of the Act, however, lays down somewhat different provision, even if not contrary. The relevant part of the section may be extracted here as under:

"388(1). The State Government may, by notification in the Official Gazette, invest any Court inferior in grade to a District Judge with power to exercise the functions of a District Judge under this part.

(2) Any inferior Court so invested shall, within the local limits of its jurisdiction, have concurrent jurisdiction with the District Judge in the exercise of all the powers conferred by this Part upon the District Judge, and the provisions of this Part relating to the District Judge shall apply to such an inferior Court as if it were a District Judge:

Provided that an appeal from any such order of an inferior Court as is mentioned in sub-section (1) of Section 384 shall lie to the District Judge, and not to the High Court, and that the District Judge may, if he thinks fit, by his order on the appeal, make any such declaration and direction as that sub-section authorises the High Court to make by its order on an appeal from an order of a District Judge."

Thus where powers of the Distinct Judge under this part are conferred upon an inferior Court by a notification issued by the State Government, such" court shall exercise the powers of the District Judge so far as-Part X of the Act is concerned. An appeal against its orders instead of being filed before the High Court, will lie before the District Judge. In fact whatever powers the District Judge enjoys in this part after notification gets vested in the Civil Judge.

5. It is not disputed here, that a notification conferring powers of the District Judge on the Civil Judge has been issued and the proceedings out of which the present appeal arises had been disposed of by that Court in exercise of powers so conferred.

6. For the appellant, however, it was submitted that in view of amendment of Bengal, Area and Assam Civil Courts Act

1887, in this State an appeal to the High Court lies in all matters of civil nature where the valuation of the suit or proceeding was more than Rs. 20,000/-. Since the valuation of proceeding in this matter was admittedly more than Rs. 20,000/- the present appeal was cognizable by the High Court. This argument however, overlooks some crucial words occurring in the relevant provision of that Act. Chapter III of the 1887 Act deals with ordinary jurisdiction of the various kind of Civil Courts established under that Act While under Section 18 the pecuniary jurisdiction of the Court of District Judge and the Civil Judge extends to all suits of civil nature but subject only to the condition that the suit must be filed in the court of lowest grade (Section 15, C.P.C) Since Section 19 of the Act fixes the jurisdiction of the Court of Munsif at Rs. 5000/- (now Rs. 10,000/-) all suits or proceedings of a value more than that will ordinarily lie in the Court of the Civil Judge or the District Judge subject to the provision of any other Act then in force. Sections 20 and 21 then deal with forum where an appeal will lie against the order of the District Judge or Additional District Judge and from the order of the Civil Judge or the Munsif respectively. In the case of the former, appeal will lie to the High Court unless provided to the contrary in any other enactment. In the latter case the appeal shall lie to the District Judge if the valuation of the suit or proceeding be Rs. 20,000/- or less and to the High Court in other cases.

7. It is, however, significant to note that provision of Section 21 is qualified by the expresssion save as aforesaid." This means that Section 21 is in the nature of a corollary to Section 20.

8. Section 20 also is subject to an exception as would be clear from the expression "save as otherwise" provided by enactment for the "time being in force." Reading Sections 20 and 21 together leads to the irresistible conclusion that an appeal of the value of more than Rs. 20,000/- would lie before the District Judge if there be in force an enactment which provides otherwise. These provisions if read in the light of Section 388(2) proviso make it abundantly clear that in such cases an appeal shall lie to the District Judge despite what is set out in S. 21(1-A) of the Bengal, Agra and Assam Civil Courts Act, 1887. The view that we are taking substantially gets support from AIR 1960 Raj 9 Mst. Bhanwar Bai vs. Balmukund where, while interpreting Sections 384 and 388 of the Indian Succession Act the Court held as under:--

"It clearly follows from the combined operation of Section 388 and Section 384 that where an order within the meaning of Section 384 of the Act has been passed by a court inferior to that of the District Judge within the meaning of subsections (1) and (2) of Section 388 then an appeal from an order granting, refusing or revoking a certificate passed by such Judge shall lie to the District Judge and not to the High Court. It is true that an inferror court properly invested with jurisdiction to decide such cases by the State Government in accordance with sub-section (1) of Section 388 has concurrent jurisdiction with the District Court in so far as the exercise of all the powers conferred by this part of the Succession Act is concerned but this must be read subject to the provision to sub-section (2) of Section 388, which clearly provides that an appeal from any order of an inferior court falling within the scope of Section 384 of the Act can only lie to the District Judge and not to the High Court."

9. In view of what we have said above, we are of the opinion that there is substance in the preliminary objection raised and it must be upheld. The High Court will, therefore, have no jurisdiction to entertain the appeal as it ought to have been filed before the District Judge. In view of this we direct that the memo of this appeal be returned to the appellant for being presented before the competent court i.e the District Judge, Saharanpur."

19. The question again arose before a Division Bench of this Court at Allahabad in **Dy. Inspector General, Group Centre, C.R.P.F. vs. Smt. Rakesh Devi and others** decided on 27.07.2015, where their Lordships of the Division Bench, noticing the decision in **Prem Chand** *(supra)*, held:

"In compliance of the aforesaid order, office has submitted a report dated 13-05-2015 to the effect that in view of Section 371 of the Act, the District Judge has jurisdiction to grant succession certificate and First Appeal From Order lies before this Court and the Civil Judge has wrongly entertained the case issued succession certificate. However, the District Judge has submitted a report dated 15-04-2015 to the effect that the Civil Judge (Senior Division), Ghaziabad has jurisdiction to entertain the proceedings under Section 371 of the Act and an appeal against such order shall lie to the District Judge as provided under Section 388 of the Act. The District Judge in his report has placed reliance on the Notification No. 4516(i)VII-900(8)-53 dated March 11, 1955 & No. 4516(iv)/VII-900(8)-53 dated March 11, 1955 investing all Civil Judges in the State with power to exercise functions of a District Judge under Part X of the Act within local limits of the respect jurisdiction as Civil Judges. A Division Bench of this Court in the case of Prem Chand v. Sunil Kumar & others, 1990 A.W.C. 593 has held that in view of the notification issued by the State Government in exercise of powers under Section 388 of the Indian Succession Act investing Civil Judges with the power to exercise the functions of a District Judge under Part-X of the Act, it is the Civil Judge who has the power to entertain a proceeding and grant succession certificate and the appeal shall lie to the District Judge in view of proviso to Section 388."

20. Thus, there is not an iota of doubt that once jurisdiction to take cognizance of and decide a petition for the grant of a succession certificate is invested by the State Government in a Court inferior in grade to the District Judge, by virtue of the proviso to sub-section (2) of Section 388 of the Act, it is the District Judge alone who is competent to entertain and decide the appeal under Section 384(1) of the Act. The appeal does not lie to this Court and the forum of appeal is not governed by the value of the subject matter of succession, or the valuation of the succession petition.

21. Viewed in this perspective, it is held that this appeal is not conginzable by this Court, but by the District Judge. It is, accordingly, ordered that this appeal be returned to the appellant for presentation before the Court of competent jurisdiction. Since, an interim order was granted on 20.09.2019, while entertaining this appeal, directing parties to maintain *status quo*, it is provided that for a period of four weeks hence, parties shall maintain *status quo*.

22. Let the lower court records be returned to the District Judge, Faizabad, forthwith.

(2022)01ILR A602
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 14.12.2021 & 21.01.2022

BEFORE

THE HON'BLE J.J.MUNIR, J.

First Appeal From Order No.278 of 2019

U.O.I. ...Appellant
Versus
Dinesh Kumar & Anr. ...Respondents

Counsel for the Appellant:
Sri Prashant Kr. Srivastava

Counsel for the Respondents:
Sri Chandra Prakash Singh, Kavita Devi Verma, Sri Manish Kumar Srivastava

A. Civil Law -Railways Claims Tribunal Act,1987-Section 23 & 123(c)(2) r/w Section 124-A-Untoward accident-compensation-entitlement-Affidavit filed by claimants/Parents-claimants shows that deceased was travelling in train with ticket and died due to untoward incident of falling down from running train-Burden of proof whether deceased was bonafide passenger was on Railways-Testimony of AW-1 & aW-2 that unknown person was runover by the train-Claimants relied for documentary evidence upon copies of the Station Superintendent's memo, inquest report issued by Pradhan, police report and ration card-But the appellants relied on the Statutory Investigation Report carrying the DRM's report -Such contradictory testimony cannot be relied on-No evidence on record that deceased was crossing the railway track and was runover by train-Claimants entitled for compensation-tribunal directed payment of Rs. 8 lacs with interest at the rate of 9% per annum reckoned from the date of judgment until realisation within a period of ninety days-modification of judgement allowed to the extent that on the sum of compensation ordered to be paid by the Tribunal, interest shall be payable at the rate of 9% per annum after expiry of a period of ninety days from the date of judgment passed by the Tribunal till realizaiton, in the event the appellants fails to pay the aforesaid amount.(Paras 1 to 25)

The appeal is allowed partly. (E-6)

List of Cases cited:

1. U.O.I. Vs Rina Devi (2019) 3 SCC 572

2. U.O.I. thru G.M., Northern Railway Vs Smt. Gayatri Devi, FAFO No. 166 of 2018

(Delivered by Hon'ble J.J. Munir, J.)

The Union of India has appealed under Section 23 of the Railways Claims Tribunal Act, 19871 from a judgment of the Tribunal dated 15.03.2019, awarding compensation to the dependents of the victim of a railway accident.

2. The claimant-respondents Dinesh Kumar and Smt. Prem Lata instituted a claim under Section 16 of the Act against the Union of India, represented by the General Manager, North Central Railway, Allahabad seeking compensation for the death of their son, Laxmikant in a railway accident on 25.02.2012. It is the claimant-respondents' case that the deceased was travelling from Satna to Varanasi on 25.02.2012 on board the Tapti Ganga Express. As the train was moving between the Meja Road and Unchadih Railway Stations, the deceased accidentally fell off the train, sustaining grievous injuries. He succumbed to those injuries. It is the claimants' case that the deceased was

travelling on a second class railway ticket from Satna to Varanasi, that was lost from his person, in the course of the accident.

3. The appellants contested the claim, denying the fact that the deceased was a *bona fide* passenger on board train on the date of the incident or that he died in consequence of an accidental fall from the train while travelling as a *bona fide* passenger. It was emphasized that no First Information Report was lodged, reporting the loss of belongings and the journey ticket by the claimants. It was pleaded that the deceased was, in fact, run over by the train on the date of accident, where fabricated facts have been pleaded to set up a false claim. It was also pleaded by the appellant that no police panchnama or autopsy was put in by the claimants in the absence of which, the claimants must be held to have failed in discharging their evidential burden. It was also pleaded that the particulars of the incident set out in Paragraph No. 6 of the claim petition, did not attract the ingredients of Section 123(c)(2) read with Section 124-A of the Act. The Tribunal framed the following issues :

(i) Whether the deceased was a bona fide passenger of the train in question?

(ii) Whether the incident of death of the deceased falls under the ambit of an untoward incident, as defined under Section 123C(2) read with Section 124-A of the Railway Act, 1989?

(iii) Who are the dependents of the deceased?

(iv) To what relief?

4. The claimants, in support of their case, relied on the testimony of Dinesh Kumar, who has been described by the Tribunal as AW-1. He testified on affidavit. Another witness was Srinath, AW-2. He too testified on affidavit. Srinath was produced in Court and cross-examined. The claimant-respondents relied for documentary evidence upon copies of the Station Superintendent's memo, inquest report issued by the pradhan, the police report and ration card. The appellants, in support of their case, relied on the Statutory Investigation Report carrying the DRM's report.

5. Issue Nos. 1 and 2 were dealt with by the Tribunal together and it was held that the deceased was a bona fide passenger on board the train in question, and that his death occurred on account of an accident during course of the journey. It falls within the ambit of "untoward incident" under Section 123(c)(2) of the Act read with Section 124-A. On the third issue, it was held that the claimants were dependents of the deceased, being his father and mother. This finding was based on the certified copy of the ration card. The claimant-respondents, while answering Issue No. 4, were held entitled to receive in compensation from the appellant a sum of Rs. 8 lacs.

6. In consequence of the findings on the four issues, the petition was allowed, ordering the appellant to pay a sum of Rs. 8 lacs in compensation to the claimant-respondents. It was further ordered that the aforesaid sum of compensation be paid to the claimants within a period of nintey days of the date of receipt of a certified copy of the judgment, with interest at the rate of 9%

per annum from the date of judgment till realisation. There were ancillary directions issued about part disbursement of the awarded compensation, but that is not much material for the purpose of this appeal.

7. Heard Mr. Prashant Kumar Srivastava, learned Counsel for the appellant and Mr. Manish Kumar Srivastava, learned Counsel appearing for the claimant-respondents.

8. It was argued with much emphasis by Mr. Prashant Kumar Srivastava that the entire accident was a ploy to extort compensation from the appellant, whereas the deceased was not at all a *bona fide* passenger on board train. It is emphasized that the deceased was a native of Village Soraon, Post Office Meja Road, Police Station Meja, Prayagraj and was allegedly proceeding to Varanasi, when he fell off the train in the vicinity of his village. It is urged that the facts show that he was not at all a bona fide passenger, but a wanderer on the tracks, who was crushed under the wheels of the train. It is argued that the entire evidence does not suggest it to be an "untoward incident" covered under Section 123(c)(2) read with Section 124-A of the Act. It is emphasized by learned Counsel for the appellant that AW-1 Dinesh Kumar has said in his affidavit that neither the deceased purchased the railway ticket in his presence nor was he travelling with him on board train, when the deceased fell off on the date of accident. It is urged by learned Counsel for the appellant that the evidence of AW-1 is, therefore, of no worth. So far as AW-2 Srinath is concerned, it is argued that he has testified that the deceased purchased the railway ticket on 25.02.2012 in his presence, but the claimants have not produced any platform ticket or other evidence to show the truth of this witness's statement. It is argued that this witness has not said that he has seen the accident. There are fine contradictions pointed out by learned Counsel for the appellant to indicate unreliability of AW-2.

9. On the other hand, Mr. Manish Kumar Srivastava, learned Counsel for the claimant-respondents, has argued that there is convincing evidence to show that the deceased was a *bona fide* passenger on board the train in question and met with an accident while travelling as such. He submits that because the accident occurred close-by the deceased's native village, is no reason to disbelieve the otherwise cogent and convincing evidence that establish both the status of the deceased as a bona fide passenger on board train as well as the *factum* of his death in an untoward incident, while journeying on the train. He has invited the attention of the Court to the evidence of the witnesses and the documentary evidence, to which allusion would be made a little later.

10. This Court has carefully considered the submissions made by the learned Counsel appearing on both sides and perused the record. So far as the issue about the deceased being a *bona fide* passenger on board the train in question is concerned, there is a clear statement in the affidavit of AW-2 Srinath, that on 25.02.2012, the deceased, in the presence of the witness, purchased a railway ticket at Satna Railway Station, booking his passage to Varanasi. It is clearly said in the affidavit that after purchasing the railway ticket, the deceased boarded the Tapti Ganga Express at Satna for destination Varanasi. In the cross-examination, the credit of this witness has been sought to be shaken, with words elicited to the effect that he had

come to testify because he was a native of the same village as the deceased, and that the deceased's aunt was the Village Pradhan. There are some other words also elicited from the witness in his cross-examination, which show that he came to know of the incident after the deceased had been cremated. He has also said that the facts detailed in the affidavit had not been shared by him with anyone earlier. It is also noticed that under the grill of cross-examination, the witness has said that the place of incident is a kilometer away from the site, where it is shown.

11. It is on the edifice of these seemingly shaky utterances of the witness that the learned Counsel for the appellant much depends to impeach his credit. For one, the utterances of the witnesses during the cross-examination, in their nature, are not wholesome, from which any conclusion, either way, can be drawn. The reason is that the words in the cross-examination are inextricably connected to the questions, in reply to which, those words have been said. Bereft of the question, the answers do not make much sense either way.

12. The other aspect of the matter is that AW-1 is not a witness of the incident. He is a witness of the *factum* of purchase of the railway ticket by the deceased at Satna. There is hardly anything elicited from this witness, discrediting his categorical assertion in the affidavit, that the deceased purchased the railway ticket in the presence of this witness at Satna for destination Varanasi. Rather, in answer to a general question, impeaching him as an untrustful witness, AW-2 has clearly said that it is incorrect to say that he had come forward to testify falsely. Therefore, this Court is in agreement with the Tribunal, that the testimony of AW-2 Srinath to the effect that the deceased had boarded the train at Satna, after purchasing a ticket to Varanasi, remains unshaken. The Tribunal has rightly believed the evidence about the deceased being a bona fide passenger on board the train in question.

13. At this stage, reference may be made to the law in **Union of India v. Rina Devi2. In Rina Devi** *(supra)* the law relating to burden of proof regarding the victim being a bona fide passenger was laid down by the Supreme Court thus :

29. 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.**

(Emphasis by Court)

14. It would, thus, appear that once it is asserted on affidavit by the claimant that the deceased was travelling on a valid ticket, the burden would shift on the Railways, and the issue has to be decided on the basis of attending circumstances.

The facts here show that the railway ticket sanctifying the deceased's journey was not recovered from his person.

15. No other evidence has been led by the Railways to show that the deceased was not a *bona fide* passenger. This Court cannot ignore the fact that there is a solitary witness, that is to say, AW-2 Srinath, about the factum of purchase of the railway ticket by the deceased at Satna, but in the cross-examination, no question has been put to from him about that fact, which he has categorically testified to in his examination-in-chief on affidavit. Once this witness has not been confronted about the assertion in his affidavit that the deceased had purchased a railway journey ticket from Satna to Varanasi, it must be held that his assertion in the affidavit/examination-in-chief goes unchallenged. The mere fact that there was no recovery of the railway ticket would not lead to the conclusion that the deceased was not a *bona fide* passenger, as held in **Rina Devi** *(supra).*

16. This Court, therefore, records its agreement with the Tribunal on the point that the deceased was indeed a *bona fide* passenger on board the train in question on the fateful day.

17. About the other issue, whether the victim fell off the train and sustained such injuries, that led to his death, entitling the claimants to recover, the testimony of AW-1 Dinesh Kumar is not of much relevance. He is not an eye-witness of the accident and was also not a co-passenger with the deceased. No inference, therefore, about the accident, can be drawn on the basis of testimony of AW-1. What cannot be ignored, however, is the certificate of the Station Superintendent, Meja Road, dated 10.02.2013, which this Court has perused. It reads :

प्रमाणित किया जाता है कि लक्ष्मी कान्त शुक्ल पुत्र दिनेश कुमार शुक्ल की मृत्यु दिनांक 28/02/2012 को रेल दुर्घटना में गाड़ी नं0 डाउन ताप्ती गंगा एक्सप्रेस से रेल यात्रा के दौरान मेजा रोड रेल स्टेशन के पास सुबह 8 बजे ट्रेन से गिरने से हो गयी थी। KM No. DN 785/26 से 785/24 के बीच मेजा रोड से आर०आर० के बीच डाउन एडवांस सिगनल के बाहर गार्ड ताप्ती गंगा एक्सप्रेस ने बताया। S.O. मेजा को भी मेमो भेजा गया था।

18. In the opinion of this Court, this certificate is enough to establish the accident, which occurred during the course of a journey on board the train in question, where the deceased was a bona fide passenger. The report of the DRM dated 17.04.2015 about the accident is absolutely conjectural. It reads :

.....मृतक किसी थ्रू गाड़ी अर्थात मेजा स्टेशन पर बिना स्टापेज वाली गाड़ी पर बैठकर यात्रा कर रहा होगा तथा स्वयं की लापरवाही से चलता गाड़ी से उतरने का प्रयास किया होगा जिससे गिरकर मृत्यु हो गई। घटना में मृतक स्वयं जिम्मेदार है। रेलवे की कोई जिम्मेदारी परिलक्षित नहीं होती है। यदि मृतक निर्धारित स्थान पर बैठकर यात्रा करता तो उक्त घटना घटित नहीं होती।

19. There is absolutely no evidence to infer that the deceased tried to deboard the running train at Meja Road. Rather, the unchallenged testimony of AW-2, that the deceased had purchased a ticket from Satna to Varanasi, would go to show that he did not intend to detrain at Meja Road. If the appellant wished to prove the case that the deceased met with the accident while deboarding the train at Meja Road that was running through, it was the appellant's burden to establish it by suitable evidence,

say, an eye-witness account, about the incident. To the contrary, the memo of the Station Superintendent, Meja Road dated 10.02.2013 extracted hereinabove, does not suggest, in the least, that the deceased was attempting to deboard the train, while it was running through. The Station Superintendent, who is an officer of the Railway Establishment, with much experience and training, would have certainly mentioned in his memo the deceased's indiscretion of the kind that the DRM's report conjectures. The Station Superintendent would know well the consequences of not recording the fact about the deceased's indiscretion in attempting to deboard a running train. The tenor of the memo dated 10.02.2013 shows that the deceased fell off the train during movement, from which, the only reasonable inference is that it was a case of an accidental fall during the journey; not the result of a misadventure to deboard a train running through. Thus, in the opinion of the Court, the findings of the Tribunal on Issue Nos. 1 and 2 are unassailable, though for added reasons.

20. The other point that has been argued by Mr. Prashant Kumar Srivastava is that the accident occurred on 25.02.2012, whereas the prescribed amount of compensation in the schedule to the Railway Accidents and Untoward Incidents (Compensation) Rules, 19903 has been amended w.e.f. 01.01.2017 by a notification dated 22.12.2016. It is urged that the Tribunal, therefore, erred in awarding compensation in the sum of Rs. 8 lacs, which is the prescribed compensation under the amended schedule to the Rules of 1990. He submits that compensation in the higher sum can be awarded with regard to post-amendment accidents, and not for pre-amendment accidents. Here, the compensation has to be awarded, going by the unamended rules, which cannot be more than a figure of Rs. 4 lacs of substantive compensation. Mr. Prashant Kumar Srivastava's submissions on this score have been opposed by Mr. Manish Kumar Srivastava, who says that even in case of pre-amendment accidents, compensation in the sum of Rs. 8 lacs has to be awarded, where the decision is rendered on a date after the coming into force of the amendment.

21. The law laid down in Rina Devi (supra) propounds a rule that in case of pre-amendment accidents, the substantive compensation would be that which obtains on the date of accident. It would be Rs. 4 lacs. However, where the award is made after coming into force of the amendment, the entitlement to compensation is to be worked out in the manner for a pre-amendment accident, that Rs. 4 lacs would be substantive compensation and such interest accrued thereon is to be added, as considered reasonable from time to time. If the resultant figure is higher than the compensation payable on the date of award, that is the sum payable; the higher of the two sums of money is to be awarded. In this regard, in **Rina Devi**, it has been held :

19. Accordingly, we conclude that compensation will be payable as applicable on the date of the accident with interest as may be considered reasonable from time to time on the same pattern as in accident claim cases. If the amount so calculated is less than the amount prescribed as on the date of the award of the Tribunal, the claimant will be entitled to higher of the two amounts. This order will not affect the awards which have already become final and where limitation

for challenging such awards has expired, this order will not by itself be a ground for condonation of delay. Seeming conflict in Rathi Menon [Rathi Menon v. Union of India, (2001) 3 SCC 714, para 30 : 2001 SCC (Cri) 1311] and Kalandi Charan Sahoo [Kalandi Charan Sahoo v. South-East Central Railways, (2019) 12 SCC 387 : 2017 SCC OnLine SC 1638] stands explained accordingly. The four-Judge Bench judgment in Pratap Narain Singh Deo [Pratap Narain Singh Deo v. Srinivas Sabata, (1976) 1 SCC 289 : 1976 SCC (L&S) 52] holds the field on the subject and squarely applies to the present situation. Compensation as applicable on the date of the accident has to be given with reasonable interest and to give effect to the mandate of beneficial legislation, if compensation as provided on the date of award of the Tribunal is higher than unrevised amount with interest, the higher of the two amounts has to be given.

22. In the aforesaid perspective of the law, the impugned award being one made on 15.03.2019, that is post-amendment, the compensation in the sum of Rs. 8 lacs cannot be disputed by the appellants. Though, it must be remarked that the Tribunal has not shown a comparison of the two compensations post and pre-amendment, but in either case, it would not lead to a different result for the appellant. The compensation cannot be less than Rs. 8 lacs.

23. Now, there is a further question that has been agitated by learned Counsel for the appellant, and that is about reckoning of interest at the rate of 9% per annum from the date of award till realisation. He submits that going by the principal in **Rina Devi**, nothing beyond Rs. 8 lacs is payable. No doubt the Tribunal has directed payment of interest at the rate of 9% *per annum* on the compensation awarded, reckoned from the date of judgment until realisation, without providing for a waiting period after expiry whereof and persistent default by the appellant, interest would be payable over and above the sum of Rs. 8 lacs. The principle in **Rina Devi** is not to be understood in the manner that the appellant can pay the awarded compensation whenever they like and yet not be liable to pay interest. The question whether over and above the sum of Rs. 8 lacs, interest can be granted, and if payable, what would be the date from which it would be reckoned, was considered by a Division Bench of this Court in Union of India through **General Manager, Northern Railway v. Smt. Gayatri Devi4. In Gayatri Devi** *(supra)*, it was held:

In Rina Devi's case [supra] while dealing with grant of interest on compensation amount (issue no.4), the Apex Court held that interest can be awarded from the date of accident itself when the liability of the Railway arises upto the date of payment without any difference in the stages. The relevant paragraph reads as under:-

"As already observed, though this Court in Thazhathe Purayil Sarabi (supra) held that rate of interest has to be at the rate of 6% from the date of application till the date of the award and 9% thereafter and 9% rate of interest was awarded from the date of application in Mohamadi (supra), rate of interest has to be reasonable rate at par with accident claim cases. We are of the view that in absence of any specific statutory provision, interest can be awarded from the date of accident itself when the liability of the Railways arises upto the date of

payment, without any difference in the stages. Legal position in this regard is at par with the cases of accident claims under the Motor Vehicles Act, 1988. Conflicting views stand resolved in this manner."

As far as the case at hand is concerned, in view of the proposition of law as propounded in Rina Devi's [supra] it is necessary to calculate the total amount i.e. amount of compensation plus interest to ascertain whether the amount so calculated is less than the amount prescribed as on the date of the award. In the event the amount of compensation with interest was less than the amount prescribed on the date of award, then the amount which is higher is to be paid to the claimants.

For the reasons aforesaid, we are of the view that the ends of justice will be secured by awarding Rs. Eight lac in all as compensation to the claimants. **It may be added that provisions for compensating monetarily either under the Railways Act or Motor Vehicles Act is a beneficial piece of legislation and the purpose for award of interest is to put pressure on the relevant person not to delay in making the payment. In other words, when any amount is due to a creditor and the same is not paid by the debtor over a certain period, the creditor is deprived of the use of the said amount for the period during which the amount remains unpaid for which he is entitled to be compensated by way of payment of interest. Therefore, in the event the appellants fails to pay the aforesaid amount of Rs. Eight lacs within a period of 90 days, then interest @ 9% shall be payable till the date of actual payment.**

(Emphasis by Court)

24. In view of the principle laid down in **Gayatri Devi**, the direction to pay interest on the compensation awarded ought to be modified by ordering interest to be payable at the rate of 9% per annum post expiry of a period of ninety days from the date of judgment till realisation.

25. In the result, this appeal **succeeds** and stands ***allowed in part.*** The impugned judgment is **modified** to the extent that on the sum of compensation ordered to be paid by the Tribunal, interest shall be payable at the rate of 9% *per annum* after expiry of a period of ninety days from the date of judgment passed by the Tribunal till realization, if within the aforesaid period of time, the awarded compensation is not paid to the claimant or deposited with the Tribunal.

26. There shall be no order as to costs.

(Order on Misc. Application No. 5 of 2022)

The Court is convened via video conferencing.

This is an application, seeking to correct the date mentioned on the judgment and order passed in the present appeal, by substituting the date "December the 14th, 2021" with "November the 25th, 2021".

A perusal of the record, particularly, the Case Status Report from the Bench Secretary's records, shows that judgment in this case was passed on 25.11.2021, but, by typographical error, the date on the judgment is shown as December the 14th, 2021.

The application is ***allowed.***

In my judgment and order passed in this First Appeal from Order, at the foot of the judgment, for the date "**December the 14th, 2021**", the date "**November the 25th, 2021**" shall be read.

The order passed in this appeal stands corrected accordingly.

In any report of this judgment, the date "November the 25th, 2021" shall be shown as the date of decision and not the December, the 14th, 2021.

(2022)01ILR A610
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.01.2020

BEFORE

THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE SHAMIM AHMED, J.

First Appeal From Order No. 1012 of 2015

Qutubudin Ansari ...Appellant
Versus
Ram Shiromani Yadav & Ors. ...Respondents

Counsel for the Appellant:
Sri Ankur Mehrotra

Counsel for the Respondents:
Sri Devendra Pratap Singh, Sri Radhey Shyam

A. Civil Law - Motor Vehicle Act, 1988-Section 176-Enhancement of compensation-deceased was 23 years old and was doing private job earning a sum of Rs. 14,360/-per month-Tribunal awarded a sum of Rs. 4,80,880/- together with interest @ 6% per annum as compensation but not granted future loss of income-the deceased was survived by five dependents- deceased was below the age of 40 years, the deemed gross income would be Rs 21,540/-per month-By applying the multiplier of 17, the total loss of dependency is assessed Rs.21,97,080-Thus, the claimants entitled for increase of compensation a sum of Rs. 22,67,080/- from Rs. 4,80,880/- @ 6% per annum.(Paras 1 to 16)

The appeal is partly allowed.(E-6)

List of Cases cited:

1. National Ins. Com. Ltd. Vs Pranay Sethi & ors. (2017) LawSuit SC 1093

2. Smt. Sarla Verma & ors. Vs D.T.C. & anr. (2009) 2 T.A.C. 677 SC

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

1. Heard learned counsel for the appellant and Sri Radhey Shyam, learned counsel for the respondent no. 3.

2. None has appeared on behalf of the respondent nos. 1, 2 and performa/respondent nos. 1 to 5.

3. This appeal has been filed by the claimant-appellant for enhancement of the compensation awarded to him by the Motor Accident Claims Tribunal/District Judge, Chandauli vide judgment and award dated 12.12.2012 passed by him in M.A.C.P. No. 7 of 2010 (Qutubudin and Others Vs. Ram Shiromani Yadav and Others) for the death of Akhlak Ansari, son of claimant-appellant, who was aged about 23 years at the time of the accident which had taken place on 21.11.2009 caused due to the rash and negligent driving of the driver of Truck No. U.P. 32 CN 6892, owner whereof was respondent no. 1, Ram Shiromani Yadav by

its driver respondent no. 2, Santram Yadav while the deceased was going on his motorcycle bearing registration no. U.P. 67 D-5979 to Bhadohi.

4. In the claim petition filed by the claimant-appellant, it was pleaded that the deceased at the time of his death was aged about 23 years and was employed in the Network Expert/Consultant Apitco Ltd., Hyderabad (Andhra Pradesh) and was earning a sum of Rs. 14,360/- per month. At the time of his death, the claimant-appellant as well as claimant-performa/respondent nos. 1 to 5 were his dependents. The total amount of

5. The claim petition was contested by respondent nos. 1 to 3, who filed their respective statements disputing the claim. The Motor Accident Claims Tribunal, Chandauli after considering the evidence on record and the submissions advanced before him by learned counsel for the parties by its judgment and award impugned in the present appeal, allowed the claim petition in part and awarded a sum of Rs. 4,80,880/- together with interest @ 6% per annum as compensation.

6. Aggrieved, the claimant-appellant as well as claimant-performa/respondent nos. 1 to 5 have filed this appeal for enhancement of compensation. The quantum of compensation awarded by the M.A.C.T. has been challenged by the learned counsel f

(i) The Tribunal failed to award any amount towards future prospects.

(ii) The Tribunal erred in law in applying the multiplier of 11 on the basis of the age of the mother of the deceased whereas the age of the deceased should have been made the basis for applying the multiplier.

(iii) The amount awarded under the conventional head is too meagre and not in consonance with the guidelines laid down by the Apex Court.

7. In support of his contention, learned counsel for the appellant has placed reliance upon the case of **National Insurance Company Ltd. Vs. Pranay Sethi and Others** reported in **2017 LawSuit (SC) 1093.**

8. Per contra, Sri Radhey Shyam, learned counsel appearing for respondent no. 3 has made his submissions in support of the impugned judgment and award and argued that the same does not suffer from any illegality, requiring any interference by this Court. This appeal lacks merit and is liable to be dismissed.

9. We have heard learned counsel for the parties present and perused the impugned judgment and award as well as other material brought on record and we find that there is force in the submissions made by the learned counsel for the appellant.

10. The constitutional Bench of the Apex Court in the judgment rendered in the case of **Pranay Sethi and Others (supra)** in sub-paragraph (iii) to (viii) of paragraph 61 has ruled inter-alia; that while determining the income, an addition of 50% of actual salary to the income of the deceased towards future prospects, where the deceased had a permanent job and was below the age of 40 years, should be made. The addition should be 30%, if the age of

the deceased was between 40 to 50 years. In case the deceased was between the age of 50 to 60 years, the addition should be 15%. Actual salary should be read as actual salary less tax; 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; for determination of the multiplicand, the deduction for personal and living expenses, the tribunals and the courts shall be guided by paragraphs 14 to 15 of the case of **Smt. Sarla Verma and others Vs. Delhi Transport Corporation and another** reported in **2009 (2) T.A.C. 677 (S.C.);** the selection of multiplier shall be as indicated in the Table in Smt. Sarla Verma (supra) read with para 21 of that judgment; the age of the deceased should be the basis for applying the multiplier; 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.

11. In the instant case, there is no dispute about the fact that the deceased was permanently employed and his age was 26 years as per the postmortem report and hence the Tribunal ought to have awarded 50% of actual income of the deceased towards future prospects. We therefore, hold that while determining the income, the amount of 50% of his actual salary shall be added to the income of the deceased towards future prospects.

12. Coming to the second ground of challenge that the Tribunal erred in applying the multiplier of 11 on the basis of the age of the mother of the deceased, there is merit in the aforesaid ground also. In sub-para (vii) of paragraph 61 of the **Pranay Sethi and Others (supra),** the Apex Court has categorically held that the age of the deceased should be the basis for applying the multiplier.

13. According to the principles laid down by the Apex Court in the case of **Smt. Sarla Verma (supra),** the correct multiplier to be used where the deceased is aged between 26 to

14. Coming to the last ground of challenge, we find that the Tribunal has awarded a sum of Rs. 2,000/- for funeral expenses and Rs. 5,000/- towards loss of consortium whereas no amount has been awarded towards loss of estate. In sub-para (viii) of paragraph 61 of the **Pranay Sethi and Others (supra)**, the Apex Court has observed that reasonable figures under 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.

15. We, accordingly, proceed to recalculate the compensation in the light of the aforesaid principles. As noted above, the actual salary of the deceased was Rs. 14,360/- per month or Rs. 1,72,320/- p.a. less tax. By adding 50% towards future prospects as the deceased was below the age of 40 years, the deemed gross income of the deceased would be Rs. 14,360/- + 50% of Rs. 14,360/- = Rs. 21,540/- per month or Rs. 2,58,480/- p.a. After deducting 50% amount (i.e. 21,540-10770) towards the living and personal expenses of the deceased, his contribution to the family is determined as

Rs. 10,770/- per month or Rs. 1,29,240/- p.a. By applying the multiplier of 17, the total loss of dependency is assessed at Rs. 21,97,080/-. We further award a sum of Rs. 15,000/- towards funeral expenses, Rs. 40,000/- under the head of loss of consortium and Rs. 15,000/- towards loss of estate. We accordingly increase the compensation awarded to the claimant-appellant as well as claimant-performa/respondent nos. 1 to 5 by the Tribunal from Rs. 4,80,880/- to Rs. 22,67,080/-. The claimant-appellant as well as claimant-performa/respondent nos. 1 to 5 shall further be entitled to interest @ 6% p.a. on the increased amount of compensation from the date of filing of the claim petition till the actual payment is made.

16. The appeal is allowed in part.

17. The impugned judgment and award stands modified to the extent indicated hereinabove.

18. The parties shall bear their own costs.

(2022)01ILR A613
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.12.2021

BEFORE

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

First Appeal From Order No.1477 of 2008

Vishal Gupta ...Appellant
Versus
Director, I.G.F.R.I., Jhansi & Ors. ...Respondents

Counsel for the Appellant:
Sri A.K. Ojha, Sri R.P. Tiwari

Counsel for the Respondents:
Sri V.K. Tiwari, Sri Ashok K. Jaiswal, Sri Manoj Kumar Sharma

A. Civil Law - Motor Vehicle Act, 1988-Section 176-Enhancement of compensation-the injured-appellant was 21 years old at the time of accident and he was final year student in engineering college also he was earning Rs. 10,000 /- per month by giving tuitions-Tribunal awarded a sum of Rs. 3,29,000/- together with interest @ 7% per annum as compensation but not granted future loss of income-the appellant sustained 80% disability due to amputation of his leg-Annual loss would be Rs 67,200/ and By applying the multiplier of 18 and including other charges , the total loss of d is assessed Rs. 15,75,000/-Thus, the claimant entitled for increase of compensation a sum of Rs. 15,75000/- from Rs. 3,29000/- with modified interest rate @ 7.5% per annum.(Paras 1 to 21)

The appeal is allowed. (E-6)

List of Cases cited:

1. Kajal Vs Jagdish Chand (2020) 0 AIJEL-SC 65725,

2. Philips Vs Western Rail. Co. (1874) 4 QBD 406

3. H.West & Son Ltd. Vs Shephard (1963) WLR 1359

4. Rajkumar Vs Ajay Kumar & ors. (2011) 1 SCC 343

5. K. Suresh Vs New India Assr. Co. Ltd. & ors.

6. National Ins. Co. Ltd. Vs Lavkush & anr. (2018) 1 T.A.C. 431

7. V. Mekala Vs M. Malathi & anr. (2014) Lawsuit SC 371

8. Sarla Verma & ors Vs D.T.C. & anr. (2009) Lawsuit SC 613

9. Zakir Hussain Vs Shabir & ors. (2015) 2 AWC 1475 SC

10. Das Vs Pradymna Mohanty & anr. (2019) ACJ 3019

11. National Ins. Co. Ltd. Vs Mannat Johal & ors. (2019) 2 T.A.C. 705 SC

12. Smt. Hansagori P. Ladhani Vs The Oriental Ins. Co. Ltd.(2007) 2 GLH 291

13. Smt. Sudesna & ors. Vs Hari Singh & anr. FAFO No . 23 of 2001

14. Tej Kumari Sharma Vs Chola Mandlam M.S. General Ins. Co. Ltd, FAFO No. 2871 of 2016

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

1. This appeal, at the behest of the injured-claimant, has been preferred against the judgement and order dated 31.01.2008 passed by Motor Accident Claims Tribunal, Jhansi (hereinafter referred to as "Tribunal') in Claim Petition No.361 of 2004 (Vishal Gupta Vs. Director IGFRI) awarding a sum of Rs.3,29,000/- as compensation with interest at the rate of 7% per annum.

2. Brief facts of the case are that a motor accident claim petition was filed by claimant-Visual Gupta, who sustained serious injuries in the accident in question. The averments of petition are that on 23.04.2004, the claimant was going from Chitra crossing towards B.K.D. crossing at 11:00 am on motorcycle No. UP 93F-7585. As soon as he reached Rishabh hotel a bus No. UP 90C-0414 hit his motorcycle from behind due to rash and negligent driving of the bus driver. The claimant was taken to the hospital. His condition was serious. Due to sustaining serious injuries in the legs, his left leg was operated thrice and at last, it was amputated from thigh. The claimant became permanently disabled to the extent of 80%. He remained hospitalized for a long period and incurred the expenditure of Rs.1,25,000/- towards medical expenses. It is also alleged in petition that claimant was student of final year engineering. Due to sustaining aforesaid injuries in accident, his future became dark. Alongwith his studies, he was earning Rs.10,000/- by doing job work in different institutions.

3. Heard learned counsel for the appellant and learned counsel for the respondent-Insurance Company as well as perused the record.

4. The accident is not in dispute. The issue of negligence decided by the learned Tribunal also is not in dispute. The respondent-Insurance Company has not challenged the liability imposed on it. The only issue to be decided is, the quantum of compensation awarded.

5. Before computation of compensation, it is worth mentioning that the principles regarding the determination of just compensation, contemplated under the Motor Vehicle Act (hereinafter referred to as "MV Act') are well settled. Injuries caused deprivation to the body, which entitles the claimant to claim damages. It is impossible to compensate human sufferings and personal deprivation with money. However, this is what the MV Act enjoins upon the courts to do. The Court has to make a judicious attempt to award damages so that the claimant or the victim may be compensated for the loss suffered by him. The damages may vary according to the gravity of the injuries sustained by the claimant in an accident. On account of injury, the claimant may suffer

consequential loss such as loss of earnings as well as future earnings, medical expenditure, special diet and attendant charges etc. Victim may suffer non-pecuniary damages also in the form of loss of pleasure of life by particular limb of the body. In this way, damages can be pecuniary as well as non-pecuniary. The Court/Tribunal should keep in mind that compensation awarded must be just compensation because the damages assess for personal injuries should be substantial to compensate the injured for the deprivation suffered by him throughout his life.

6. In **Kajal Vs. Jagdish Chand** reported in **2020 (0) AIJEL-SC 65725**, the Apex Court has quoted pertinent observations from a very old case Philips Vs. Western Railway Company (1874) 4QBD 406 as under:

"You cannot put the plaintiff back again into his original position, but you must bring your reasonable common sense to bear, and you must always recollect that this is the only occasion on which compensation can be given. The plaintiff can never sue again for it. You have, therefore, now to give him compensation once and for all. He has done no wrong, he has suffered a wrong at the hands of the defendants and you must take care to give him full fair compensation for that which he has suffered." Besides, the Tribunals should always remember that the measures of damages in all these cases "should be such as to enable even a tortfeasor to say that he had amply atoned for his misadventure."

7. Hon'ble the Apex Court has further quoted pertinent observations from a very old case **H. West & Son Ltd. v. Shephard 1963 2 WLR 1359** as under:

"Money may be awarded so that something tangible may be procured to replace something else of the like nature which has been destroyed or lost. But money cannot renew a physical frame that has been battered and shattered. All that Judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common assent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards.

In the same case Lord Devlin observed that the proper approach to the problem was to adopt a test as to what contemporary society would deem to be a fair sum, such as would allow the wrongdoer to "hold up his head among his neighbours and say with their approval that he has done the fair thing", which should be kept in mind by the court in determining compensation in personal injury cases."

8. Section 168 of MV Act stipulates that there should be grant of just compensation. Thus, it becomes challenge for a Court of law to determine just compensation which should not be bonanza for the claimant/victim and at the same time it should not be too meagre. Hon'ble the Apex Court in ***Rajkumar Vs Ajay Kumar and others (2011) 1 SCC 343*** has laid down the heads under which

compensation is to be awarded for personal injuries which is as follows:

"Pecuniary damages (Special damages)

(i)Expenses relating to treatment, hospitalization, medicines, transportation, nourishing food, and miscellaneous expenditure.

(ii) Loss of earnings (and other gains) which the injured would have made had he not been injured, comprising:

(a) Loss of earning during the period of treatment;

(b) Loss of future earnings on account of permanent disability.

(iii) Future medical expenses.

Non-pecuniary damages (General damages)

(iv) Damages for pain, suffering and trauma as a consequence of the injuries.

(v) Loss of amenities (and/or loss of prospects of marriage).

(vi) Loss of expectation of life (shortening of normal longevity).

In routine personal injury cases, compensation will be awarded only under heads (i), (ii) (a) and (iv). It is only in serious cases of injury, where there is specific medical evidence corroborating the evidence of the claimant, that compensation will be granted under any of the heads (ii)(b), (iii), (v) and (vi) relating to loss of future earnings on account of permanent disability, future medical expenses, loss of amenities (and/or loss of prospects of marriage) and loss of expectation of life.

9. In **K. Suresh v. New India Assurance Company Ltd. and Ors.8**, Hon'ble the Apex Court has held as follows :

"2...There cannot be actual compensation for anguish of the heart or for mental tribulations. The quintessentiality lies in the pragmatic computation of the loss sustained which has to be in the realm of realistic approximation. Therefore, Section 168 of the Motor Vehicles Act, 1988 (for brevity the Act) stipulates that there should be grant of just compensation. Thus, it becomes a challenge for a court of law to determine just compensation which is neither a bonanza nor a windfall, and simultaneously, should not be a pittance."

10. We have gone through the Judgement in the case of **National Insurance Company Limited Vs. Lavkush and another, 2018 (1) T.A.C. 431**, in which the concept of just compensation is discussed elaborately.

10. Applying for the aforesaid principles, we now proceed to assess the compensation.

11. The injured-appellant was 21 years of age at the time of accident. He was final year student in engineering college and it is averred that alongwith his studies, he was earning Rs.10,000/- by doing job work in different institutions in the form of giving tuition as argued by learned counsel for the appellant. The Tribunal awarded total compensation of Rs.3,29,000/- with

rate of interest of 7%. It is submitted by learned counsel for the appellant that the Tribunal assumed income of the appellant as Rs.15,000/- per annum while appellant was earning Rs.10,000/- per month and no amount is awarded for future loss of income. Learned counsel also submitted that appellant was going to become engineer within a year of accident and he was having a bright future. But his whole life is shattered due to the accident. Hence, Tribunal has committed grave error in assessing the income of the appellant.

12. Learned counsel for the appellant also submitted that appellant sustained 80% disability due to amputation of his leg and disability certificate of 80% is given by Chief Medical Officer. Learned counsel next submitted that Tribunal has awarded Rs.1,00,000/- towards medical expenses while appellant has incurred Rs.1,50,000/- in the said head. It is also submitted that Tribunal has awarded only Rs.25,000/- for pain, shock and suffering, which is very meagre amount keeping in view the agony of the appellant. It is also submitted that no amount is awarded for future medicines, special diet and attendant charges by the Tribunal and 7% per annum interest is awarded by the Tribunal, is also on lower side. Hence, Tribunal has not awarded just compensation. Learned counsel for the appellant placed reliance on **V. Mekala Vs. M. Malathi and another, 2014 Lawsuit (SC) 371, Sarla Verma and others Vs. Delhi Transport Corporation and another, 2009 Lawsuit (SC) 613 and Zakir Hussain Vs. Shabir and other 2015 (2) AWC 1475 (SC).**

13. Recently, Hon'ble Supreme Court in the case of **Basudev Das Vs. Pradymna Mohanty & Another** reported in **2019 ACJ 3019**, has held that even for amputation, addition of future income has to be made and therefore in case of appellant also future loss will have to be added.

14. Per contra, it is submitted by respondent-Insurance Company that the quantum awarded by the Tribunal is just and proper. It is also submitted that regarding the income of the appellant, there is no documentary evidence on record, only oral evidence is there, which was rightly disbelieved by the Tribunal. There is no illegality or error in awarding the compensation by the Tribunal and it does not call for any interference by this Court as the income, which is not proved, cannot be granted.

15. After hearing the counsel for the parties and perusing the record, it is crystal clear, at the time of accident, that the appellant was final year student in engineering college. He has deposed before learned Tribunal that alongwith his studies, he was doing part time job and earning Rs.10,000/- per month, but there is no documentary evidence in this regard. Hence, we feel that his income can be considered to be Rs.5,000/- per month. At the time of accident, the appellant was 21 years old, therefore, 40% of the income will be added as future loss of income of the injured in view of the decision of the Apex Court in Rajkumar Vs. Ajay Kumar (Supra) and Kajal Vs. Jagdish Chandra (supra). The Chief Medical Officer has issued permanent disability certificate to the extent of 80%, which is not disputed by Insurance Company. Hence, loss of earning capacity namely, 80% has considered by the Tribunal is maintained.

16. The amount awarded by the Tribunal for medical expenses is also on

lower side. Looking into the injuries sustained by the appellant and alleged by the appellant, we holds that appellant would be entitled to a sum of Rs.1,25,000/- for medical expenses instead of Rs.1,00,000/- as allowed by the Tribunal.

17. Tribunal has not awarded any sum for future medicines, special diet and attendant charges while in these heads he would have necessarily incurred expenses keeping in view the seriousness of injuries sustained by him and amputation of left leg from thigh. Hence, Tribunal has committed an error in not awarding any sum under aforementioned heads. Hence, Rs.25,000/- shall be awarded for future medicines and Rs.10,000/- for special diet and Rs.10,000/- for attendant charges shall also be awarded.

18. It is very pertinent to mention that on account of injuries sustained in accident, the left leg of the appellant was amputated from thigh and it is evident from the record that only 6 inch of length of the leg has left. The appellant has deposed before learned Tribunal that his left leg is artificial, therefore, appellant shall be entitled to get Rs.1,00,000/- for artificial limb because artificial limb manufactured and fitted to the injured, cannot long last. There is every possibility for its replacement because first artificial limb may not work whole life. The appellant might incur replacement cost also. The appellant shall get Rs.1,00,000/- for pain, shock and suffering.

19. Hence, the total compensation payable to the appellant is computed herein below:

i. Income : Rs.5,000/-

ii. Percentage towards future prospects : 40% = Rs.2,000/-

iii. Total Income : Rs.5000+ Rs.2,000/- = Rs.7,000/-

iv. Loss of earning capacity : 80% namely Rs.5,600/-

v. Annual loss : Rs.5,600/- x 12 = Rs.67,200

vi. Multiplier applicable : 18

vii. Total loss Rs.67,200 x 18 = Rs.12,09,600/-(which is rounded of Rs.12,10,000/-)

viii. Medical expenses : Rs.1,25,000/-

ix. Future medicines : Rs.25,000/-

x. Artificial limb : Rs.1,00,000/-

xi. Special diet : Rs.10,000/-

xii. Attendant charges : Rs.5,000/-

xiii. Amount under pain, shock and suffering : Rs.1,00,000/-

xiv. Total compensation : Rs.12,10,000 + Rs.1,25,000 + Rs.25,000 + Rs.1,00,000 + Rs. 10,000 + Rs.5000 + Rs.1,00,000= Rs.15,75,000/-

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.)*** 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."

21. Learned Tribunal has awarded rate of interest as 7% per annum but we are fixing the rate of interest as 7.5% in the light of the above judgment.

22. No other grounds were urged when the matter was heard.

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 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 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. The records and proceedings be sent back to the Tribunal for disbursement.

(2022)01ILR A619
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.12.2021

BEFORE

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

First Appeal From Order No.2591 of 2016

Smt. Usha & Ors. ...Appellants
Versus
U.P.S.R.T.C. & Anr. ...Respondents

Counsel for the Appellants:
Sri Alok Kumar Singh

Counsel for the Respondents:
Sri Ramanuj Pandey

A. Civil Law -Motor Vehicle Act, 1988- Section 176-Enhancement of compensation-deceased was working in a factory and the age of the deceased was 40 years old -Tribunal awarded a sum of Rs. 3,08,000/- together with interest @ 7% per annum as compensation but not granted future loss of income- the deceased was survived by five dependents - the deemed gross income would be Rs 5000/-per month-By applying the multiplier of 12, the total loss of dependency is assessed Rs. 8,28,800/- Thus, the claimants entitled for increase of compensation a sum of Rs. 8,28,800/-- from Rs. 3,08,000 with a modified rate of interest @ 7.5% per annum.(Paras 1 to 22)

The appeal is partly allowed.(E-6)

List of Cases cited:

1. Bajaj Allianz General Ins. Co.Ltd. Vs Smt. Renu Singh & ors.,FAFO No.1818 of 2012

2. Rylands Vs Fletcher (1868) 3 HL LR 330

3. Jacob Mathew Vs St. of Punj. (2005) 0 ACJ SC 1840

4. Khenyei Vs New India Assr. Co. Ltd. & ors (2015) LawSuit SC 469

5. Sarla Verma & ors. Vs D.T.C. & anr. (2009) Lawsuit SC 613

6. National Ins. Com. Ltd. Vs Pranay Sethi & ors. (2017) LawSuit SC 1093

7. National Ins. Co. Ltd. Vs Mannat Johal & ors. (2019) 2 T.A.C. 705 SC

8. Smt. Hansagori 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. Tej Kumari Sharma Vs Chola Mandlam M.S. General Ins. Co. Ltd, FAFO No. 2871 of 2016

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

1. By way of this appeal, the claimants have challenged the judgment and order dated 03.05.2016 passed by Motor Accident Claims Tribunal/Additional District & Sessions Judge, Court No.11, Ghaziabad (hereinafter referred to as "Tribunal') in M.A.C.P. No. 111 of 2015 awarding sum of Rs.3,08,000/- as compensation to the claimants with interest at the rate of 7% per annum.

2. Heard Mr. Alok Kumar Singh, learned counsel for the appellants and Mr. Ramanuj Pandey, learned counsel for the respondents. Perused the record.

3. The accident is not in dispute. The Uttar Pradesh State Road Transport Corporation (in short "U.P.S.R.T.C.") has not challenged the liability fastened on it. In this case, Tribunal has fixed 20% contributory negligence of the deceased.

4. The claimants-appellants filed Motor Accident Claim Petition against the U.P.S.R.T.C. with the facts that on 17.01.2012 deceased Devkidas was going to his work place at 6:30 AM. When he crossed by-pass road and reached the other side, a U.P.S.R.T.C. bus came from the side of Delhi bearing No. U.P. 84 F 9208, which was being driven in a very rash and negligent manner by its driver, which hit the deceased from behind. The deceased sustained fatal injuries and died on the spot.

5. The U.P.S.R.T.C.-respondent in its written statement admitted the factum of accident but contended that deceased was himself negligent. He all of sudden came in front of the bus by jumping the divider. Accident could have been avoided if the deceased would have not been so negligent.

6. Learned counsel for the appellants has submitted that deceased was not negligent in accident. It is also submitted that at the time of accident, the deceased had already crossed the road and the driver of the bus hit him on the side of the road by rash and negligent driving.

7. *Per contra*, learned counsel for the U.P.S.R.T.C. has submitted that on the basis of evidence on record, it is established that deceased was crossing the road at the place which was not ment for crossing and all of sudden, he came in front of the bus due to his own negligence. Learned counsel for the respondents has also submitted that the judgment and order passed by Tribunal also does not suffer from any such infirmity or illegality which may call for any interference by this court.

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."

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.

12. In this regard, we have perused the evidence regarding the contributory negligence on record. Learned Tribunal after threadbare perusing the evidence, has opined that Investigating Officer has prepared site plan during the course of investigation, which shows that at the place of occurrence, there was divider in the middle of road and there was no cut in the divider. It means that the deceased came in front of the bus after jumping on the divider. On the basis of evidence on record, learned Tribunal fixed 20% contributory negligence of the deceased and held that driver of the bus in question, was negligent to the extent of 80% only.

13. We are in full agreement with the finding of learned Tribunal on the point of negligence.

14. The issue to be decided is, the quantum of compensation awarded by the Tribunal. The facts except for deciding compensation are not being narrated.

15. Learned counsel for the appellants has submitted that learned Tribunal has fixed the income of the deceased as Rs.36,000/- per annum, while the deceased used to earn much more because he was a mechanic in a factory. It is next submitted that income of the deceased was Rs.2,40,000/- per annum. Perusal of record shows that there is no plausible, acceptable and documentary evidence to prove the income of the deceased so as to accept the submission of learned counsel for the appellants that deceased be held to be earning Rs.2,40,000/- per annum as no income tax return is also filed. On the basis of evidence on record, it is clear that deceased was working in a factory, hence, keeping in view the above fact, the income of the deceased may be fixed as Rs.5,000/- per month (Rs.5,000 X 12 = 60,000 per annum) in the absence of any documentary or plausible evidence. Hence, the annual income of deceased is fixed as Rs.60,000/- per annum.

16. It is also submitted by learned counsel for the appellant that learned Tribunal has not given compensation under the head of future prospects. The age of the deceased was 40 years, hence in the light of the judgment of the Apex Court in ***Sarla Verma and Others Vs. Delhi Transport Corporation and Another, 2009 LawSuit (SC) 613 and National Insurance Co. Ltd. Vs. Pranay Sethi and Others, 2017 LawSuit (SC) 1093***, due to being self employed and being of 40 years of age, 40% shall be added towards future prospects to the income of the deceased as per the aforesaid decision being self employed.

17. As far as the dependency is concerned, there are five dependents. Learned Tribunal has deducted 1/3rd of the income of the deceased for personal expenses which requires reassessment. Keeping in view the number of dependents, ¼th shall be deducted for personal expenses. Learned Tribunal has applied multiplier of 15 for which there is no dispute. The deceased was 40 years of age.

Under the non pecuniary head, claimants-appellants shall be entitled to get Rs.15,000/- for loss of estate and Rs.15,000/- for funeral expenses. Apart from it, wife of the deceased shall also be entitled to get Rs.40,000/- for loss of consortium. In this way, claimants shall get Rs.70,000/- under the head of non pecuniary damages with increase of 10% for every three years as per the judgment of Apex Court in **Pranay Sethi** *(Supra).*

18. Hence, the total compensation payable to the appellants are computed herein below:

(i) Annual income Rs.60,000/- Per annum.

(ii) Percentage towards future prospects : 40%. Rs.24,000/-

(iii) Total income : Rs.60,000 + 24,000 = Rs.84,000/-

(iv) Income after deduction of ¼th : Rs.63,000/-

(v) Multiplier applicable : 15

(vi) Loss of dependency : Rs.63,000 X 15 = 09,45,000/-

(vii) Amount under non pecuniary head : Rs.70,000/- + 21,000/- = 91,000/-

(viii) Total compensation : Rs.09,45,000/- + 91,000/- = Rs. 10,36,000/-

(ix)Amount after 20% deduction towards contributory negligence : Rs.10,36,000 - 02,07,200/- = Rs. 08,28,800/-

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. Learned Tribunal has awarded rate of interest as 7% per annum but we are

21. No other grounds are argued 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-U.P.S.R.T.C. 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.

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 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 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.

(2022)01ILR A625
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.12.2021

BEFORE

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

First Appeal From Order No.3097 of 2007

Smt. Bhoori & Ors. ...Appellants
Versus
Ashraf & Anr. ...Respondents

Counsel for the Appellants:
Sri Abhai Saxena, Sri Krishna Kumar Singh, Sri Mohd. Asim Zulfiquar

Counsel for the Respondents:
Sri S.C. Srivastava

A. Civil Law - Motor Vehicle Act, 1988- Section 176-Enhancement of compensation-deceased was 40 years of age and he was serving with Northern Indian Railway Mandal as a gang-man- Tribunal dismissed the claim petition for compensation- the deceased was the sole bread-earner and was earning Rs. 8,850/-per month- the Annual income would be Rs 96,000/- and By applying the multiplier of 15, the total loss of dependency is assessed Rs. 15,09000/- Thus, the claimants entitled for compensation of a sum of Rs. 15,09000/- with rate of interest @ 7.5% per annum.(Paras 1 to 15)

The appeal is partly allowed.(E-6)

List of Cases cited:

1. Anita Sharma & ors. Vs The New India Assr. Co. Ltd. & anr., (2021) 1 SCC 171

2. Sunita & ors Vs R.S.R.T.C. & Anr. (2019) 1 T.A.C. SC

3. Mangla Ram Vs Oriental Ins. Co. Ltd. & ors (2018) 4 Supreme 525

4. Bithika Mazumdar Vs Sagar Pal (2017) 2 SCC 748

5. Sarla Verma & ors. Vs D.T.C. & anr. (2009) Lawsuit SC 613

6. National Ins. Com. Ltd. Vs Pranay Sethi & ors. (2017) LawSuit SC 1093

7. National Ins. Co. Ltd. Vs Mannat Johal & ors. (2019) 2 T.A.C. 705 SC

8. Smt. Hansagori 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. Tej Kumari Sharma Vs Chola Mandlam M.S. General Ins. Co. Ltd, FAFO No. 2871 of 2016

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

1. By way of this appeal, the claimants-appellants who are legal heirs of the deceased have challenged the judgment and order dated 15.09.2007 passed by Motor Accident Claims Tribunal/Additional District Judge, Court No.1, Moradabad (hereinafter referred to as "Tribunal') in M.A.C.P. No. 156 of 2007. The appellants' claim petition for compensation on account of the death of the sole bread earner came to be dismissed by the Tribunal.

2. The brief facts as culled out from the record, which is placed before this Court are that at 07:00 AM, when deceased after completing his duty on 13.01.2006 was plying his cycle at that point of time at a place known as turning Bheetkheda, a truck bearing No. HR 55/6244 came on the wrong side rashly and negligently and dashed the cyclist. Shyam Lal-deceased suffers serious injuries. The deceased before succumbed to injuries, taken up for medical aid as he had suffered several injuries but during his treatment he succumbed to the injuries. The deceased was 40 years of age and he was serving with Northern Indian Railway Mandal as a gang-man and was posted at Rampur, his basic salary was Rs.8,850/- per month.

3. On the claim petition being filed, the respondent no.1 appeared and did not accept any of the averments made in the claim petition and contended that the vehicle if it is held to be liable, the vehicle was insured with respondent no.2 from 10.11.2005 to 09.11.2006 and the driver was having a valid licence to ply the same vehicle. However, The New India Assurance Co. Ltd. has replied to this denial. The Tribunal framed three issues and held that it was not proved that the driver of the truck was rash and negligent while driving the truck.

4. The Tribunal disbelieved the presence of P.W.-1 and P.W.-2 and held that just because the charge sheet it does not conclude that the accident had occurred with the same truck and thereafter, decided Issued nos.2 and 3 also against the appellants.

5. Heard learned counsel for the parties and perused the record.

6. The evidence on record comprises of oral testimony of witnesses and the documentary evidence in support of the said accidental injuries. The post-mortem report shows that the deceased died due to the injuries which he had sustained in the accident and hence, it is a homicidal death, which is proved. As far as involvement of the truck is concerned. The respondent no.1 or the driver has not stepped into the witness box. The only defence has been taken to the written statements and the evidence on record is very clear. P.W.-2 and P.W.-3 have stated in their oral testimony and in the cross-examination, the doubt created by the Tribunal that they were not eye witnesses and their evidence is not worth believing is contrary to the judgment of the Apex Court in the case of ***Anita Sharma and Others Vs. The New India Assurance Co. Ltd. and Another, 2021 (1) SCC 171***, wherein the approach of the High Court as as to appreciate turns of even is in a very casual manner is deprecated. In our case, the judgment of ***Sunita and Others Vs. Rajasthan Sate Road Transport Corporation and Another, 2019 (1) T.A.C. (S.C.***) will also be applicable to the facts of this case. The judgment of the Supreme Court in the case of ***Mangla Ram Vs. Oriental Insurance Co. Ltd. and Others, 2018 (4) Supreme 525,*** cited by the appellant goes to show

that pleadings of parties will have to be scrutinized in a practical manner.

7. The learned Tribunal has failed to consider this aspect while dismissing the claim petition. Hence, this appeal requires to be allowed and the impugned judgment and award of the Tribunal dismissing the claim petition being against the mandate of law and facts requires to be quashed.

8. The counsel for the respondent contended that no amount can be granted and requested to reject the appeal and or remand the same to the Tribunal. The said contention is rejected in view of the decision in ***Bithika Mazumdar Vs. Sagar Pal, (2017) 2 SCC 748,*** wherein it has been held that compensation claim petition which remained undecided for nine years and the record was before the Apex Court, the Apex Court decided the quantum.

9. Similarly, this Court feels that as sixteen years have elapsed from filing of claim appeal and that the record is before this Court, instead of directing the parties to go before the Tribunal only for the assessment of compensation which could cause further delay and will also cause further loss to the appellants, it would be more justifiable if this Court decide the quantum as this Court has to decide only quantum under Section 140 of the Act, 1988 which would be the final amount payable.

10. Keeping in view the above fact, the income of the deceased may be fixed as Rs.8,000/- per month. Hence, the annual income of deceased is fixed as Rs.96,000/- per annum. The age of the deceased was 40 years, hence in the light of the judgment of the Apex Court in ***Sarla Verma and Others Vs. Delhi Transport Corporation and Another, 2009 LawSuit (SC) 613 and National Insurance Co. Ltd. Vs. Pranay Sethi and Others, 2017 LawSuit (SC) 1093***, due to being self employed and having the age of 40 years, 30% shall be added towards future prospects in the income of the deceased.

11. As far as the dependency is concerned, there are five dependents. Keeping in view the number of dependents, ¼th shall be deducted for personal expenses. The multiplier of 15 has to be applied. Under the non pecuniary head, claimants-appellants shall be entitled to get Rs.15,000/- for loss of estate and Rs.15,000/- for funeral expenses. Apart from it, wife of the deceased shall also be entitled to get Rs.40,000/- for loss of consortium. In this way, claimants shall get Rs.70,000/- under the head of non pecuniary damages with increase of 10% for every three years as per the judgment of Apex Court in **Pranay Sethi** *(Supra).*

12. The total compensation payable to the appellants are computed herein below:

(i) Annual income Rs.8,000/- per month = 96,000/- per annum.

(ii) Percentage towards future prospects : 30%. Rs.28,800/-

(iii) Total income : Rs.96,000 + 28,800 = Rs.1,24,800/-

(iv) Income after deduction of ¼th : Rs.93,600/-

(v) Multiplier applicable : 15

(vi) Loss of dependency : Rs.93,600 X 15 = 14,04,000/-

(vii) Amount under non pecuniary head: Rs.70,000/- +35,000/- = 1,05,000/-

(viii) Total compensation :

Rs.14,04,000/- + 1,05,000/- = Rs. 15,09,000/-

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.)*** 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."

14. In view of the above, the appeal is **partly allowed**. Judgment and award passed by the Tribunal is set aside. The respondent-The New India Assurance Co. Ltd. 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.

15 . 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 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.

(2022)01ILR A628
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.12.2021

BEFORE

THE HON'BLE VIVEK VARMA, J.

First Appeal From Order No. 3149 of 2017

United India Insurance Company Ltd. ...Appellant
Versus
Smt. Sanwala Devi & Ors. ...Respondents

Counsel for the Appellant:
Sri Nagendra Kumar Srivastava

Counsel for the Respondents:
Sri Ramesh Chandra Pathak, Sri Neeraj Chandra Srivastava

A. Civil Law - Motor Vehicle Act, 1988- Section 176-Enhancement of compensation-deceased was 50 years of

age and he was self-employed-Tribunal awarded compensation of Rs. 30,46,622/- with 6% rate of interest per annum- the deceased was survived by his wife and four sons-future prospects of a deceased shall be added 20% if the deceased was more than 50 years of age as per principles enunciated by Hon'ble Apex Court in Urmila Shukla case-Hence, the Tribunal rightly awarded compensation.(Paras 1 to 19)

The appeal is dismissed. (E-6)

List of Cases cited:

1. Sarla Verma Vs DTC, (2009) 6 SCC 121

2. Vimal Kanwar & ors. Vs Kishore Dan & ors. (2013) 7 SCC 476

3. National Ins. Co. Ltd. Vs Pranay Sethi & ors. (2017) 16 SCC 680

4. Reshma Kumari Vs Madan Mohan,(2013) 9 SCC 65

5. New India Ins. Co. Vs Urmila Shukla, Civil Appeal No. 4634 of 2021,

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

1. Heard Sri Nagendra Kumar Srivastava, learned counsel for the appellant, Sri Ramesh Chandra Pathak, learned counsel for the respondent nos. 1 to 5, and Sri Neeraj Chandra Srivastava, learned counsel for respondent nos. 6 to 10.

2. The present first appeal from order arises out of the judgment and award dated 18.05.2017 passed by the Motor Accident Claims Tribunal/ District Judge, Basti (hereinafter referred to as the "Tribunal') in M.A.C.P. No. 18 of 2015 (Smt. Sanwala Devi and others vs. Ram Sumarin and others) awarding Rs.30,46,622/- as compensation from the appellant with simple interest at the rate of 6 percent from the date of filing of petition till the date of its actual payment.

3. The respondent nos.1 to 5, the claimants, filed a Claim Petition under Section 166 of the Motor Vehicles Act, 1988 before the Tribunal, seeking compensation amounting to Rs.64,99,476/- along with 15 percent interest per annum from the date of filing of petition till its payment.

4. The claimants are the heirs and legal representatives of late Ramraj, son of Jagmohan, who died as a result of an accident on 14.12.2014. The deceased Ramraj along with his son Dilip Kumar (Respondent no.3) was going to the house of his relative on a Scooty bearing registration no. UP 51 X/4621. He was pillion rider of the Scooty, which was driven by his son. When they reached near Sukrauli village, a tractor bearing registration no. UP 51Q/5794 took a sudden turn and collided with the Scooty. Ramraj was seriously injured in the mishap. He was brought to the district hospital where he was declared dead by the doctor. He is survived by his wife Smt. Sanwala Devi, respondent no.1 aged about 50 years, and four sons namely, Rajesh Kumar aged about 30 years, Dilip Kumar aged about 20 years, Ajay Kumar aged about 18 years and Sangram Kumar aged about 15 years.

5. It was asserted in the claim petition that the deceased died due to negligent and rash driving of respondent no.10- Ashwani Kumar (tractor driver). It was brought to the notice of the Tribunal that the respondent no.10- Ashwani Kumar was under the employment of respondent nos. 6 to 9. The appellant i.e. United India

Insurance Co. Ltd., is the insurer of the offending vehicle. The Tribunal allowed the claim petition by the impugned judgment and award.

6. In the instant appeal the learned counsel for the appellant has raised two issues:

(i) The Tribunal has considered the income of the deceased as Rs.3,11,280/- per annum and the slab of income tax was nil up to Rs.2,50,000/-, hence the taxable amount be deducted towards income tax.

(ii) The Tribunal has provided 20% of the income for future prospect, which is not sustainable as the age of the deceased was 51 years at the time of incident and the Hon'ble Supreme Court in Sarla Verma vs. DTC, (2009) 6 SCC 121 held that there is no provision for future prospect after the age of 50 years.

7. On the other hand, learned counsel for the respondents-claimants has submitted that the award passed by the learned Tribunal is legally sustainable and calls for no interference.

8. Rival submissions fall for consideration. The accident is not in dispute. The appellant has not challenged the liability imposed on it. Hence, only the aforesaid issues are to be dealt with.

Issue No.1:

9. The deceased was a peon in the office of Rajkiya Ayurvedik Evam Unani Officer, Basti and the only source of income was his salary. The Tribunal on the basis of the last pay certificate of the month of November 2014 issued on 18.03.2017 as well as on the basis of the statement of PW-3 Mahmood Jafar dated 06.04.2017, a Junior Clerk in Rajkiya Ayurvedik Evam Unani Karyalaya, assessed the income of the deceased as Rs 3,11,280/- per annum.

10. It becomes pertinent to note here that neither the appellant- insurance company nor any of the respondents in the claim petition brought to the notice of the Tribunal that the income tax payable by the deceased Ramraj was not deducted at source by the employer i.e. Rajkiya Ayurvedik Evam Unani Karyalaya. No such statement was also made by PW-3, who placed on record the last pay certificate of the deceased. The Tribunal on the perusal of the last pay certificate did not find that the income tax on the estimated income of the employee was not deducted from the salary of the employee. In the absence of evidence to the contrary, the presumption will be that the employer - Rajkiya Ayurvedik Evam Unani Karyalaya at the time of payment of salary deducted the income tax on the estimated income of the deceased employee.

11. The Hon'ble Supreme Court in the Case of **Vimal Kanwar and others v. Kishore Dan and others, (2013) 7 SCC 476,** has held as under -

"22. The third issue is "whether the income tax is liable to be deducted for determination of compensation under the Motor Vehicles Act".

23. In Sarla Verma v. DTC, [(2009) 6 SCC 121 : (2009) 2 SCC (Civ) 770 : (2009) 2 SCC (Cri) 1002] this Court held: (SCC p. 133, para 20)

"20. Generally the actual income of the deceased less income tax should be the starting point for calculating the compensation."

This Court further observed that: (SCC p. 134, para 24)

"24.... Where the annual income is in taxable range, the words "actual salary' should be read as "actual salary less tax'."

Therefore, it is clear that if the annual income comes within the taxable range, income tax is required to be deducted for determination of the actual salary. But while deducting income tax from the salary, it is necessary to notice the nature of the income of the victim. If the victim is receiving income chargeable under the head "salaries" one should keep in mind that under Section 192(1) of the Income Tax Act, 1961 any person responsible for paying any income chargeable under the head "salaries" shall at the time of payment, deduct income tax on estimated income of the employee from "salaries" for that financial year. Such deduction is commonly known as tax deducted at source ("TDS", for short). When the employer fails in default to deduct the TDS from the employee's salary, as it is his duty to deduct the TDS, then the penalty for non-deduction of TDS is prescribed under Section 201(1-A) of the Income Tax Act, 1961. Therefore, in case the income of the victim is only from "salary", the presumption would be that the employer under Section 192(1) of the Income Tax Act, 1961 has deducted the tax at source from the employee's salary. In case if an objection is raised by any party, the objector is required to prove by producing evidence such as LPC to suggest that the employer failed to deduct the TDS from the salary of the employee. However, there can be cases where the victim is not a salaried person i.e. his income is from sources other than salary, and the annual income falls within taxable range, in such cases, if any objection as to deduction of tax is made by a party then the claimant is required to prove that the victim has already paid income tax and no further tax has to be deducted from the income.

24. In the present case, none of the respondents brought to the notice of the Court that the income tax payable by the deceased Sajjan Singh was not deducted at source by the employer State Government. No such statement was made by Ram Avtar Parikh, PW 2, an employee of the Public Works Department of the State Government who placed on record the last pay certificate and the service book of the deceased. The Tribunal or the High Court on perusal of the last pay certificate, have not noticed that the income tax on the estimated income of the employee was not deducted from the salary of the employee during the said month or financial year. In absence of such evidence, it is presumed that the salary paid to the deceased Sajjan Singh as per last pay certificate was paid in accordance with law i.e. by deducting the income tax on the estimated income of the deceased Sajjan Singh for that month or the financial year. The appellants have specifically stated that the assessment year applicable in the instant case is 1997-1998 and not 1996-1997 as held by the High Court. They have also taken specific plea that for Assessment Year 1997-1998 the rate of tax on income more than Rs 40,000 and up to Rs 60,000 was 15% and not 20% as held by the High Court. The aforesaid fact has not been disputed by the respondents.

25. In view of the finding as recorded above and the provisions of the

Income Tax Act, 1961, as discussed, we hold that the High Court was wrong in deducting 20% from the salary of the deceased towards income tax, for calculating the compensation. As per law, the presumption will be that employer State Government at the time of payment of salary deducted income tax on the estimated income of the deceased employee from the salary and in absence of any evidence, we hold that the salary as shown in the last pay certificate as Rs 8920 should be accepted which if rounded off comes to Rs 9000 for calculating the compensation payable to the dependant(s)."

12. The reason given in the judgment of the Apex Court in Vimal Kanwar (Supra) squarely applies to the facts of the present case. Hence, following the said judgment the first issue is decided in negative and against the appellant.

Issue No. 2:

13. In the case of **Sarla Verma (supra)** the Hon'ble Supreme Court did not provide any scope of compensation for a person who is above 50 years of age.

14. The aforesaid issue was further considered by the Hon'ble Supreme Court in the case of **National Insurance Company Ltd v. Pranay Sethi and Others, (2017) 16 SCC 680.** The Hon'ble Supreme Court observed in paragraphs-31 and 55 to 58 of the judgment and has held as under :

"31. Though we have devoted some space in analyzing the precedential value of the judgments, that is not the thrust of the controversy. We are required to keenly dwell upon the heart of the issue that emerges for consideration. The seminal controversy before us relates to the issue where the deceased was self-employed or was a person on fixed salary without provision for annual increment, etc., what should be the addition as regards the future prospects. In Sarla Verma v. DTC, (2009) 6 SCC 121, the Court has made it as a rule that 50% of actual salary could be added if the deceased had a permanent job and if the age of the deceased is between 40-50 years and no addition to be made if the deceased was more than 50 years. It is further ruled that where deceased was self-employed or had a fixed salary (without provision for annual increment, etc.) the courts will usually take only the actual income at the time of death and the departure is permissible only in rare and exceptional cases involving special circumstances.

*** *** ***

55. Section 168 of the Act deals with the concept of "just compensation" and the same has to be determined on the foundation of fairness, reasonableness and equitability on acceptable legal standard because such determination can never be in arithmetical exactitude. It can never be perfect. The aim is to achieve an acceptable degree of proximity to arithmetical precision on the basis of materials brought on record in an individual case. The conception of "just compensation" has to be viewed through the prism of fairness, reasonableness and non-violation of the principle of equitability. In a case of death, the legal heirs of the claimants cannot expect a windfall. Simultaneously, the compensation granted cannot be an apology for compensation. It cannot be a pittance. Though the discretion vested in the tribunal is quite wide, yet it is obligatory on the part

of the tribunal to be guided by the expression, that is, "just compensation". The determination has to be on the foundation of evidence brought on record as regards the age and income of the deceased and thereafter the apposite multiplier to be applied. The formula relating to multiplier has been clearly stated in Sarla Verma v. DTC, (2009) 6 SCC 121 and it has been approved in Reshma Kumari [Reshma Kumari v. Madan Mohan, (2013) 9 SCC 65: (2013) 4 CC (Civ) 191 : (2013) 3 CC (Cri) 826]. The age and income, as stated earlier, have to be established by adducing evidence. The tribunal and the courts have to bear in mind that the basic principle lies in pragmatic computation which is in proximity to reality. It is a well-accepted norm that money cannot substitute a life lost but an effort has to be made for grant of just compensation having uniformity of approach. There has to be a balance between the two extremes, that is, a windfall and the pittance, a bonanza and the modicum. In such an adjudication, the duty of the tribunal and the courts is difficult and hence, an endeavour has been made by this Court for standardisation which in its ambit includes addition of future prospects on the proven income at present. As far as future prospects are concerned, there has been standardisation keeping in view the principle of certainty, stability and consistency. We approve the principle of "standardisation" so that a specific and certain multiplicand is determined for applying the multiplier on the basis of age.

56. The seminal issue is the fixation of future prospects in cases of deceased who are self-employed or on a fixed salary. Sarla Verma v. DTC, (2009) 6 SCC 121 has carved out an exception permitting the claimants to bring materials on record to get the benefit of addition of future prospects. It has not, per se, allowed any future prospects in respect of the said category.

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.

58. The controversy does not end here. The question still remains whether there should be no addition where the age of the deceased is more than 50 years. Sarla Verma [Sarla Verma v. DTC, (2009) 6 SCC 121 : (2009) 2 SCC (Civ) 770 : (2009) 2 SCC (Cri) 1002] thinks it appropriate not to add any amount and the same has been approved in Reshma Kumari [Reshma Kumari v. Madan Mohan, (2013) 9 SCC 65]. Judicial notice can be taken of the fact that salary does not remain the same. When a person is in a permanent job, there is always an enhancement due to one reason or the other. To lay down as a thumb rule that there will be no addition after 50 years will be an unacceptable concept. We are disposed to think, there should be an addition of 15% if the deceased is between the age of 50 to 60 years and there should be no addition thereafter. Similarly, in case of self-employed or person on fixed salary, the addition should be 10% between the age of 50 to 60 years. The aforesaid yardstick has been fixed so that there can be consistency in the approach by the tribunals and the courts."

15. However, it is pertinent to mention here that in a recent judgment the Hon'ble Supreme Court in the case of **New India Insurance Company vs. Urmila Shukla, Civil Appeal No. 4634 of 2021,** decided on 6th August 2021, considered the issue by placing reliance upon Rule 220A of U.P. Motor Vehicles Rules 1998 specially Rule 3(iii), which is to the following effect:

"(3) The future prospects of a deceased, shall be added in the actual

salary or minimum wages of the deceased as under:

(iii) More than 50 years of age: 20% of the salary."

16. In ***Urmila Shukla (supra)*** the Supreme Court, after considering the holding in ***Pranay Sethi (supra)***, has held as under:

"8. It is submitted by Mr. Rao that the judgment in Pranay Sethi does not show that the attention of the Court was invited to the specific rules such as Rule 3(iii) which contemplates addition of 20% of the salary as against 15% which was stated as a measure in Pranay Sethi. In his submission, since the statutory instrument has been put in place which affords more advantageous treatment, the decision in Pranay Sethi ought not to be considered to limit the application of such statutory Rule.

9. It is to be noted that the validity of the Rules was not, in any way, questioned in the instant matter and thus the only question that we are called upon to consider is whether in its application, sub-Rule 3(iii) of Rule 220A of the Rules must be given restricted scope or it must be allowed to operate fully.

10. The discussion on the point in Pranay Sethi was from the standpoint of arriving at "just compensation" in terms of Section 168 of the Motor Vehicles Act, 1988.

11. If an indicia is made available in the form of a statutory instrument which affords a favourable treatment, the decision in Pranay Sethi cannot be taken to have limited the operation of such statutory provision specially when the validity of the Rules was not put under any challenge. The prescription of 15% in cases where the deceased was in the age bracket of 50-60 years as stated in Pranay Sethi cannot be taken as maxima. In the absence of any governing principle available in the statutory regime, it was only in the form of an indication. If a statutory instrument has devised a formula which affords better or greater benefit, such statutory instrument must be allowed to operate unless the statutory instrument is otherwise found to be invalid.

12. We, therefore, reject the submission advanced on behalf of the appellant and affirm the view taken by the Tribunal as well as the High Court and dismiss this appeal without any order as to costs."

17. Therefore, applying the said principles as enunciated by the Hon'ble Apex Court in ***Urmila Shukla (Supra)*** this Court is of the opinion that since the deceased was 51 years of age at the time of death, as such the addition of 20% for future prospect has rightly been awarded by the Tribunal placing reliance upon the U.P. Motor Vehicle Rules, 1998. Thus, the second issue is also decided in negative and against the appellant.

18. No other ground was pressed at the time of arguments.

19. For the reasons as stated in the preceding paragraphs, the instant appeal fails and is, accordingly, **dismissed.**

20. Let the lower Court record and proceedings be sent to the Tribunal.

(2022)01ILR A636
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 24.12.2021

BEFORE

THE HON'BLE RAJNISH KUMAR, J.

Misc. Single No. 808 of 1991
& other cases

Sunder Lal & Ors. ...Petitioners
Versus
State Of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Awadhesh Kumar, Anil Kr. Mishra, Rajeev Chaturvedi, Vijay Bahadur Verma

Counsel for the Respondents:
C.S.C.

A. Land Ceiling - U.P. Imposition of Ceiling on Land Holdings Act, 1960: Section 5(6), 5(8), 12-A proviso (d) -It is settled that the sale deed executed during pendency of the Ceiling proceedings would be ignored and transferred land shall be included in the holding of the transferee i.e., the original tenure holder. (Para 17)

Writ Petition Rejected. (E-10)

List of Cases cited:

1. Mohd. Hayat Khan (Minor) Vs St. of U.P. & ors. 1991 (9) LCD 395

2. Raja Yuveraj Datt Singh Vs Prescribed Authority & ors. (F.B., L.B.) 1968 RD 171

3. Mohd. Muste Hassan & ors. Vs The Addl. Commissioner, Meerut & ors. 1995 RD 186

4. Jogendra Singh & ors. Vs St. of U.P. & ors. 1983 All.L.J. 1297

5. Smt. Prema Devi Vs A.D.J., Hamirpur & anr. 2005 (2) AWC 1411

6. Deo Singh & ors. Vs Addl. Commissioner, Jhansi & ors. 2004 (96) RD 228

7. Chaudhary Mohammad Mumtaz Husain Vs SDO/Press Authority & ors. 1988 (6) LCD

8. Smt. Kamlesh Kumari Vs St. of U.P. & ors. 1981 All.L.J. 1139

9. Nakchhed Singh Vs St. of U.P. & ors. 1978 All.L.J. 776

10. Ravindra Singh Vs Phool Singh & anr. (1995) 1 SCC 251

11. Ghasi Ram & ors. Vs Prescribed Authority & ors. 1988 RD 314

12. Smt. Ram Kali Vs St. of U.P. & ors. 1982 All. L.J. 134

13. Rajendra Singh Vs St. of U.P. & ors. 1999 (1) AWC 188 (SC)

14. Sanjay Kumar & anr. Vs St. of U.P. & ors. 1995 RD 478 (SC)

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

1. Heard Shri Vijay Bahadur Verma, learned counsel for the petitioner and Shri Rajeev Singh Chauhan, learned Additional Chief Standing Counsel for the State.

2. The writ petition No.808 (MS) of 1991, writ petition No.807 (MS) of 1991, writ petition No.809 (MS) of 1991 and writ petition No.810 (MS) of 1991 arises out of the common judgment and order dated 27.10.1989 passed by the Prescribed Authority/opposite party no.3 by means of which four applications of the petitioner under Section 11(2) of the U.P. Imposition of Ceiling on Land Holdings Act 1960 (hereinafter referred as the Ceiling Act) have been dismissed and the order dated 30.01.1991, passed by the Additional Commissioner (Judicial), Lucknow Division, Lucknow/opposite party no.2 in

four appeals filed by the petitioner. Therefore, they have been clubbed together and are being decided together by a common judgment and order.

3. The brief facts of the case, for adjudication of the aforesaid cases as alleged in the writ petitions are that Kunwar Yudhendra Bahadur Singh son of Jayendra Bahadur Singh was the original tenure holder of the land in dispute who acquired the disputed property by means of a partition decree dated 07.04.1973 in Civil Suit No.11-B/52 from the court of Civil Judge, Kheri. He executed a registered sale deed of the plot no.68/4.43 acres in favour of the petitioner on 06.12.1983. The application under Section 11(2) of the Ceiling Act was filed on the ground that the petitioner is a tenure holder/bhumidhar of the land in dispute situated in village Bhansariya, Pargana-Kheri, Tehsil-Lakhimpur, District-Kheri on the basis of a registered sale deed. The land in dispute has wrongly been included in the holdings of the other co-tenure holders and declared surplus which could not have been done. An objection was filed by the State opposing the application on the ground that the sale deed was executed during ceiling proceedings because the Ceiling proceedings under Section 10 (2) of the Ceiling Act were pending since 1981 and decided on 28.02.1986, therefore it was not valid as such the application was liable to be dismissed. Considering the same the application was dismissed by means of the order dated 27.10.1989. The petitioners preferred four appeals under Section 13 of the Ceiling Act before the opposite party no.2. All the four appeals were dismissed by a common judgment and order dated 30.01.1991. Hence the present four writ petitions have been filed.

4. The writ petitions have been contested by the respondent-State by filing the counter affidavits and supplementary counter affidavits, to which the rejoinder affidavit was filed by the petitioners. To which supplementary counter affidavit was filed, but no response to that has been filed.

5. The sole argument advanced by learned counsel for the petitioner was that the sale deed executed during the ceiling proceedings is not void, however it can be ignored for the purpose of Ceiling Act. But on the choice, under Section 12-A proviso (d) of the Ceiling Act, given on behalf of the transferrer was liable to be considered and the land of petitioner should have been excluded in lieu of other land of transferrer but it has not been considered and wrongly ignored on the ground that the right of choice has already been exercised by the transferrer. Therefore the impugned orders are not sustainable in the eyes of law and liable to be quashed with a direction to the Prescribed Authority to accept the choice of the transferrer and take his another land in place of the land of the petitioner. Learned counsel for the petitioner relied on **Mohd. Hayat Khan (Minor) Versus State of U.P. and others; 1991 (9) LCD 395, Raja Yuveraj Datt Singh Versus Prescribed Authority and others(F.B., L.B.); 1968 RD 171, Mohd. Muste Hassan and others Versus The Addl. Commissioner, Meerut and others; 1995 RD186, Jogendra Singh and others Versus State of U.P. and others; 1983 All.L.J.1297, Smt. Prema Devi Versus A.D.J, Hamirpur and another; 2005(2) AWC 1411, Deo Singh and others Versus Addl. Commissioner, Jhansi and others; 2004 (96) RD 228, Chaudhary Mohammad Mumtaz Husain Versus SDO/Press Authority and others; 1988**

(6) LCD 374, Smt. Kamlesh Kumari Versus State of U.P. and others; 1981 All.L.J. 1139, Nakchhed Singh Versus State of U.P. and others; 1978 All.L.J. 776, Ravindra Singh Versus Phool Singh and another; (1995) 1 SCC 251, Ghasi Ram and others Versus Prescribed Authority and others; 1988 RD 314 and Smt. Ram Kali Versus State of U.P. and others; 1982 All.L.J. 134.

6. Learned Additional Chief Standing Counsel vehemently opposed the submissions of learned counsel for the petitioner. He had submitted that the sale deed executed during the ceiling proceedings is void under Section 5(8) of the Ceiling Act and it cannot be legalized. He further submitted that the choice once exercised cannot be again exercised. He had also submitted that the transferee cannot exercise the choice because the choice was already exercised by the transferrer on the basis of which the land of the petitioner was declared surplus. He had also submitted that the possession of the land in dispute was taken on 13.12.1986. There is no illegality or error in the impugned orders. The writ petitions are misconceived and lacks merit, therefore liable to be dismissed. Learned Additional Chief Standing counsel had relied on **Rajendra Singh and others Versus State of U.P. and others; 1999 (1) AWC 188 (SC) and Sanjay Kumar and another Versus State of U.P. and others; 1995 RD 478(SC).**

7. I have considered the submissions of learned counsel for the parties and perused the records.

8. The ceiling proceedings under Section 10(2) of the Ceiling Act were started against the original tenure holders in the year 1981 and the order was passed on 28.02.1986 declaring the surplus land, which was the land, sold by Kunwar Yudhendra Bahadur Singh to the petitioner by means of the registered sale deed executed on 06.12.1983 i.e. during the ceiling proceedings. The possession was taken by the State Government on 13.12.1986 as per statement of Lekhpal and the documents filed before the prescribed authority, which is recorded in the order. The dispute relates to plot no.68 situated in village-Bhansariya, Pargana-Kheri, Tehsil-Lakhimpur, district-Kheri. The applications under Section 11(2) of the Ceiling Act was filed by the petitioner on 20.12.1986 on the ground that the petitioner had purchased the land in dispute through registered sale deed. Therefore it could not have been declared as surplus land. Four cases were registered. The case was contested by the State on the grounds that the sale deed was void under Section 5(8) of the Ceiling Act, the sale deed was also defective and not admissible because the trees on the plot were not included and there was deficiency of Stamp duty, the compromise decree was made after the 24.01.1971 therefore it was ignored and in Gata No.68 on area 4.43 acre other co-tenure holders had also share. The written statement was filed by the Power of Attorney holder of Kunwar Yudhendra Bahadur Singh stating therein that order in regard to grove may be cancelled and in lieu thereof other grove may be declared surplus. But the same has not been accepted by the Prescribed Authority on the ground that the land in dispute has been declared surplus as per option exercised by the original tenure holder. Being aggrieved the appeal was filed by the petitioner, which has also been dismissed.

9. The ceiling area has been declared following the provisions under Section 5(6) of the Ceiling Act, as per option of the

original tenure holders under Section 12-A proviso (d) of the Ceiling Act. Section 5(6) and Section 12-A proviso (d) of the Ceiling Act are extracted below:-

" **Section 5 - Imposition of ceiling** (1) On and from the commencement of the Uttar Pradesh Imposition of Ceiling on Land Holdings (Amendment) Act, 1972, no tenure-holder shall be entitled to hold in the aggregate through-out Uttar Pradesh, any land in excess of the ceiling area applicable to him.

.....
.....

(6) In determining the ceiling area applicable to a tenure-holder, any transfer of land made after the twenty-fourth day of January, 1971, which but for the transfer would have been declared surplus land under this Act, shall be ignored and not taken into account :

Provided that nothing in this sub-section shall apply to--

(a) a transfer in favour of any person (including Government) referred to in sub-section (2);

(b) a transfer proved to the satisfaction of the prescribed authority to be in good faith and for adequate consideration and under an irrevocable instrument not being a benami transaction or for immediate or deferred benefit of the tenure-holder or other members of his family.

[Explanation I.--For the purposes of this sub-section, the expression 'transfer to land made after the twenty-fourth day of January, 1971', includes--

(a) a declaration of a person as a co-tenure-holder made after the twenty-fourth day of January, 1971 in a suit or proceeding irrespective of whether such suit or proceeding was pending on or was instituted after the twenty-fourth day of January, 1971];

(b) any admission, acknowledgment, relinquishment or declaration in favour of a person to the like effect, made in any other deed or instrument or in any other manner.]

Explanation II.--The burden of proving that a case falls within clause (b) of the proviso shall rest with the party claiming its benefit.

"Section 12A

In determining the surplus land under Section 11 or Section 12, the Prescribed Authority shall, as far as possible, accept the choice indicated by the tenure-holder to the plot or plots which he and other members of his family, if any, would like to retain as part of the ceiling area applicable to him or them under the provisions of this Act, whether indicated by him in his statement under Section 9 or in any subsequent proceedings :

Provided that--

(a) the Prescribed Authority shall have regard to the compactness of the land to be included in the ceiling area applicable to the tenure-holder;

(b) where the tenure-holder's wife holds any land which is aggregated with the land held by the tenure-holder for purposes of determination of the ceiling area, and his wife has not consented to the choice indicated by the tenure-holder as to the plot or plots to be retained as part of the ceiling area applicable to them, then the Prescribed Authority shall, as far as possible, declare the surplus land in such manner that the area taken out of the land held by the tenure-holder's wife bears to the total surplus area the same proportion as the area originally held by her bore to the total land held by the family;

(c) where any person holds land in excess of the ceiling area including any land mortgaged to the State Government or to a 2[bank as defined in clause (c) of Section 2 of the Uttar Pradesh Agricultural Credit Act, 1973] or to a co-operative land development bank or other co-operative society or to the Corporation or to a Government Company, the surplus land to be determined shall, as far as possible, be land other than that so mortgaged;

(d) where any person holds land in excess of the ceiling area including land which is the subject of any transfer or partition referred to in sub-section (6) or sub-section (7) of Section 5, the surplus land determined shall, as far as possible, be land other than land which is the subject of such transfer or partition, and if the surplus land includes any land which is the subject of such transfer or partition, the transfer or partition shall, in so far as it relates to the land included in the surplus land, be deemed to be and always to have been void, and--

(i) it shall be open to the transferee to claim refund of the proportionate amount of consideration, if any, advanced by him to the transferor, and such amount shall be charged on the 3[amount] payable to the transferor under Section 17 and also on any land retained by the transferrer within the ceiling area, which shall be liable to be sold in satisfaction of the charge, notwithstanding anything contained in Section 153 of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 ;

(ii) any party to the partition (other than the tenure-holder in respect of whom the surplus land has been determined) whose land is included in surplus land of the said tenure-holder shall be entitled to have the partition re-opened."

10. The sale deed of the land in dispute was executed in favour of the petitioner on 06.12.1983 during pendency of the ceiling proceedings against the original tenure holders. Sub-section (8) of Section 5 provides that no tenure-holder shall transfer any land held by him during the continuance of proceedings for determination of surplus land in relation to such tenure-holder and every transfer made in contravention of this sub-section shall be void. Section 5(8) is extracted below:-

"**Section 5 (8)** Notwithstanding anything contained in Sub-sections (6) and (7), no tenure-holder shall transfer any land held by him during the continuance of proceedings for determination of surplus land in relation to such tenure-holder and every transfer made in contravention of this sub-section shall be void.

Explanation.-- For the purposes of this sub-section, proceedings for, determination of surplus land shall be deemed to have commenced on the date of

publication of notice under Sub-section (2) of Section 9 and shall be deemed to have concluded on the date when an order in relation to such tenure-holder is passed under Sub-section (1) of Section 11 or under Sub-section (1) of Section 12, or as the case may be, under Section 13."

11. This amendment has been incorporated by way of U.P.Act No.20 of 1976 (w.e.f.10.10.1975). The combined reading of the aforesaid provisions shows that in determining the ceiling area applicable to a tenure holder any transfer of land made after 24.01.1971 and during the continuance of the ceiling proceedings shall be ignored and such transferred land shall be included in the holding of the transferrer for the purposes of Ceiling Act and declaring surplus land. Thereafter while determining the surplus area a tenure holder may exercise choice and the Prescribed Authority shall as far as possible accept the choice. If however surrender of surplus land by tenure holder is not possible or feasible without including the transferred land then the Prescribed Authority will accept such surrender and in such an event the transfer of such land shall be deemed to be null and void and the transferee is entitled to compensation and other rights as are provided under sub clause (i) of clause (d) of the Proviso to Section 12-A.

12. It is fortified by the judgment of Hon'ble Supreme Court in the case of **Ravindra Singh Versus Phool Singh and another; (1995) (1) SCC 251.** The relevant paragraph 6 is extracted below:-

"6. A combined reading of sub-section (6) of Section 5 and clause (d) of the proviso to Section 12-A yields the following position (insofar as it is relevant for the purpose of this appeal):

(a) In determining the ceiling area applicable to a tenure-holder, any transfer of land made after 24-1-1971 shall be ignored and such transferred land shall be included in the holding of the transferor except where such transfer is saved by the proviso to sub-section (6) of Section 5;

(b) In the matter of surrender, however, the Prescribed Authority is entitled to insist that the tenure-holder surrender land which is not the subject-matter of transfer referred to in Section 5(6);

(c) If, however, surrender of surplus land by the tenure-holder is not possible or feasible without including the transferred land, then the Prescribed Authority will accept such surrender, in which event transfer of such land shall be deemed to be null and void;

(d) Where the Prescribed Authority accepts the surrender of transferred land, the transferee is entitled to compensation and other rights as are provided in sub-clause (1) of clause (d) of the proviso to Section 12-A.

The object of the above provisions is quite clear and consistent. Any transfer effected after 24-1-1971 shall be ignored for the purpose of determining the ceiling area of the tenure-holder, but in the matter of surrender, the Government does not want, as far as possible, to accept surrender of transferred land. This may be for the reason that acceptance of surrender of transferred land is likely to lead to complications and disputes; the

Government wants to accept the surrender of lands which are free of any such controversy. But if that does not prove possible, the Government will accept the surrender of transferred land even, in which event the transfer of such land shall be treated as null and void so as to vest clear title in the Government. The transferee of a land so surrendered is entitled to claim the compensation money and other rights mentioned in sub-clause (i) of clause (d)."

13. Similar view has been taken by the Hon'ble Supreme Court in the case of **Smt. Kamlesh Kumari Versus State of U.P. and others; (1982) 3 SCC 315** by a short order, which reads as under:-

" The short point taken by Mr Ashoke Sen in support of the petition is that even assuming that the finding of the prescribed authority that the transfer was not bona fide is correct, the prescribed authority was in error in not excluding the land said to have been transferred from the surplus area. The land which was the subject-matter of transfer was covered by Plot 460. The contention is well-founded and must prevail. In these circumstances, we set aside the judgment of the High Court and that of the prescribed authority and remit the case to the prescribed authority to decide the surplus land in accordance with Section 12-A(d) of the Act by excluding the area which was the subject of transfer as far as possible.

2. The appeal is disposed of accordingly."

14. Similar view has been taken by this court in the case of Mohd.Hayat Khan (minor) Versus State of U.P. and others; 1991 (9) LCD 396, Mohd.Muste Hassan and others Versus The Addl. Commissioner, Meerut and others; 1995 RD 186, Jogendra Singh and others Versus State of U.P. and others; 1983 All.L.J.1297, Chaudhary Mohammadn Mumtaz Husain Versus SDO/Press Authority and others; 1988(6) LCD 374 and Nakchhed Singh Versus State of U.P. and others; 1978 All.L.J.776.

15. In the case of **Sanjay Kumar and another Versus State of U.P. and others; 1995 RD 478,** the Hon'ble Supreme Court considered the question as to whether voluntary transfers such as a court sale, is a transaction valid under the provisions of sub-section (6) and (8) of Section 5 of the Ceiling Act and to be reckoned in decreasing the surplus area and the Hon'ble Supreme court concluded to say that the sales voluntary or involuntary are required to pass the test of being bona fide sales and for adequate consideration so as to be excluded from being computed in the surplus area of the tenure holder and are to be treated as void when taking place during continuance of surplus area proceedings.

16. The Hon'ble Supreme Court in the case of **Rajendra Singh and others Versus State of U.P. and others; 1999(1) AWC 188 (SC)** has held that the prohibition contained in sub-Section (8) of Section 5 of the Ceiling Act is absolute, therefore the sale deeds executed in violation thereof to be treated to be part of the land held by the tenure holder and it would be within the exclusive jurisdiction of the Prescribed Authority to take or carve out the surplus area from any land of tenure holder.

17. In view of above, it is settled that the sale deed executed during pendency of the Ceiling proceedings would be ignored and the transferred land shall be included in

the holding of the transferee i.e. the original tenure holder. However, in view of the judgment of the Hon'ble Supreme Court in the Case of **Ravindra Singh Versus Phool Singh and another; (1995) (1) SCC 251**, the Prescribed Authority is entitled to accept the surrender of land which is not the subject matter of transfer in lieu thereof and if not possible the transferee is entitled to compensation and other rights as are provided in sub clause (i) of clause (d) of proviso to Section 12-A.

18. A Full Bench of this court in the case of **Raja Yuveraj Datt Singh Versus Prescribed Authority and others; 1968 RD 171**, has held that clearly the scheme of the Act is that the tenure holder remains the owner (Bhumidhar) of the entire land held by him retaining with him the entire bundle of rights until a notification is issued under Section 14 of the Act and the rights, title and interest of the tenure holder even in respect of the surplus land stand extinguished only from the date of the notification under Section 14 of the Act. It has also held that the Prescribed Authority has no authority to deal with the rights of the transferees. It had to treat the transfers a nullity.

19. This court, in the case of **Smt. Prema Devi Versus A.J.D., Hamirpur and anther; 2005(2) AWC 1411**, has held that the rights conferred upon the tenure holder of making a choice by enacting part of Section 12-A has to be balanced with the right of a transferee to seek exclusion of the plots purchased by him for a valuable consideration from the surplus land in case plots other than those purchased by him are available for being declared surplus. Only such a construction of Section 12A of the Act will further the object of Clause (d) of proviso to the said section and any other construction will make it redundant. Thus the normal rules is that the land forming subject matter of transfer shall not be included in the surplus land unless the tenure holder is left with no other land or the area available with him falls short of area declared surplus.

20. This court, in the case of **Smt. Ram Kali Versus State of U.P. and others; 1982 All. L.J. 134**, has held that the Prescribed Authority and the Appellate Court did not have valid or sufficient grounds for rejecting the revised choice indicated by the petitioner because the choice can be revised till such time his rights stand extinguished under Section 14 of the Act. The relevant paragraph 5 is extracted below:-

"The second reason, which the Prescribed Authority gave, was that in the revised choice certain plots were sought to be declared as surplus which stood transferred after 8-6-1973. The appellant Court itself has held that the said ground was not valid or good ground. In my view, the Prescribed Authority and the appellate Court did not have valid or sufficient grounds for rejecting the revised choice indicated by the petitioner. There is a uniform case law of this Court on the point that the petitioner can revise his choice till such time as her rights stand extinguished under S.14 of the Act. In the instant case, from the record it is clear that the Prescribed Authority held that the so-called dispossession of the petitioner on 8-4-1977 was illegal. In this view of the matter, it has to be held that there was o extinction of the interest of the petitioner when she moved the application dated 6-9-1979, and, therefore, there was no good ground for

rejecting the prayer made in the said application."

21. Adverting to the facts of the present case and upon consideration in the light of above this court finds that the Prescribed Authority has recorded a categorical finding that on perusal of files of proceedings under Section 10(2) of Ceiling Act, it is apparent that 0.83 dic. of plot No.68 has been declared surplus from the holding of Kunwar Gokhale Bahadur Singh and 1.86 acre was given to other two co-tenure holders as their Ceiling area. It has also come in the appellate order that 0.83 acre of plot no.68 of Smt.Raj Kumari Ranja Devi was declared surplus. Therefore the dispute relates to 2.77 acre area. Whereas it has been claimed by the petitioner that Kunwar Yudhendra Bahadur Singh had executed the registered sale deed of 4.43 acre of plot no.68 in favour of petitioner on 06.12.1983, which was during pendency of Ceiling proceedings against him. Therefore the said land was to be treated as of transferrer for the purpose of Ceiling proceedings ignoring the sale deed in view of Section 5(8) as it was void. As claimed the land in dispute had come to Kunwar Yudhendra Bahadur Singh on the basis of a compromise decree dated 07.04.1973 passed by Civil Judge, Kheri, whereas such trasfer was to be ignored under Section 5(6) of the Ceiling Act. Accordingly the land in dispute has rightly and in accordance with law was not treated as exclusive of Kunar Yudhendra Bahadur Singh. It was dealt with accordingly treating it to be of all the four tenure holders and it appears the same has not been challenged by anybody because nothing was brought before this court in this regard.

22. The sale deed executed in favour of the petitioner has also not been found bona fide by the court's below on the ground that there was a grove on the land in dispute but the sale of only land was made, whereas both should have been sold, accordingly there was a deficiency of stamps of Rs.40,000/-. It seems to be correct because certified copy of the written statement filed by the Power of Attorney holder before the Prescribed Authority, which has been filed with supplementary affidavit dated 30.01.2013 by the petitioner. It has been disclosed in the written statement that Kunwar Yudhendra Bahadur Singh had got the disputed grove in partition in the suit, which was pending in the court of Civil Judge w.e.f. 24.01.1971 to 08.07.1973. It was further stated that the said grove may be included in his ceiling area and the notice may be cancelled and if it is not possible another grove of answering respondent may be kept in his ceiling area. Therefore the sale deed was not bonafide and the partition on the basis of compromise was made in a proceeding which had started on the cut of date i.e. 24.01.1971. Therefore apparently the whole exercise was done in a fraudulent manner to save the land from the provisions of Ceiling Act, which was not permissible and against the aims and objects of the Ceiling Act.

23. In view of above, the contention of learned counsel for the petitioner is misconceived and not tenable. The land of other co-tenure holders was also included and declared surplus or given to them in the land in dispute. The land in dispute was declared surplus on the option of tenure holders. Therefore the vague revised option of Power of Attorney holder of only one of them that too without specification was not

valid and acceptable in the facts and circumstances of case. Therefore it has rightly not been accepted.

24. Thus the impugned orders have rightly been passed in accordance with law by reasoned and speaking orders. this court does not find any illegality or error in the impugned orders, which may call for any interference by this court. The writ petitions are misconceived and lacks merit.

25. The writ petitions Misc. Single No.808 of 1991, Misc. Single No.807 of 1991, Misc. Single No.809 of 1991 and Misc. Single No.810 of 1991 are, accordingly, **dismissed.** No order as to costs.

(2022)01ILR A645
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 16.12.2021

BEFORE

THE HON'BLE MANISH MATHUR, J.

Misc. Single No. 11790 of 2021

Yashraj Inst. Of Prof. Studies & Ors.
...Petitioners
Versus
Indian Nursing Council New Delhi & Ors.
...Respondents

Counsel for the Petitioners:
Ashok Kumar Singh, Anshuman Singh

Counsel for the Respondents:
C.S.C., Gyanendra Kumar Srivastava, Samidha

A. Civil Law - Indian Nursing Council (Minimum Prerequisites for granting suitability to Nursing Programs), Regulations, 2020: Regulation 22 - The petitioner's application for grant of No Objection certificate for conducting the M.Sc. (Nursing) courses is required to be issued only by the State Government strictly in accordance with the provisions of Regulation 22 of Regulation of 2020. (Para 22)

Writ Petition Allowed. (E-10)

List of Cases cited:

1. Karnataka State Assc. of the Management of Nursing & Allied Health Science Institutions & ors. Vs Indian Nursing Council & ors. *(distinguished)*

(Delivered by Hon'ble Manish Mathur, J.)

1. Heard Mr. Prashant Chandra, learned Senior Advocate assisted by Mr. Anshuman Singh, learned counsel for petitioner, Ms. Samidha, learned counsel for opposite party no.1, learned State Counsel for opposite party no.2 and Mr. Gyanendra Kumar Srivastava, learned counsel for opposite party no.3. Opposite party no.4 being merely proforma in nature, notices to it stand dispensed with.

2. Petition has been filed seeking the following main relief:-

i) issue a writ, order or direction in the nature of Mandamus commanding opposite parties 2 and 3 to forthwith issue a No Objection Certificate/Essentiality Certificate and recognition for running the M.Sc. (Nursing Programme) as mandated under Regulation 22 of the Indian Nursing Council Regulations.

ii) issue a writ, order or direction in the nature of Mandamus commanding opposite parties not to create any obstacle or hindrance in the imparting of training in the M.Sc. (Nursing Programme) and in

taking admissions for the academic year 2020-21 and for starting the same.

*iii) issue a writ, order or direction in the nature of Mandamus commanding opposite party no.3 to forthwith refund the amount of Rs.5 lacs collected as inspection fee together with such interest as may have accrued thereon and as may be ordered by this Hon'b*le *Court to be paid to petitioner within such time as may kindly be stipulated;*

3. Learned counsel for petitioner submits that paragraph 4 of Circular dated 19.02.2009 issued by Indian Nursing Council stipulates that institutions could start nursing programme [GNM/B.Sc.(N)] with affiliation or parent Hospital with minimum of 120/150 beds. It is submitted that since petitioner-institution had affiliation with various Hospitals, petitioner-institution was granted recognition for conducting B.Sc. (Nursing) Program on 31.01.2011 which was renewable every year and in pursuance thereof, recently opposite party no.3 i.e. U.P. State Medical Faculty on its website indicated petitioner's continued recognition for the said course for the academic session 2020-21. It is submitted that as such, petitioner-institution has conducted the aforesaid programme for the past ten years continuously and the course pertaining to first batch of students was also completed in the year 2016.

4. It is submitted that subsequently with regard to conduct of the courses, the Indian Medical Council issued notification known as the Indian Nursing Council (Minimum Prerequisites for granting suitability to Nursing Programs) Regulations, 2020 (hereinafter referred to as Regulations of 2020). The regulations have been framed in accordance with Indian Nursing Council Act, 1947 (hereinafter referred to as Act of 1947) and, therefore have statutory force. It is submitted that Regulation 22 of Regulations of 2020 prescribes minimum pre-requisites for starting M.Sc. (Nursing) course with Regulation 22(ii) indicating that an institution offering B.Sc. (Nursing) program wherein one batch has passed out is eligible to start M.Sc. (Nursing) program.

5. As such, it is submitted that the only condition required for an institution to be eligible to start M.Sc. (Nursing) program was conduct of B.Sc. (Nursing) program where one batch had passed out. It is submitted that the procedure for obtaining Essentiality Certificate/No Objection Certificate were thereafter indicated in Regulation 22 (iii), (iv) and (v). Learned counsel submits that petitioner-institution being fully eligible to conduct M.Sc. (Nursing) program applied on 17.01.2020 but result thereupon has not seen light of the day leading to filing of present writ petition.

6. It has further been submitted that in terms of the procedure indicated under Regulation 22(iii), the eligible Establishments/Organizations are required to obtain Essentiality Certificate/No Objection Certificate firstly from the concerned State Government where the program is sought to be established. It is further submitted that a reading of aforesaid provision will indicate that No Objection is required to be issued by the State Government pertaining only to verification of bona fides of the institution requiring to conduct aforesaid programmes. It is submitted that it is only once the State Government concerned issues No Objection Certificate that the

institution is required to obtain Essentiality Certificate/No Objection Certificate from the concerned State Nurses and Midwives Registration Council (SNRC). It is submitted that in the State of U.P., opposite party no.3 is the concerned SNRC but its role would commence only after the State Government provides Essentiality Certificate/No Objection Certificate.

7. As such, it has been submitted that petitioner being fully eligible to conduct M.Sc. (Nursing) program in terms of Regulation 22, the State Government is required to issue No Objection Certificate so as to enable the petitioner-institution conduct the aforesaid programmes.

8. Learned counsel appearing on behalf of opposite party no.1 upon instructions admitted that Indian Nursing Council had granted petitioner-institution recognition to conduct B.Sc. (Nursing) program in 2011 and its suitability was renewed thereafter every year. It is also admitted that petitioner-institution has already completed the first batch of the course of B.Sc. (Nursing) program. It is also admitted that the recognition granted to petitioner-institution in 2011 has neither been rescinded nor withdrawn.

9. Learned counsel appearing on behalf of opposite party no.3, however, has submitted that even for the purposes of issuance of Essentiality Certificate/No Objection Certificate from the concerned State Government in terms of Regulation 22 (iii) of Regulations of 2020, it is the SNRC concerned, i.e. opposite party no.3 which is required to conduct an inspection and provide a report to State Government. As such, it is denied that opposite party no.3 does not have any role in the matter. It has been further submitted that Regulations specifically provide for inspection being conducted by opposite party no.3, which is not merely an administrative exercise and is required to be done to its fullest to achieve the objects of the Regulations and the Act and in order to ascertain the bona fide of any institution which applies for such a course. Learned counsel has also relied upon a judgment and order dated 24.07.2017 passed by High Court of Karnataka at Bangaluru in W.P. No.25355-25357/2017 **(Karnataka State Association of the Management of Nursing and Allied Health Science Institutions and others v. Indian Nursing Council & others)** with the submission that after passing of the aforesaid judgment and order, the Indian Nursing Council does not have any authority or competence to grant recognition to any institution for any nursing courses and it is only the SNRCs which have been authorized to do so. It is submitted that as per his instructions although appeal against the aforesaid judgment was filed but the same was withdrawn. As such, it is submitted that it is only opposite party no.3 being SNRC who is competent authority to grant recognition to new Nursing course. It has also been submitted that Regulation 4(ii) of Regulations of 2020 clearly specifiy the minimum pre-requisites for starting GNM/B.Sc.(Nursing) program that the eligible Establishments/Organizations should have their own 100 bedded Parent Hospital. Since petitioner-institution does not have its own 100 bedded Parent Hospital, it is ineligible to be considered for starting an M.Sc. (Nursing) program in accordance with Regulations of 2020.

10. Considering the aforesaid submissions advanced by learned counsel

for the parties and upon perusal of material on record, it is an admitted fact that prior to advent of Regulations of 2020, recognition for conduct of B.Sc. (Nursing) program was subject to eligibility and qualifications prescribed under Circular dated 19.02.2009 by Indian Nursing Council. Paragraph 4 of aforesaid Circular clearly indicates that institutions can start nursing programme [GNM/B.Sc.(N)] with affiliation or parent Hospital with minimum of 120/150 beds. It is in accordance with the Circular of 2009 that admittedly petitioner-institution was granted recognition by Indian Nursing Council in 2011 for conduct of B.Sc. (Nursing) program. It is the specific case of petitioner institution that petitioner although did not have its own parent hospital but had affiliation with various Government as well as private hospitals, which was a fact recognised by Indian Nursing Council while granting recognition in year 2011. It is also a relevant fact as admitted by opposite party no.1 upon instructions that initial recognition granted to petitioner-institution for conducting B.Sc. (Nursing) program still holds good and has neither been rescinded nor withdrawn and in pursuance thereof, the first batch of the course has also been completed. It is also an admitted fact that even as on date, petitioner-institution does not have its own parent hospital.

11. So far as submission of opposite party no.3 is concerned that the institution is ineligible to conduct M.Sc. (Nursing) program since it does not have its own parent hospital, it is seen from the record that such a stipulation is required only for the purposes of starting B.Sc. (Nursing) program. It is also on record that resolution dated 29.10.2014 was issued by Indian Nursing Council pertaining to implementation of Nursing Educational Standards. Paragraph 17 is with regard to starting of the Nursing Programme with effect from 2013-14. The resolution specifically indicates that an institution is required to have 100 bedded parent hospital for opening new B.Sc. (Nursing) program but the same would not affect institutions which have been established without parent hospital. The resolution also indicates that institutions under the State Government and Central Government which wish to start or open M.Sc. Nursing Department are exempted from the twin criteria of having parent hospital or one batch of B.Sc. Nursing students having passed out provided they are affiliated to State or Central Government Hospitals.

12. It is the assertion of learned counsel for opposite party no.3 that since petitioner-institution is not an institution under the State or Central Governments, the exemptions would be inapplicable upon them and they will therefore be required to fulfil the mandatory condition of having their own parent hospital.

13. From the facts narrated herein above, it is evident that at the time of recognition of petitioner-institution, the only condition required was for the petitioner-institution either to have a parent hospital or to have an affiliation with regard to same. The resolution of Indian Council clearly exempts the condition of having a 100-bedded parent hospital for those institutions which have already been established without parent hospital such as petitioner-institution.

14. Clause 3 of paragraph 17 of the Resolution is clearly applicable upon institutions operated under the State Government and Central Government wishing to start an M.Sc. (Nursing)

Department. The exemption clause would be referable to the Regulations framed under the Act and do not operate in a vacuum.

15. In the intervening period, Regulations of 2020 have been issued on 12.03.2021 in terms of the Act of 1947. It would supersede the resolutions of the Indian Nursing Council particularly since they have statutory force.

16. As per Regulation 22 of Regulations of 2020, the only minimum pre-requisite required for starting M.Sc. (Nursing) program is for an institution offering B.Sc. (Nursing) program where one batch has passed out.

17. It is not the case of opposite parties that the institution does not have a currently operating B.Sc. (Nursing) program or that one batch of B.Sc. (Nursing) program has not passed out. There is no such condition indicated in Regulation 22 that an institution desirous of commencing M.Sc. (Nursing) program is required to have a 100-bedded parent hospital. It is not a case of casus omissus. This Court cannot read a condition which is not indicated in the statutory regulations. Since there is no ambiguity in the condition indicated in Regulation 22, there is no requirement of having or taking any external aid and the provision has to be read as it is. Since it is the admitted case of opposite parties that petitioner's recognition is still operative right from 2011 and one batch of B.Sc. (Nursing) program has passed out in the year 2016, clearly petitioner-institution fulfils the minimum pre-requisites required for starting M.Sc. (Nursing) program in terms of Regulation 22 of Regulations of 2020.

18. So far as role of opposite party no.3 is concerned, Regulation 22(iii) clearly indicates the first stage of grant of recognition and prescribes that the eligible establishments/organizations are required to obtain Essentiality Certificate/No Objection Certificate from the concerned State Government. The provisions in regulation 22 of Regulations of 2020 are as follows:-

"22. Minimum pre-requisites {for starting M.Sc. (Nursing)}

(i) The following Establishments/Organizations are eligible to start a M.Sc. (Nursing) program.

a) Central Government/State Government/Local Body;

b) Registered Private or Public Trust;

c) Organizations registered under Societies Registration Act including Missionary Organizations;

d) Companies incorporated under Section 8 of Company's Act.

(ii) An institution offering B.Sc. (Nursing) program wherein one batch has passed out is eligible to start a M.Sc. (Nursing) program.

OR

Super specialty hospital having the following requisite beds is eligible to start a M.Sc. (Nursing) program.

.....

.....

(iii) The eligible Establishments/Organizations should obtain Essentiality Certificate/No Objection Certificate from the concerned State Government where the M.Sc. (Nursing) program is sought to be established. The particulars of the name of the College/Nursing Institution along with the name of the Trust/Society [as mentioned in Trust Deed or Memorandum of Association] as also full address shall be mentioned in No Objection Certificate/Essentiality Certificate.

(iv) After receipt of the Essentiality Certificate/No Objection Certificate, the eligible institution shall get recognition from the concerned SNRC for the M.Sc. (Nursing) program for the particular Academic Year, which is a mandatory requirement.

(v) The Council shall after receipt of the above documents/proposal online would then conduct Statutory Inspection of the recognized training nursing institution under Section 13 of the Act in order to assess the suitability with regard to availability of Teaching Faculty, Clinical and Infrastructural Facilities in conformity with Regulation framed under the provision of the Act.

.....

....."

19. From a perusal of aforesaid Regulation 22 (iii), it is apparent that the initial No objection Certificate is required to be obtained by Establishments/Organizations from the State Government where the nursing programme is sought to be established along with particulars indicated therein. The dichotomy between the provisions of Regulation 22 (iii) and (iv) are self-evident. The role of SNRC is clearly indicated as being operative after the No Objection Certificate has been issued by the State Government. The Regulation does not prescribe any role to SNRC prior to issuance of any No Objection Certificate from the State Government. The purpose of obtaining No objection Certificate from the concerned State Government appears only to test the bona fides of the Organizations seeking recognition to conduct M.Sc. (Nursing) course. As such, the initial burden of issuing No objection Certificate is only upon the State Government and not upon the State Nurses and Midwives Registration Council.

20. So far as the judgment relied upon by learned counsel for opposite party no.3 is concerned, the same pertains to competence of the Indian Nursing Council for grant of recognition to organizations desirous of conducting nursing courses. It has been held that the Indian Nursing Council has no authority to grant recognition to institutions imparting nursing courses.

21. It is a relevant fact that the said judgment has been rendered six years after petitioner-institution has already been recognized by the Indian Nursing Council, which still holds good. A reading of the said judgment does not make it apparent that it is retrospective in nature or that recognition granted by Indian Nursing Council prior to passing of the judgment would render all such recognition de facto withdrawn or rescinded. As such, it is the considered opinion of this Court that the aforesaid judgment rendered by High Court of Karnataka would be inapplicable in the present facts and circumstances.

22. Considering the aforesaid facts and circumstances and the observations made, it is apparent that the petitioner's application for grant of No objection Certificate for conducting the M. Sc. (Nursing) courses is required to be issued only by the State Government strictly in accordance with the provisions of Regulation 22 of Regulations of 2020.

23. As such a writ in the nature of Mandamus is issued commanding opposite party no.2 to consider the application of petitioner-institution for conduct of M.Sc. (Nursing) course strictly in terms of Regulation 22 of Regulations of 2020. Relevant orders pertaining to same shall be passed within a period of 15 days from the date a copy of this order is produced before the concerned authority.

24. So far as prayer no.3 to writ petition is concerned, although learned counsel for petitioner has submitted that opposite party no.3 is incompetent to have collected the amount as inspection free but this Court at this stage is not entering into the dispute granting liberty to petitioner to approach appropriate authority for redressal pertaining to said grievance. In case any such representation is filed, the same shall be decided by a reasoned and speaking order within a period of six weeks from the date a copy of this order is produced before the concerned authority.

25. With aforesaid observations and directions, the petition is partly **allowed.**

(2022)01ILR A651
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 08.11.2021

BEFORE

THE HON'BLE J.J. MUNIR, J.

Misc. Single No. 13533 of 2021

Ram Kali ...Petitioner
Versus
State Of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Smriti

Counsel for the Respondents:
C.S.C.

A. Civil Law - Fair Price Shop - In case any charges are levelled against the holder of the fair price shop, the standard of proof, in the opinion of this Court, would be the preponderance of probability of the civil standard. However, nothing has been done by the State to prove charges against the petitioner. (Para 14)

Writ Petition Partly Allowed. (E-10)

(Delivered by Hon'ble J.J. Munir, J.)

This writ petition is directed against an order dated 19.03.2018 passed by the Sub-Divisional Officer, Mitauli, District - Lakhimpur Kheri, cancelling the petitioner's license and contract for the fair price shop at Village - Ashiq Nagar, Block and Tehsil - Mitauli, District - Lakhimpur Kheri and also forfeiting security of Rs. 5,000/-. Also under challenge is the order of the Additional Commissioner (Food), Lucknow Division, Lucknow passed in Appeal No. 3561 of 2018, affirming the order last mentioned and dismissing the petitioner's appeal.

2. A counter affidavit has been filed on behalf of respondent nos.1 to 4.

3. Admit.

4. Heard forthwith.

5. The petitioner is the fair price shop dealer at Village - Ashiq Nagar Development Block, Tehsil - Mitauli, District - Lakhimpur Kheri. According to the petitioner, she had been doing her business of distributing essential commodities eventlessly. She was served with a charge-sheet dated 25.01.2018 by the Sub-Divisional Magistrate, Mitauli, District - Lakhimpur Kheri, requiring her to submit her reply. The petitioner submitted her reply on 24.02.2018, rebutting the charges and detailing her defence. The petitioner's fair price shop license and contract were ordered to be cancelled by the Sub-Divisional Officer vide order dated 19.03.2018. The order was challenged in appeal under Section 13(3) of the U.P. Essential Commodities (Sales and Distribution) Control Order, 20161 before the Joint Commissioner (Food), Lucknow. The appeal aforesaid was registered on the file of the Appellate Authority as Case No. 03561 of 2018. The Appellate Authority, by his order dated 09.12.2020, has dismissed the petitioner's appeal and affirmed the order of the Authority of first instance.

6. Aggrieved, the present writ petition has been instituted.

7. Heard Ms. Smriti, learned Counsel for the petitioner and Mr. Ved Prakash Verma, learned Standing Counsel appearing for the respondents.

8. A perusal of the impugned order passed by the Authority of first instance would show that proceedings against the petitioner were drawn allegedly on the basis of a complaint by thirty-three cardholders, the summary whereof is set out in the order impugned. The proceedings giving rise to the impugned order and charge-sheet that followed was said to be drawn up on the basis of the complaint of these cardholders and their statements recorded by the Regional Supply Inspector concerned. A summary of the complaints indicated to have been made by the cardholders, attached to the petitioner's shop, is about charging extra for food grains or providing lesser quantity of kerosene than the cardholders' entitlement. There are facts and figures about the short supply and the overcharge relating to thirty-three cardholders, shown in the tabulated summary. On the basis of these statements of the various cardholders, the authority has culled out four charges against the petitioner (translated from Hindi to English) :

1. The dealer provided the antyodaya cardholders with food supplies in quantity less than their entitlement and at a higher price.

2. The dealer provided kerosene to the antyodaya cardholders in quantity less than their entitlement and overcharging them for it.

3. The dealer, while distributing food grains to grehasti cardholders, overcharges them and to some of them, for months together, no supply is made.

4. The dealer, while distributing kerosene, provides it in short measure and overcharges for it.

9. A perusal of the impugned order shows that it is recorded by the Sub-Divisional Officer, that after service of the charge-sheet dated 25.01.2018, the dealer

was required to submit his reply, together with appropriate evidence in his defence, within a week. The charge-sheet was served upon the dealer on 29.01.2018, to which a reply was submitted on 24.02.2018. The Sub-Divisional Officer has then proceeded to record a summary of the petitioner's defence to the charges. A reference to copies of the stock register vis-à-vis the relevant charges, also finds mention. The Sub-Divisional Officer has proceeded to hold that upon perusal of a photostat copy of the stock register, it is found that at Serial Nos. 1-29, the twenty-nine pages that have been annexed, do not show the month to which these relate, nor the date. It is also remarked that the register does not also indicate verification of the same by any competent authority. It is remarked that to these inaccuracies in the photostat copy of the stock register annexed "The explanation furnished by the dealer cannot be regarded as entirely satisfactory, nor the stock register filed in support of the explanation admissible in evidence." It is also said in the order impugned that the petitioner, in support of his explanation, has not offered any such dependable evidence, on the basis of which, his explanation can be accepted or that on its basis, he may be held innocent. It is then abruptly concluded that in the aforesaid manner, all the four charges levelled against the petitioner stand fully proved, rendering his contract/license liable to be cancelled. The Appellate Authority has largely refused to interfere with the order of cancellation on the ground that the petitioner has not produced any firm evidence in support of his defense.

10. Learned Counsel for the petitioner has argued that the submissions, on the basis of which he has been charged, are not those of the cardholders, but merely foisted allegations by the Supply Inspector. It is also urged that the authorities below have failed to accept the petitioner's defense on the ground that twenty-nine pages of the distribution register did not bear the date, month or the signatures of the verifying authority. It is also argued that the authorities below have failed to take into consideration the distribution certificate issued by the Gram Panchayat for the month of January, 2018, which is a duly signed document by the Block Development Officer. Learned Counsel submits that ignoring the said certificate vitiates the impugned order, on account of non-consideration of material evidence. It is particularly pointed out that the Sub-Divisional Officer failed to consider Forms 'A' and 'B' filed by the petitioner, with his reply dated 14.02.2018, which are certificates issued by the Prescribed Authority, that is the Block Development Officer. These certificates have material bearing on the charge about the distribution of essential commodities. Both the orders passed by the authorities below, according to the learned Counsel for the petitioner, suffer from non application of mind and do not constitute a reasonably informed determination by quasi-judicial authorities, whose decision carries adverse civil consequences, affecting a citizen's livelihood.

11. Mr. Ved Prakash Verma, learned Standing Counsel, on the other hand, argues that all relevant evidence has been taken into consideration by the authorities below to record concurrent findings of fact that are not open to question in the present petition under Article 226 of the Constitution.

12. Proceedings for cancellation on a charge of short distribution or short

measurement is a stigmatic order, that visits a fair price shop dealer with adverse civil consequences. It impacts his right to livelihood. This Court cannot fail to notice that both the authorities below have proceeded on a presumption about proof of the charges, just because the Supply Inspector has brought them. Both the authorities below seem to believe that whatever the State say against the license holder is to be presumed true, unless rebutted by cogent evidence adduced by the license holder.

13. A reading of the Sub-Divisional Officer's order cannot but lead one to the conclusion that he has identified himself with the State and their case, rather than to act as an impartial arbiter, before whom charges have been laid by the State. Upon the Supply Inspector representing the State, bringing charges of short measurement or short supply of essential commodities, fairness of procedure demands that the one who alleges ought to be saddled with the burden of proof. The State ought to have been required to adduce evidence aliunde in support of the allegations that are carried in charge-sheet and culled out into four charges. For instance, if the Supply Inspector has made imputations in his report that the petitioner short supplied kerosene to certain cardholders or food grains to others, whose names he has mentioned in his report, he ought to have called them to testify at the inquiry, at least some of those whom he has named in the report, to prove the charges before the Sub-Divisional Officer. The petitioner would have opportunity to cross-examine those cardholders. If that practice of a viva voce examination-in-chief, for some reason, be not countenanced by the procedure for holding such inquiries prescribed under some statutory rule or even a Government Order, in that event, affidavits of those cardholders ought to have been filed by the State to prove its charges against the petitioner. The petitioner could then have requested some of those deponents to be summoned for cross-examination in respect of whatever they deposed on facts, in support of the charges.

14. The State cannot be presumed to have come before the Sub-Divisional Officer with a pre-established case, merely because it is said in the charge-sheet that some statements of cardholders have been recorded by the Supply Inspector. The burden to prove those charges would always be on the State. At the same time, it does not mean that the charges against the holder of fair price shop license have to be proved beyond reasonable doubt by the State, like a criminal trial. Ideally, the standard of proof, in the opinion of this Court, would be preponderance of probability or the civil standard. Unfortunately, nothing here has been done by the State to prove the charges, except laying a charge-sheet and the two authorities accepting the charges by their folly in not distancing themselves from the State in their different role of quasi-judicial authorities, under the Control Order of 2016, charged with the responsibility to pronounce upon rights of a fair price shop license holder, that would visit him with adverse civil consequences. The Appellate Authority has acted no differently from the Sub-Divisional Officer and his order is more sketchy and casual than that of the authority of first instance.

15. This Court is of opinion that it is not a case, as the learned Counsel for the petitioner says, of non application of mind by the two authorities below, but a case of a fundamental fallacy about their

understanding of the manner in which a quasi-judicial inquiry ought to be undertaken. This Court does not propose to determine the validity of the charges on merits or the quantum of penalty inflicted, it would require a re-determination of the case by the authority of first instance.

16. In the result, this petition **succeeds** and stands ***allowed in part.*** The impugned orders dated 21.11.2020 passed by the Joint Commissioner (Food), Lucknow, in Case No. 3561 of 2018 and the order dated 19.03.2018 passed by the Sub-Divisional Officer, Mitauli, District - Lakhimpur Kheri are hereby **quashed**. The Sub-Divisional Officer concerned shall now proceed to inquire into the charges afresh and pass an order in accordance with law, after hearing the petitioner, bearing in mind the guidance in this judgment, within a period of six weeks of receipt of a copy of this order.

17. There shall be no order as to costs.

Note : Since my digital signature has expired and its renewal will take some time, the printout of the order has been taken and has been manually signed by us. This copy be uploaded with the stipulation that as and when the digital signature is renewed or a fresh digital signature is obtained, the digital signature copy be uploaded after deleting the scanned copy.

(2022)01ILR A655
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 02.12.2021

BEFORE

THE HON'BLE J.J. MUNIR, J.

Misc. Single No. 23973 of 2020

Oriental Insurance Comp. Ltd. **...Petitioner**

Versus

Smt. Uma Devi & Ors. **...Respondents**

Counsel for the Petitioner:
Waquar Hashim

Counsel for the Respondents:
C.S.C., Ajeet Kumar, Rinku Verma

A. Practice & Procedure - Limitation - Limitation Act, 1963 - Article 44(a) - The policy here is a Group Accidental Insurance Cover provided by the State Government for all the farmers of Uttar Pradesh, who are recorded tenure holders. It is for the said purpose that claims are to be routed through the District Magistrate. If the claim of the tenure holder is rejected and the result communicated to the District Magistrate, who in turn did not informed the claimant, as happened in the present case, then the period of limitation under the provisions of Article 44 (a) cannot be held to run. (Para 11& 12)

Writ Petition Partly Allowed. (E-10)

List of Cases cited:

1. The Oriental Insurance Co. Ltd. Through Divisional Manager Vs Chhote Singh & ors. Misc. Single No. 20736 of 2018 *(followed)*

(Delivered by Hon'ble J.J. Munir, J.)

1. This petition under Article 227 of the Constitution has been filed assailing a judgment and order of the Permanent Lok Adalat, Lucknow dated 22.02.2020 passed in P.L.A. Case No.196 of 2017. By the impugned judgment and order, the Permanent Lok Adalat has granted the claim of respondent nos.1, 2 and 3 to the proceeds of a Group Insurance Policy for tenure-holder-farmers dying an accidental death. The Permanent Lok Adalat has ordered the petitioner, Insurance Company

to pay the sum assured i.e. Rs.1 lakh together with penalty in the sum of Rs.1,50,000/-. Simple interest at the rate 9% per annum has been ordered on the aforesaid sum from the date of presentation of respondents' petition to the Lok Adalat. Costs in the sum of Rs.5000/- have also been awarded against the petitioner.

2. The facts giving rise to this petition are that a contract was entered into by the Commissioner and Secretary, Board of Revenue, U.P., Lucknow and the petitioner, Oriental Insurance Company Limited, whereby a Group Accidental Insurance Cover was provided to all the farmers of Uttar Pradesh, who were recorded tenure-holders and in the age group of 12 years to 70 years. Their eligibility was dependent on the fact that the farmer was duly recorded in the Khatauni and died an unnatural death in an accident. The said policy was in force from 19.11.2009 to 18.11.2010. The husband of respondent no.1-Smt. Uma Devi and father of respondent nos.2 and 3, Nishu and Bhola Singh, that is to say, the late Omkar Singh, was a resident of Village Sahurapur, Post Paunthia Buzurg, Police Station Lalpura, District Hamirpur. He died in a road accident on 08.10.2010. It is not in issue that the deceased, on the date of his demise, was in the eligibility zone according to his age group. Consequent upon Omkar Singh's death, respondent no.1 on behalf of herself and respondent nos.2 and 3, invoked the Insurance Policy and presented a claim, after completing all formalities, to the petitioner Insurance Company, routed through the District Magistrate, Hamirpur. After presentation of the claim, respondent no.1 pursued it regularly and with due diligence, visiting the office of the petitioner Insurance Company for the purpose. Despite lapse of a long period of time, she neither received the sum assured nor any communication in that regard from the Insurance Company.

3. When the first respondent did not receive any response from the Insurance Company for a considerable period of time, she presented a petition to the Permanent Lok Adalat at Lucknow. The Insurance Company filed a written statement, contesting the first respondent's claim. However, the factum of the contract of insurance was not denied. The Insurance Company, however, disputed the fact about the death of the assured in a road accident on 08.10.2010 on ground that no First Information Report had been lodged. There were other pleas raised that the postmortem report and the panchayatnama, that was presented, related to an unknown person, which could not be read to infer the death of the assured in a road accident. It was also averred in the written statement that on receipt of the first respondent's claim through the District Magistrate, Hamirpur, the Insurance Company had appointed a surveyor, who submitted his report on 08.03.2011, wherein it was mentioned the first respondent did not produce necessary documents. It was also pleaded that on 04.04.2011, the first respondent's claim was rejected by the Competent Authority in the Insurance Company and its information was given to the District Magistrate, Hamirpur. Amongst other things, it was also pleaded that if there is any dispute between parties to the contract, the same has to be resolved by a Committee headed by the District Magistrate, whose decision would be binding on the Insurance Company. There is also a plea that the petition was presented with a delay of seven years, with no explanation about it. The territorial jurisdiction of the Permanent Lok Adalat at Lucknow was also questioned. There were attempts for

reconciliation by the Permanent Lok Adalat, but these failed and the matter went to trial. On 30.05.2018, five issues were framed, which read (translated into English from Hindi):

"(1) Whether the petitioner on the basis of grounds taken in the petition is entitled to the sum assured and penalty from the Insurance Company, opposite party no.1? If yes, what sum of money?*

(2) Whether the petition is bad for non-joinder of necessary parties?*

(3) Whether the petition is barred by limitation?

(4) Whether the Permanent Lok Adalat had jurisdiction to hear the petition?*

(5) Whether the petitioner is entitled to any relief?*"

(*Note: The description of parties is according to the array before the Permanent Lok Adalat)

4. The Permanent Lok Adalat answered all the issues against the petitioner-Insurance Company and in favour of respondent nos.1, 2 and 3.

5. Aggrieved, this petition has been filed.

6. Heard Mr. Waquar Hashim, learned Counsel for the petitioner, Mr. Rinku Verma, learned Counsel appearing on behalf of respondent nos.1, 2 and 3 and Mr. P.K. Singh, learned Additional Chief Standing Counsel appearing for respondent nos.4 and 5.

7. Before this Court, Mr. Waquar Hashim has confined his submissions to the point of limitation. He has argued that the claim was rejected by the petitioner-Insurance Company on 04.04.2011. The rejection was duly communicated to the District Magistrate, Hamirpur. The petition, therefore, filed before the Permanent Lok Adalat on 18.02.2017 is hopelessly time barred. He has invited the attention of the Court to Article 44(a) of the Schedule to the Limitation to submit that the prescribed period of limitation is three years reckoned from the date that the claim on the policy is denied.

8. Mr. Rinku Verma, on the other hand, has refuted the aforesaid submission and said that the denial was never communicated to respondent no.1 and until that was done, the period of limitation would not run. He has emphasized that the District Magistrate, Hamirpur, to whom the repudiation of the first respondent's claim was communicated, never conveyed the denial of the claim to the first respondent or to respondent nos.2 and 3.

9. The question of limitation for a claim of insurance under the Group Accident Insurance Scheme in question came up for consideration before this Court in **The Oriental Insurance Company Limited through Divisional Manager vs. Chhote Singh and others, Misc. Single No.20736 of 2018, decided on 13.08.2018. In The Oriental Insurance Company Limited vs. Chhote Singh (supra), it was held:**

"On the aspect of limitation this Court would certainly note that there is no period of limitation envisaged under the Legal Services Authority Act for a claim

being instituted before the Permanent Lok Adalat but it does not mean that a claim for compensation can be delayed inordinately. This would defeat the very purpose of beneficial policy which is meant to mitigate the financial hardship of an indigent family. The benefit must flow to a victim promptly and without any inordinate delay. It is for this this reason that clause-11 of the agreement provides for lodging a claim within four months of mishap before the Lekhpal. The limitation provided under Clause 11 of the agreement is to aid the quantum of penalty provided for under clause 22 of the agreement but would not constitute a bar for approaching the permanent Lok Adalat where a claim is delayed or denied.

The proceedings before Permanent Lok Adalat under the Legal Services Authority Act, 1987 are akin to the proceedings before a civil court by virtue of Section 22(3). The general law of limitation prescribing three years period, cannot be given a go-bye and in absence of a prescription in the Act, the same has to be understood to be a valid condonable bar insofar as the aspect of limitation is concerned.

In the present case, however, it is clear that the Oriental Insurance Company has not put up a definite stand before the Permanent Lok Adalat except the date of repudiation of the claim by letter dated 7.4.2011 of which the last paragraph reads as under:

"कपया उक्त दावा को नो क्लेम करने से पूर्व इस दावे पर आपकी टिप्पणी/मत की पुष्टि आपेक्षित है। आपको हुई असुविधा के लिए खेद है।"

From the above paragraph of the letter dated 7.4.2011, it is clear that the final repudiation was dependent upon the consideration by the district committee or any decision taken by the said committee. There is no such communication placed on record according to which the claim of the opposite parties was finally repudiated in the light of any shortcoming having been finally affirmed against the claimants.

Learned counsel for the petitioner also invited attention of this Court to clause 20 of the agreement which reads as under:

"20. If any objection is raised by Insurance Company in settlement of claim documents, the same will have to be returned to District Magistrate positively within two weeks and Committee headed by District Magistrate of the concerned districts would resolve the objection within one month. The Committee can also take a decision by circulation. The decision of the Committee will be final and binding on the Oriental Insurance Company Limited."

Having regard to the condition extracted above, it is argued that the repudiation once conveyed to the district authorities was never turned down within the stipulated period of time and as such, at least the letter dated 7.4.2011 followed by a period of one month, would be a relevant date from which the period of limitation will have to be treated to commence.

This Court having regard to the essence of clause 20 of the agreement is of the opinion that the claim of a victim cannot be defeated within the scope of clause 20 of the agreement so long as there is a communication of any shortcoming for entitlement of a claim duly communicated to the aggrieved claimant which in the present case is none.

Thus, the plea of limitation taken up in the present case on the strength of clause 20 of the agreement read with Article 44 of the Schedule appended to the Limitation Act, would not defeat the object and purpose of the scheme so long as the claim was kept pending constituting a continuing cause, hence the plea raised deserves rejection."

10. In the present case, Clause 21 of the agreement is the same as that involved in **Oriental Insurance Company Limited vs. Chhote Singh (supra)**. In what precise terms the claim was declined and communicated to the District Magistrate is not known. The Permanent Lok Adalat has dealt with the matter under Issue No.3. The Permanent Lok Adalat relied upon the provisions of the Insurance Regulatory and Development Authority (Protection of Policyholders' Interests) Regulations, 2002 to hold that by dint of Regulation 7(2) of the Regulations, the Insurer is obliged to keep the insured periodically informed on the requirements to be fulfilled regarding lodging of a claim arising in terms of an Insurance Policy and the procedures to be followed by the assured in order to enable the insurer to settle the claim.

11. It has also been recorded by the Permanent Lok Adalat that the District Magistrate has not conveyed any information to the first respondent. Thus, whatever decision was taken by the Insurance Company regarding the first respondent's claim on 04.04.2011, or soon thereafter when it was rejected, it is difficult to hold that the period of limitation would run from 04.04.2011, in terms of Article 44 (a) of the Limitation Act, when the Insurance Company-petitioner rejected the first respondent's claim. This difficulty about reckoning the period of limitation seems to have arisen because Article 44 (a) of the Limitation Act takes into account a transaction of the nature leading to the taking out of an Insurance Policy by an insured. Invariably, the person, who purchases the policy or the beneficiaries are privy to the Insurance Policy in some manner, where the Insurance Company, after a claim is laid on the policy, communicates the result to the claimants. The policy here, is, in its nature, different, which is a Group Accidental Insurance Cover provided by the State Government for all the farmers of Uttar Pradesh, who are recorded tenure-holders. It is for the said purpose that claims are to be routed through the District Magistrate.

12. Now, if the claim is rejected and the result communicated to the District Magistrate, as is the case here, who does not, in turn, communicate the factum of rejection to the claimants, it would be an absurd construction to place on the provisions of Article 44(a) of the Schedule to the Limitation Act that period of limitation would run from the date of such rejection. The factum of rejection of the claim in the case of a policy of the kind in hand would never be known to the claimants, like the first respondent. If the fact of rejection is not communicated by the Insurer, the period of limitation under the provisions of Article 44 (a) cannot be held to run. The rejection of a claim by the Insurer for the purpose of Article 44(a) carries with it implicitly a reasonable communication of the Insurer's decision to the claimant. It is precisely on the basis of this reasoning that this Court in the **Oriental Insurance Company Ltd. vs. Chhote Singh** *(supra)*, held the claim not to be barred by time. This is the reasoning

that the Permanent Lok Adalat has adopted and we do not find any flaw with it. The first respondent's claim cannot, therefore, be said to be barred by limitation as urged by the learned Counsel for the petitioner.

13. Learned Counsel for the petitioner has also questioned the imposition of penalty in the sum of Rs.1,50,000/- on the ground that the penalty imposed is disproportionate, considering the fact that the Insurance Company believed that they validly conveyed the rejection of the claim laid by the first respondent to the District Magistrate.

14. In the totality of circumstances, this Court finds that there is some communication gap between the petitioner-Insurance Company, the District Magistrate and the claimant-respondent no.1, that has all contributed to the delay in the ultimate enforcement of the claim before the Permanent Lok Adalat. In the circumstances obtaining, equity would be best adjusted if the penalty imposed by the Permanent Lok Adalat is reduced by 50% and determined at a figure of Rs.75,000/-, instead of Rs.1,50,000/-.

15. In the circumstances that this is a case where there was a miscommunication between parties, this Court is of opinion that Simple Interest at 9% *per annum* ordered by the Permanent Lok Adalat from the date of presentation of the petition, ought to be substituted by an order directing payment at the rate of 9% per annum Simple Interest on the substantive award of Rs.1,00,000/- from the date of the award till realization.

16. In the result, this petition succeeds and is **allowed in part.** The impugned order dated 22.02.2020 passed by the Permanent Lok Adalat in P.L.A. Case No.196 of 2017 is **modified** to the extent that in substitution of the direction to pay penalty in the sum of Rs.1,50,000/-, the penalty payable by the petitioner shall be a sum of Rs.75,000/-. Also, the Simple Interest awarded by the Permanent Lok Adalat at the rate of 9% *per annum* on the sum of Rs.2,50,000/- shall be substituted by a direction to pay simple interest at the rate of 9% *per annum* on the substantive award of Rs.1,00,000/- from the date of the order impugned, passed by the Permanent Lok Adalat, until realization. The rest of the award made by the Permanent Lok Adalat is upheld.

17. Parties will bear their own costs before this Court.

(2022)01ILR A660
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 27.10.2021

BEFORE

THE HON'BLE RAKESH SRIVASTAVA, J.
THE HON'BLE SHAMIM AHMED, J.

Misc. Bench No. 24704 of 2021

Prem Shankar Chaturvedi ...Petitioner
Versus
State Of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Anil Kumar Upadhyay, Bhup Chandra Singh

Counsel for the Respondents:
C.S.C.

A. Practice & Procedure - Indian Constitution, 1950 - Article 226 - The present matter pertains to the private rivalry between the parties therefore the writ is not maintainable. (Para 7)

Writ Petition Rejected. (E-5)

List of Cases cited:

1. Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahatosav Smarak Trust & ors. Vs V.R. Rudani & ors. (1989) 2 SCC 691 *(followed)*

(Delivered by Hon'ble Rakesh Srivastava, J.
&
Hon'ble Shamim Ahmed, J.)

1. Heard Shri Anil Kumar Upadhyay, learned counsel for the petitioner and the learned Standing Counsel appearing on behalf of State-respondents.

2. This petition has been filed praying, inter alia, the following relief:

(i) A writ, order or direction in the nature of Mandamus commanding and directing the opposite party no. 2 and 3 to consider and decide the representation dated 01.10.2021 in accordance with law (contained as Annexure No. 1) and directed to the opposite party no. 5 and 6 to refund the money of Rs. 1,25,000/- which has been received in advance from petitioner for the occasion of marriage ceremony of petitioner's daughter in the interest of justice.

3. Brief facts of the case as argued by the learned counsel for the petitioner is that in the month of December, 2020, the petitioner fixed the date of marriage of his daughter on 28.04.2021. The petitioner gave Rs. 1,00,000/- through NEFT on 29.12.2020 to the respondent No. 5 in advance for booking of marriage place. The petitioner also gave Rs. 25,000/- in advance for catering arrangements to the respondent No. 6. In the month of March, April, 2021, permission of marriage was not given by the authorities concerned, due to which the petitioner had no option but to postpone the marriage of her daughter. In this regard the petitioner had also informed the respondent Nos. 5 and 6 much before the date of marriage, i.e., 28.04.2021 through telephone as well as through letter, communicated to them. A photocopy of such letter is annexed as Annexure-5. It is also stated in the writ petition that the petitioner has also send representation to the higher authorities, but no heed has been paid by the authorities.

4. Learned counsel for the petitioner submits that the petitioner claims refund of the money given by him to the respondent Nos. 5 and 6, which was given to them through NEFT, copies of which are annexed with the present writ petition.

5. Learned Standing counsel appearing for the respondent-State submitted that the dispute involved in the present writ petition between the parties is private dispute. The present writ petition is not maintainable under Article 226 of the Constitution of India and no mandamus can be issued by this Court as prayed by the petitioner.

6. The Hon'ble Supreme Court in the case of **Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahatosav Smarak Trust and others Vs. V.R. Rudani and others, (1989) 2 SCC 691** was pleased to observe as under:

"15. If the rights are purely of a private character no mandamus can issue. If the management of the college is purely a private body with no public duty

mandamus will not lie. These are two exceptions to mandamus. But once these are absent and when the party has no other equally convenient remedy, mandamus cannot be denied. It has to be appreciated that the appellants-trust was managing the affiliated college to which public money is paid as government aid . Public money paid as government aid plays a major role in the control, maintenance and working of educational institutions. The aided institutions like government institutions discharge public function by way of imparting education to students. They are subject to the rules and regulations of the affiliating University. Their activities are closely supervised by the University authorities. Employment in such institutions, thereof, is not devoid of any public character. So are the service conditions of the academic staff. When the University takes decision regarding their pay scales, it will be binding on the management. The service conditions of the academic staff are, therefore, not purely of a private character. It has super-added protection by University decisions creating a legal right-duty relationship between the staff and the management. When there is existence of this relationship, mandamus cannot be refused to the aggrieved party."

7. After perusal of the arguments advanced by the learned counsel for the parties and after perusal of the record we find that the dispute involved in the present writ petition between the parties is a private dispute and in view of the judgment rendered in the case of **Andi Mukta (supra)**, no mandamus can be issued by this Court and the present writ petition is not maintainable under Article 226 of the Constitution of India for the relief claimed by the petitioner. The objection raised by the learned Standing counsel for the State appears to be justified.

8. The petitioner is at liberty to pursue the other remedy available to him under law.

9. Accordingly the present writ petition is not maintainable and the same is **dismissed**.

(2022)01ILR A662
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 08.12.2021

BEFORE

THE HON'BLE RAKESH SRIVASTAVA, J.
THE HON'BLE SAURABH LAVANIA, J.

Misc. Bench No. 28453 of 2021

Nirmala Devi ...Petitioner
Versus
U.O.I. & Ors. ...Respondents

Counsel for the Petitioner:
Zubair Hasan

Counsel for the Respondents:
C.S.C., A.S.G.

A. Practice & Procedure - The application received after the last date of submission cannot be treated as valid application form and no right, based upon the same, can be claimed by such candidate. (Para 11)

The petitioner was negligent as the petitioner sent her application form through registered post on 27.10.2020 despite of having knowledge of last date i.e., 30.11.2020, mentioned in the notification. (Para 18)

Writ Petition Rejected. (E-10)

List of Cases cited:

1. Neena Chaturvedi Vs Public Service Commission, U.P. Allahabad (11) AWC (FB)

2. Smt. Sushmita Pandey Vs St. of U.P. & anr. 2014 (1) ADJ 382 (DB)

(Delivered by Hon'ble Saurabh Lavania, J.)

1. Heard Sri Zubair Hasan, learned counsel for the petitioner and Sri H.P. Srivastava, learned Additional C.S.C. appearing on behalf of opposite party Nos. 2 and 4.

2. This writ petition has been filed praying inter alia the following main relief:-

"(i) Issue a writ, direction or order in the nature of Mandamus commanding the respondents to issue a call letter and permit her to appear in the interview which is going for selection of post of Woman Member of District Consumer Commission, Hardoi."

3. Learned counsel for the petitioner, based upon the pleadings and documents on record, submitted that State Government for making appointment on the post(s) of President(s) and Member(s) of District Consumer Commission established in different districts of State of U.P. published a notification/ advertisement dated 27.10.2020 and the last date, as mentioned therein, for submission of application form, was 30.11.2020. Vide application dated 25.11.2020 (annexed as Annexure No. 2 to the petition), petitioner being eligible applied for the post of Women Member of District Consumer Commission, Hardoi. This application was sent through registered post on 27.11.2020. Thereafter, another notification/ advertisement dated 12.05.2021 was issued by the State Government by which last date for submission of application form was extended from 30.11.2020 to 11.06.2021, which was further extended to 25.06.2021 by a notification/ advertisement dated 10.06.2021.

4. He further submitted that when call letters were issued to all the candidates except the petitioner then she represented her cause and in turn, her request for permitting her to appear in the interview was not acceded, despite the fact that the Demand Draft of Rs. 1000/- was encashed, on the ground that the application form of the petitioner was received in the concerned Office on 01.12.2020 i.e. after the last date of submission of application form, which, as per notification/advertisement dated 27.10.2020 was 30.11.2020, though, the same was extended till 25.06.2021 and being so the application form of the petitioner was valid and she should have been called for facing interview. He also stated that the petitioner was not informed about this aspect of the case else she would have resubmitted her application form in pursuance to the notification/advertisement dated 12.05.2021. Now for the post(s) in issue, interview is going on and would be completed very soon and if the petitioner is not permitted to appear in the interview process she would suffer irreparable loss and injury for no fault. In fact opposite parties are at fault as they have not informed the petitioner about the delay in submission of application form and in this way, the petitioner has to made suffer for the fault of opposite parties.

5. Learned Additional C.S.C., on the basis of instructions, submitted that in the notification/advertisement dated 27.10.2020 issued by the State Government, last date of submission of application form was 30.11.2020. This last date, in fact, was not extended vide notification/advertisement dated 12.05.2021. The notification/advertisement dated 12.05.2021 is fresh notification inviting the applications for the post(s) mentioned therein i.e. President(s) and Member(s) of District Consumer Commission. As per this notification, last date of submission of application(s) was 11.06.2021, which was extended to 25.06.2021 vide notification/advertisement dated 10.06.2021. The notification/ advertisement dated 12.05.2021 only saves the candidature of those applicants who had submitted proper applications within time. Meaning thereby, a candidate whose application form, pursuant to the notification/ advertisement dated 12.05.2021 was valid, was not required to apply afresh pursuant to the notification/advertisement dated 12.05.2021 and his/her candidature would be considered otherwise not. In this case, application form of the petitioner was not valid as the same was received in the Office concerned on 01.12.2020 i.e. after last date of submission of application form i.e. 30.11.2020. As such, she is not entitled to prayer sought in the writ petition.

6. In view of above, this Court feels that the issues(s), under consideration, are that (i) as to whether the application form, pursuant to the notification/advertisement dated 27.10.2020, submitted by the petitioner through registered post on 27.11.2020 was valid on the date of notification/advertisement dated 12.05.2021 or not; (ii) as to whether the Department was under obligation to inform the candidate about the defect in application form or not; and (iii) as to whether vide notification/ advertisement dated 12.05.2021 the last date i.e. 30.11.2020 mentioned in the notification/advertisement dated 27.10.2020, was extended or not;

7. For adjudication of aforesaid issue(s), it would be appropriate to refer relevant condition(s) mentioned in the notification(s)/advertisement(s) dated 27.10.2020, 12.05.2021 as also 10.06.2021.

(a) Relevant portion of Condition No. 2 of the notification/advertisement dated 27.10.2020, reads as under:-

"इसके अनुसार निम्नलिखित अर्हता रखने वाले अभ्यर्थियों से आवेदन– पत्र आमंत्रित किये जाते हैं। आवेदन–पत्र की अंतिम तिथि 30.11.2020 होगी।"

(b) Condition No. 9 and 10 of notification/advertisement dated 27.10.2020, are as under:-

"9. अभ्यर्थियों द्वारा आवेदन–पत्र ***निबन्धक, राज्य उपभोक्ता विवाद प्रतितोष आयोग, उ0प्र0, सी–1, विकान्त खण्ड–1 (शहीद पथ के बगल में) गोमती नगर, लखनऊ उ.प्र. पिन कोड–226010*** *को रजिस्टर्ड पत्र द्वारा सीधे प्रेषित किया जायेगा।*

10- आवेदन–पत्र निर्धारित प्रारूप पर न होने, अपूर्ण होने या इस विज्ञापन की तिथि के पूर्व अथवा विज्ञापन में आवेदन–पत्र प्राप्त होने हेतु निर्धारित की गई अंतिम तिथि के पश्चात आवेदन प्राप्त होने पर आवेदन–पत्र स्वतः निरस्त समझे जायेगें। पदों की संख्या तथा स्थान में परिवर्तन बिना किसी पूर्व सूचना के किया जा सकता है। अभ्यर्थी द्वारा आवेदित जनपद के अतिरिक्त किसी अन्य जनपद में भी नियुक्ति किये जाने पर विचार किया जा सकता है।"

(c) Relevant portion of Condition No. 2 as also Condition No. 4, 9 and 10 of

notification/advertisement dated 12.05.2021, are as under:-

"इसके अनुसार निम्नलिखित अर्हता रखने वाले अभ्यर्थियों से आवेदन–पत्र आमंत्रित किये जाते हैं। आवेदन–पत्र की अंतिम तिथि 11 जून, 2021 होगी।

4- जिन आवेदकों द्वारा सदस्य, जिला उपभोक्ता आयोग के पद हेतु विज्ञापित विज्ञापन संख्या सीपी 202/84–2–2020–सीपी 14/88 टीसी, दिनांक 27 अक्टूबर, 2020 के क्रम में आवेदन किया गया है : को पुनः आवेदन की आवश्यकता नहीं है।

9- अभ्यर्थियों द्वारा आवेदन–पत्र ***निबन्धक, राज्य उपभोक्ता विवाद प्रतितोष आयोग, उ0प्र0, सी–1, विक्रान्त खण्ड–1 (शहीद पथ के बगल में) गोमती नगर, लखनऊ उ.प्र. पिन कोड–226010 को रजिस्टर्ड पत्र द्वारा सीधे प्रेषित किया जायेगा।***

10- आवेदन–पत्र निर्धारित प्रारूप पर न होने, अपूर्ण होने या इस विज्ञापन की तिथि के पूर्व अथवा विज्ञापन में आवेदन–पत्र प्राप्त होने हेतु निर्धारित की गई अंतिम तिथि के पश्चात आवेदन प्राप्त होने पर आवेदन–पत्र स्वतः निरस्त समझे जायेगें। पदों की संख्या तथा स्थान में परिवर्तन बिना किसी पूर्व सूचना के किया जा सकता है। अभ्यर्थी द्वारा आवेदित जनपद के अतिरिक्त किसी अन्य जनपद में भी नियुक्त किये जाने पर विचार किया जा सकता है।"

(e) The notification/advertisement dated 10.06.2021, reads as under:-

"पत्रांक सी0पी0 132/84–2–2021 दिनांक 10 जून, 2021

विज्ञप्ति

सर्वसाधारण को सूचित किया जाता है कि कोविड–19 महामारी के दृष्टिगत जिला उपभोक्ता आयोग के अध्यक्ष एवं सदस्यों के रिक्त/रिक्त होने वाले पदों पर चयन हेतु प्रकाशित विज्ञापन पत्रांकः सी. पी.127/84–2–2021, दिनांक 12 मई, 2021 में आवेदन करने की निर्धारित अंतिम तिथि दिनांक 11 जून, 2021 से बढ़ाकर 25 जून, 2021 निर्धारित की जाती है। उक्त पद पर नियुक्ति हेतु विज्ञापन पत्रांकः सी0पी0 127/84–2–2021, दिनांक 12 मई, 2021 एवं आवेदन प्रारूप, राज्य उपभोक्ता आयोग की विभागीय वेबसाइट ीजजचरूध्ध्बकतबण्नचण्दपबण्पदध पर अपलोड है। इच्छुक अभ्यर्थी उक्त वेबसाइट से सेवा शर्तें एवं आवेदन पत्र का प्रारूप प्राप्त कर, वांछित औपचारिकताओं को पूर्ण करते हुए राज्य आयोग कार्यालय में डाक के माध्यम से अथवा सीधे निर्धारित तिथि दिनांक 25 जून, 2021 तक आवेदन निबन्धक, राज्य उपभोक्ता विवाद प्रतितोष आयोग, उ0प्र0, सी–1, विक्रान्त खण्ड–1 (शहीद पथ के बगल में) गोमती नगर, लखनऊ उ0प्र0 पिन कोड–226010 के पते पर कर सकते हैं। आवेदन पत्र अपूर्ण होने अथवा निर्धारित तिथि के पश्चात प्राप्त होने पर आवेदन पत्र स्वतः निरस्त समझे जाएंगे।"

8. At this juncture, it would also be appropriate to refer relevant pronouncements of this Court on the issue as to whether the application form sent through registered post before last date of submission of application form is to be treated to be valid submission of application form or not?

9. Relevant paragraphs 5, 33 and 39 of the judgment passed by Full Bench of this Court in ***Neena Chaturvedi vs. Public Service Commission, U.P. Allahabad, 2011 (2) AWC 1114 (FB***); are quoted as under:-

"5. The question that can be formulated for consideration would be "when applications are invited, one through post office and the other by any other means or only through post, does the post office become the agent of the addressee, because there is express or implied authorisation by the addressee to send the articles by post.

"33. Apart from that insofar as the entire process of recruitment is concerned, may be in the office of respondent or any other body, which invites applications, if view is accepted that the post office becomes the agent of the addressee, the very process of recruitment itself would be frustrated. A contract between the sender and the post office cannot bind the addressee. Even otherwise accepting a proposition that the post office becomes the agent of the body which invited the applications would lead to manifest inconvenience and absurdity. For how long would such body have to wait for receipt of applications sent by post to conduct the interview, or hold the examination and what happens in cases where the application is lost through transit. Therefore when applications are to be received by a particular cut off date assuming that there is an offer and acceptance, receipt of the application by that cut off date only would make the acceptance complete.

39. If applications are invited by addressee for an interview or recruitment from eligible members from the general public, by advertisement either expressly by one mode or more, one of which is post office, when an applicant chooses to send his application through post, though the letter is posted in time but delivered late after last date of receipt, the question that arises for consideration is:-

"On an offer being made by advertisement, and an acceptance is sent by post, when does the acceptance become complete, on the date of receipt of the acceptance in the post office or its receipt by the addressee."

On an advertisement being issued by the offeror inviting applications through post and the sender (applicant) sends application through post (acceptance) but the same does not reach by the date mentioned in the advertisement, will the postal rule apply? The offeror in such cases, apart from inviting applications also lays down as one of its terms, that applications have to be received by a particular date. The offer therefore made if any, is receipt of the application through the post by a particular date.

The postal rule however applies, the moment an acceptance is posted through post, then the post office becomes the agent of the addressee (offeror). An advertisement inviting applications for examination or recruitment is merely an invitation to offer and not an offer itself. The person who sends his application by post or by any other mode assuming it is based on an offer, must send the acceptance by the particular date, in terms of offer. If it does not reach by that date, there can be no acceptance and the postal rule would not apply."

10. This question was again considered by Hon'ble Division Bench of this Court in ***Smt. Sushmita Pandey vs. State of U.P. and another, 2014 (1) ADJ 382 (DB),*** and after placing reliance on judgment of Hon'ble Full Bench in ***Neena Chaturvedi (supra)***, it was held as under:-

"In view of the aforesaid, the postal authority cannot be treated as an agent of the Commission so as to treat the dispatch of the application before the last date by post, as having been submitted before the last date. This apart, it was clearly provided in the advertisement that the print out of the online application with

the other relevant documents could also be submitted personally which facility could have been availed of by the petitioner but admittedly was not availed of.

The reliefs prayed for cannot, therefore, be granted to the petitioner.

The petition is, accordingly, dismissed."

11. As per law settled by this Court, in the above mentioned judgments, it is crystal clear that an application form received after the last date of submission can not be treated as valid application form and no right, based upon the same, can be claimed by such candidate/ applicant.

12. Relevant part of Condition No. 2 of the notification/advertisement dated 27.10.2020, quoted above, specifically says that last date of submission of application form is 30.11.2020. The advertisement/ notification dated 12.05.2021 also says in the same terms, according to which, the application form should be submitted by the applicant on or before 11.06.2021.

13. Condition No. 10 of both the notification(s)/ advertisement(s) dated 27.10.2020 and 12.05.2021, respectively, in clear terms provide that an application form received after the last date prescribed for submission of form would be deemed to be rejected.

14. Besides above, the petitioner herself filled the application form, as appears from the copy of application form annexed as Annexure No. 2 to the petition, and a perusal whereof particularly Clause No. 17 of the same shows that this Clause in specific terms provide that the application if received after the last date would not be considered.

15. Considering the aforesaid including the law propounded by this Court as also relevant part of Condition No. 2 and Condition No. 10, referred above, this Court is of the firm view that the application form of the petitioner was not valid on the date of publication of notification/ advertisement dated 12.05.2021. Issue No. (i) framed above is accordingly decided against the petitioner.

16. Now coming to Issue No. (ii). A perusal of condition(s), above quoted, shows that the same does not provide that an application, if received after delay, the applicant would be informed by the concerned Office. The conditions also does not provide that the concerned would be informed about the defect in application form. Moreover, no other condition or statutory provision has been placed before this Court according to which the State Government was under obligation to inform the candidate about the defect or delay in submission of application form. Thus, submission of the learned counsel for the petitioner on this aspect is rejected. Issue No. (ii) decided accordingly.

17. Adverting to Issue No. (iii). Condition No. 04 of notification/advertisement dated 12.05.2021, quoted above, provides that a candidate who has submitted his/her application form pursuant to the notification/advertisement dated 27.10.2020, need not to apply again. This condition, to the view of this Court, says that a candidate whose application form was accepted by the Recruitment Agency need not to apply afresh, however, a

candidate whose application form was not accepted was required to apply afresh pursuant to the notification/ advertisement dated 12.05.2021. Condition, under consideration, does not say that the last date mentioned for submission of application in the notification/ advertisement dated 27.10.2020 has been extended.

18. It goes without saying that a candidate should be vigilant in relation to the filling of application form as also on the issue as to whether the application form has been duly received, in time, by the Office concerned or not, more so, when a candidate is applying for the post(s) on which if he/ she is appointed has to decide a 'lis' between the parties. In the instant case, to the view of this Court, the petitioner/ applicant was negligent as the petitioner send her application form through registered post on 27.10.2020 despite of having knowledge of last date i.e. 30.11.2020, mentioned in the notification/advertisement dated 27.10.2020.

19. Thus for the reasons aforesaid, the interpretation, as suggested by the learned counsel for the petitioner, that the application form was within time as subsequent notification/advertisement dated 12.05.2021 provides last date of submission of application form as 11.06.2021, which was subsequently extended to 25.06.2021 vide notification/advertisement dated 10.06.2021 would be absurd interpretation of Condition No. 4 of notification/advertisement dated 12.05.2021 as this condition does not provide that the candidature of those candidates whose application forms were not found valid/incomplete or received after last date of submission of applications in the notification/advertisement dated 27.10.2020, would be considered and they need not apply afresh nor it says that the last date for submission of application form in the notification/ advertisement dated 27.10.2020, has been extended. Moreover, if the submission of the learned counsel for the petitioner is taken on its face value, then in that event, the Condition No. 10 of the notification(s)/ advertisement(s) in issue, quoted above, would become redundant and this would provide what has not been provided under the notification(s)/ advertisement(s) in issue. Moreover, this interpretation would also open a Pandora's Box and if it happens then in that event the entire process of recruitment would be held up. In catena of cases, it has been held by this Court as also by the Hon'ble Supreme Court that recruitment process should not be interfered with unless gross illegality or arbitrariness is shown on the part of the recruitment agency.

20. For the reasons aforesaid, Issue No. (iii) is also decided against the petitioner.

21. As already held that in entire notification/advertisement dated 27.10.2020, pursuant to which, the application form was submitted by the petitioner through registered post on 27.10.2020, there is no such condition which says that a candidate would be apprised about the defect in the application form or about the fact that the application form has not been received within time by the Office concerned and the application form of the petitioner was not valid on the date of publication of notification/ advertisement dated 12.05.2021, rather as per legal fiction, the same was rejected as was received by the Office concerned after

the last date of submission of application form as also that the last date for submission of application form i.e. 30.11.2020 in the notification/ advertisement dated 27.10.2020 was not extended in subsequent notification/ advertisement, the candidature of the petitioner can not be considered in ongoing interview process.

22. Thus, for the reasons aforesaid, this Court is of the view that the petitioner is not entitled to the relief sought in the present writ petition. The writ petition is ***dismissed*** with no order as to costs.

(2022)01ILR A669
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 10.12.2021

BEFORE

THE HON'BLE RAKESH SRIVASTAVA, J.
THE HON'BLE SHAMIM AHMED, J.

Misc. Bench No.28953 of 2021

Om Prakash ...Petitioner
Versus
State Of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Salil Tripathi, Gaurav Singh, Krishnat Tripathi, Ragini Pandey, Shikhar Dixit

Counsel for the Respondents:
C.S.C.

A. Practice & Procedure - Indian Constitution, 1950 - Article 226 - In the present case, the petitioner being a complainant fails to establish any legal right or able to show any breach of statutory duty on the part of authorities. Thus he has no locus to prefer the present writ. (Para 9 & 12)

Writ Petition Rejected. (E-10)

List of Cases cited:

1. Ravi Yashwant Bhoir Vs Collector (2012) 4 SCC 407 *(followed)*

2. Dharam Raj Vs. St. of U.P. & ors. (2010) 2 AWC 1878 (All) *(followed)*

3. Ayaaubkhan Noorkhan Pathan Vs St. of Mah. & ors. AIR 2013 SC 58

(Delivered by Hon'ble Rakesh Srivastava, J.
&
Hon'ble Shamim Ahmed, J.)

1. Heard Shri Salil Tripathi, learned counsel for the petitioner and the learned Standing counsel for State-respondent nos. 1and 2.

2. In view of the order proposed to be passed, notice to respondent no.3 is dispensed with.

3. This writ petition has been filed praying inter alia the following reliefs:-

i) To issue a writ in the nature of mandamus commanding the respondent nos. 1 and 2 to take appropriate action against the respondent no.3 within a fix time frame.

ii) To issue a writ in the nature of mandamus commanding the respondent nos. 1 and 2 to take effective steps for compliance of the (**Annexure No.1**)within fix period of time.

4. Learned counsel for the petitioner submits that respondent no.3 was initially appointed in the year 1993 in Shri Gandhi Kisan Inter College, Khadda on the post of

L.T. Grade Teacher which was vacated due to the sudden death of one Sri Madan Rai, for temporary period and in the appointment letter, the condition was mentioned that till the incumbent joins from the Public Service Commission, the services of the respondent no.3 will continue, however, it came to the knowledge of the petitioner that the respondent No.3 was appointed on the post of C.T.Grade Teacher instead of L.T.Grade Teacher and the appointment was sought on the basis of frivolous and concocted documents.

5. It was further argued by the learned counsel for the petitioner that respondent no.3 was further promoted without having requisite qualification as per the norms and standard of the Public Service Commission. The selection of the respondent no.3 is without following the due procedure as established by the law and the salary which was drawn by the respondent no. 3 is loss to the State Exchequer.

6. It was further argued by the learned counsel for the petitioner that the services of the respondent no.3 were regularized in the year 1913 without any proper advertisement, thereafter the respondent no.3 got himself transferred to Nehru Inter College, Mansa Chappar on the same post.

7. Learned counsel for the petitioner further argued that the appointment of the respondent no.3 is on the basis of the forged and fabricated documents and has curtailed the right of the eligible candidate, which is against the law and the salary which has been paid to the respondent no.3 be recovered by the State authorities. In this regard, one Moti Prasad has made a complaint to the District Inspector of Schools, Kushinagar on 19.7.2019. On the complaint made by Shri Moti Prasad, some orders have been passed by the concerned District Inspector of Schools against respondent no.3 but still he is working on the post of C.T.Grade Teacher and till date no action has been taken.

8. Per contra, learned Standing counsel submits that petitioner has no locus to file the present writ petition challenging the appointment of respondent no. 3 as he is not aggrieved person nor he has any concern with the appointment of respondent no.3 nor he was candidate of the said post at any point of time. It was further argued by the learned Standing counsel appearing on behalf of State that the petitioner has not made any complaint against the respondent no.3 to any of the authorities and even though the complainant who is Moti Prasad, has not turned up for filing the present writ petition, therefore, the present writ petition is totally misconceived and has been filed by a third person who has no locus to challenge the appointment of respondent no.3 nor it is a Public Interest Litigation nor there is any prayer for a writ of quo warranto.

9. After considering the arguments advanced by the learned counsel for the parties and after perusal of the record, we find that for a person to prefer the writ petition, has to establish that he has been deprived of or denied of a legal right and he has sustained injury to any legally protected interest. Thus in order to prefer a writ, the person entitled would be one who has either been wrongly deprived of his entitlement which he is legally entitled to receive and it does not include any kind of disappointment or personal inconvenience. It is settled proposition of law that the person who suffers from legal injury only can challenge the act or action or order by

filing a writ petition inasmuch as the writ petition under Article 226 of Constitution of India is maintainable for enforcing a statutory or legal right or when there is a complaint by the petitioner that there is breach of statutory duty on the part of authorities. Thus, there must be a judicially enforceable right for the enforcement of which the writ jurisdiction can be resorted to and not for the purpose of settlement of a personal grievance. In the present case, the petitioner fails to establish his any legal right or able to show any breach of statutory duty on the party of authorities.

10. The same view was observed by the Hon'ble Supreme Court in the case of **Ravi Yashwant Bhoir Vs. Collector, (2012) 4 SCC 407** with regard to the locus of a complainant and was pleased to observe as under:-

"58. Shri Chintaman Raghunath Gharat, Ex-President was the complainant, thus, at the most, he could lead the evidence as a witness. He could not claim the status of an adversial litigant. The complainant cannot be the party to the lies. A legal right is an averment of entitlement arising out of law. In fact, it is a benefit conferred upon a person by the rule of law. Thus, a person who suffers from legal injury can only challenge the act or omission. There may be some harm or loss that may not be wrongful in the eyes of law because it may not result in injury to a legal right or legally protected interest of the complainant but juridically harm of this description is called damnum sine injuria.

59. The complainant has to establish that he has been deprived of or denied of a legal right and he has sustained injury to any legally protected interest. In case he has no legal peg for a justiciable claim to hang on, he cannot be heard as a party in a lies. A fanciful or sentimental grievance may not be sufficient to confer a locus stand to sue upon the individual. There must be injuria or a legal grievance which can be appreciated and not a stat pro rationed valuntas reasons.

60. Under the garb of being necessary party, a person cannot be permitted to make a case as that of general public interest. A person having a remote interest cannot be permitted to become a party in the lies, as the person wants to become a party in a case, has to establish that he has a proprietary right which has been or is threatened to be violated, for the reason that a legal injury creates a remedial right in the injured person. A person cannot be heard as a party unless he answers the description of aggrieved party."

11. The same view was taken by the Division Bench of this Court in the case of **Dharam Raj Vs. State of U.P and others, (2010) 2 AWC 1878 (All)** with respect to the locus of complainant and was pleased to observe has under:-

"9. As evident from narration of the facts given above, it is evident that the petitioner was one of the complainants in the complaint against the respondent No. 4 on 12.3.2008. The action has since been taken on the complaint so made by the petitioner and others against the respondent No. 4, and fine of Rs. 5,000 has been imposed.

10. In the circumstances, the petitioner cannot have any grievance in the matter, and he is not an aggrieved person rather he is a person annoyed,

11. In the case of R. v. London Country Keepers of the Peace of Justice, (1890) 25 QBD 357, the Court has held:

A person who cannot succeed in getting a conviction against another may be annoyed by the said findings. He may also feel that what he thought to be a breach of law was wrongly held to be not a breach of law by the Magistrate.

He thus may be said to be a person annoyed but not a person aggrieved, entitle to prefer an appeal against such order.

12. According to our opinion a "person aggrieved" means a person who is wrongly deprived of his entitlement which he is legally entitled to receive and it does not include any kind of disappointment or personal inconvenience. "Person aggrieved" means a person who is injured or he is adversely affected in a legal sense.

13. It is settled law that a person who suffers from legal injury only can challenge the act/action/order etc. by filing a writ petition. Writ petition under Article 226 of the Constitution is maintainable for enforcing a statutory or legal right or when there is a complaint by the petitioner that there is a breach of the statutory duty on the part of the authorities. Therefore, there must be a judicially enforceable right for the enforcement of which the writ jurisdiction can be resorted to. The Court can enforce the performance of a statutory duty by public bodies through its writ jurisdiction at the behest of a person, provided such person satisfied the Court that he has a legal right to insist on such performance. The existence of the said right is the condition precedent to invoke the writ jurisdiction [Utkal University etc. v. Dr. Nrusingha Charan Sarangi and Ors. AIR 1999 SC 943 and Laxminarayan R. Bhattad and Ors. v. State of Maharashtra and Anr. (2003) 5 SCC 413].

14. Legal right is an averment of entitlement arising out of law. It is, in fact, an advantage or benefit conferred upon a person by a rule of law, [Shanti Kumar R. Canji v. Home Insurance Co. of New York AIR 1974 SC 1719 and State of Rajasthan v. Union of India and Ors. AIR 1977 SC 1361).

15. In **Jasbhai Motibhai Desat v. Roshan Kumar Hazi Bashir Ahmad and Ors.: AIR 1976 SC 578,** the Apex Court has held that only a person who is aggrieved by an order, can maintain a writ petition. The expression "aggrieved person" has been explained by the Apex Court observing that such a person must show that he has a more particular or peculiar interest of his own beyond that of the general public in seeing that the law is properly administered. In the said case, a cinema hall owner had challenged the sanction of setting up of a rival cinema hall in the town contending that it would adversely affect monopolistic commercial interest, causing pecuniary harm and loss of business from competition. The Hon'ble Apex Court observed as under:

Such harm or loss is not wrongful in the eye of law because it does not result in injury to a legal right or a legally protected interest, the business competition causing it being a lawful activity. Judicially, harm of this description is called damnum sine injuria. The term injuria being here used in its true sense reason why law suffers a person knowingly to inflict harm of this description on another, without holding him accountable for it, is that such harm done to an individual is a gain to

society at large. In the light of the above discussion, it is demonstratively clear that the appellant has not been denied or deprived of a legal right. He has not sustained injury to any legally protected interest. In fact, the impugned order does not operate as a decision against him, much less does it wrongfully effect his title to something. He has not been subjected to legal wrong. He has suffered no grievance. He has no legal peg for a justiciable claim to hang on. Therefore, he is not a "person aggrieved" to challenge the ground of the no objection certificate."

In Northern Plastics Ltd. v. Hindustan Photo Films Mfg Co. Ltd. and Ors. MANU/SC/1151/1997 MANU/SC/ 1151/1997 : (1997) 4 SCC 452, the Hon'ble Supreme Court again considered the meaning of "person aggrieved" and "locus of a rival Government undertaking" and held that a rival businessman cannot maintain a writ petition on the ground that its business prospects would be adversely affected.

16. The view taken by us that the petitioner is not a person aggrieved, thus he has no locus standi to file the present writ petition thereby challenging the order dated 16.3.2009 passed by Sub-Divisional Magistrate, Jaisinghpur, district Sultanpur is also supported by the decision of this Court in the case of Suresh Singh v. Commissioner Moradabad Division 1993 (1) AWC 601, where it was held that in an inquiry under Section 95(g) of the U.P. Panchayat Raj Act, 1947, the complainant who was Up-Pradhan could be a witness in. an inquiry but had no locus standi to approach this Court against the order of the State authorities, for the reasons that none of his personal statutory right are affected.

17. As such the petitioner has no focus standi to file the present writ petition under Article 226 of the Constitution of India. Even otherwise having regard to the facts and circumstances of the case, we are not inclined to exercise our discretionary jurisdiction under Article 226 of the Constitution of India."

12. When the facts of the instant case are tested on the touchstone of the law laid down in the aforesaid two judgments, it clearly comes out that the petitioner has no legal right of his own and neither has suffered from any legal injury, rather is a complainant, and thus would not have any locus to prefer the present petition.

13. Further the Hon'ble Supreme Court in the case of **Ayaaubkhan Noorkhan Pathan Vs. State of Maharashtra and others, AIR 2013 SC 58** was pleased to observe in paragraph 22 that under ordinary circumstances, a third person, having no concern with the case at hand, cannot claim to have any locus-standi to raise any grievance whatsoever but in the exceptional circumstances, the Court may examine the issue and in exceptional circumstances the Court may proceed suo-motu. For the sake of convenience, the relevant observations in the case of **Ayaaubkhan Noorkhan Pathan (supra)** are reproduced as under:-

"22. Thus, from the above it is evident that under ordinary circumstances, a third person, having no concern with the case at hand, cannot claim to have any locus-standi to raise any grievance whatsoever. However, in the exceptional circumstances as referred to above, if the actual persons aggrieved, because of

ignorance, illiteracy, in articulation or poverty, are unable to approach the court, and a person, who has no personal agenda, or object, in relation to which, he can grind his own axe, approaches the court, then the court may examine the issue and in exceptional circumstances, even if his bonafides are doubted, but the issue raised by him, in the opinion of the court, requires consideration, the court may proceed suo-motu, in such respect."

14. This Court has gone through the entire petition and no such averment has been made anywhere in the entire petition that the actual aggrieved persons because of ignorance, illiteracy, in articulation or poverty are unable to approach the Court and in those circumstances the petitioner has approached this Court. Thus, the present case would not stand the exceptional circumstances as have been spelt out by the Apex Court in the cases of **Ayaaubkhan Noorkhan Pathan (supra) and Dharm Raj (supra).**

15. Accordingly, we find that the petitioner prima facie has no locus to file the present writ petition challenging the appointment of respondent no. 3, who is working on the post of C.T.Grade Teacher. The petitioner is also not an aggrieved person nor he is complainant nor has filed any complaint before the authority concerned challenging the appointment of respondent no.3. The objection raised by the learned Standing counsel appears to be justified regarding locus of the petitioner.

16. Accordingly, keeping in view the aforesaid discussion, the writ petition is dismissed.

(2022)01ILR A674
ORIGINAL JURISDICTION

CIVIL SIDE
DATED: ALLAHABAD 18.10.2021

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE VIKAS BUDHWAR, J.

Writ A No. 14216 of 2021

Rajesh Kumar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Sri Akhilesh Kumar Pandey, Sri Punya Sheel Pandey

Counsel for the Respondents:
C.S.C.,

A. Service Law – Pension – Constitutional Validity – GO dated 08.12.2008: Clause 7(3)(gha) - Entitlement of life time family pension is neither an unfettered nor a fundamental right, as the same is governed by the statutory enactments so issued from time to time and in vogue. Nobody has right to receive family pension except otherwise provided by the Rules and the Schemes in that regard. (Para 12, 22)

B. Article 15(1) of the Constitution of India is not attracted in the present case and there is no violation of the same as the Government Order dated 8.12.2008 does not discriminate between same class of persons. Instead it protects interest of the petitioner to get family pension till the age of 25 years. (Para 18)

C. Concept of Valid Classification – Valid discrimination - Article 16 of the Constitution of India permits a valid classification. A valid classification is based on a just objective. 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. Legalistically, the test for a valid classification may be summarized as, a distinction based on a classification founded on an intelligible differentia, which has a rational relationship with the object sought to be achieved. (Para 23)

Classification made in the Government Order dated 8.12.2008 is a valid classification founded on an intelligible differentia which has a rational relationship with the object sought to be achieved. (Para 24)

There is nothing on record to suggest as to what is the educational qualification of the petitioner and whether he is working anywhere or not. It is hardly inconceivable that a person (male) who is aged about 46 years is not working anywhere to sustain himself and rather dependent upon the family pension of the deceased (mother). (Para 26)

Writ petition dismissed. (E-4)

Precedent followed:

1. Smt. Violet Issac & ors. Vs U.O.I. & ors. 1991 (62) FLR (Para 19)

2. Nitu Vs Sheela Rani & ors. (2016) 16 SCC 229 (Para 20)

3. Kallakkurichi Taluk Retired Officials Association, Tamil Nadu & ors. Vs State of Tamil Nadu (2013) 2 SCC 772 (Para 22)

Present petition challenges order dated 16.03.2021, passed by Executive Engineer P.W.D. Etah.

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

1. The petitioner herein has filed the present writ petition seeking following reliefs:-

"1. Issue a writ, order or direction in the nature of mandamus by declaring the Constitutional Validity of rule 7(3) ¼Hk½ of the Government Order mRrj izns'k 'kklu] foRr ¼lkekU;½ vuqHkkx&3] lk0&3&1508@nl&2008&308&97 y[kuÅ fnukad 08.12.2008 of U.P. retirement benefit rules 1967 as well as new Family Pension Scheme 1965 to declare the part of G.O. bearig sentence ÞvkfJr ekrk&firk vfookfgr@rykd'kqnk@fo/kok iq=h dh ikfjokfjd isa'ku thou i;ZUr feysxhAß to declare it ultra virus as against the provisions of Article 15(1) of the Constitution of India as ultra virus.

2. Issue a writ, order or direction in the nature of Certiorari quashing the impugned order dated 16.3.2021 passed by the Respondent No.2 upon the complaint no.40020121002680 preferred by the petitioner."

2. We have heard Sri Punya Sheel Pandey, learned counsel for the petitioner and Sri Girish Vishwakarma, learned Standing Counsel for the State-respondents. With the consent of the parties the present writ petition is being disposed of at the admission stage itself.

3. Admittedly as per case set out by the petitioner in the present writ petition, his father late Madan Mohan (since deceased) was an employee of respondent no.2 Public Works Department (In short P.W.D.) who expired. The mother of the petitioner Smt. Vidya Devi was conferred with the benefit of family pension and she was continuously paid family pension till her death i.e. 18.12.2020. Consequent to the death of his mother, the petitioner is before this Court seeking relief for declaring the part of the Government Order

being Clause 7(3) (kha) (gha) bearing No. lk0&3&1508@nl&2008&308&97 dated 8.12.2008 to be violative of Article 15 of the Constitution of India as it creates a discrimination between son/daughter (including widow daughter) married/remarried or on attainment of age of 25 years vis-a-vis the dependent father, mother, unmarried/divorcee/widow daughter, who have been made entitled to life time family pension.

4. The Government Order No. lk0&3&1508@nl&2008&308&97 dated 8.12.2008 has been filed as annexure-1 at page 13 of the paper book. Its alleged offending Clause 7(3) (gha) is quoted below:-

7.;3द्ध पारिवारिक पेंशन की अनुमन्यता हेतु परिवार को निम्न प्रकार वर्गीकृत किया जायेगा।

वर्ग–।

(क) विधवा/विधुर, अजन्म अथवा पुर्नविवाह, जो भी पहले हो,

(ख) पुत्र/पुत्री (विधवा पुत्री सहित) को विवाह/पुर्नविवाह अथवा 25 वर्ष की आयु तक अथवा जीविकोपार्जन की तिथि, जो भी पहले हो, तक।

वर्ग–।।

(ग) अविवाहित/विधवा/तलाकशुदा पुत्री, जो उपरोक्त वर्ग–1 से आच्छादित नहीं है, को विवाह/पुर्नविवाह तक अथवा जीविकोपार्जन की तिथि अथवा मृत्यु की तिथि तक जो भी पहले हो,

"(घ) ऐसे माता–पिता जो सरकारी सेवक पर उसके जीवनकाल में पूर्णतः आश्रित रहे हो तथा मृत सरकारी सेवक ने अपने पीछे कोई विधवा/विधुर अथवा बच्चे नहीं होती है।

आश्रित माता–पिता अविवाहित/तलाकशुदा/विधवा पुत्री को पारिवारिक पेंशन जीवन पर्यन्त मिलेगी।"

5. After going through the pleadings and arguments canvassed by the petitioner and the Standing Counsel, who appears for respondents No. 1 to 3, it is clear that the State Government has issued Government Order lk0&3&1508@nl &2008&308&97 dated 8.12.2008 wherein provisions relating to the grant of family pension has been provided classifying the dependents, who are conferred with the benefit of family pension.

6. Learned counsel for the petitioner has argued that the Government Order dated 8.12.2008, as referred to above, creates discrimination and it is in violation of Article 15 of the Constitution of India as the benefit of life time family pension has been made admissible to dependents i.e. mother, father, unmarried/divorcee daughter/widow daughter but the same has been denied to son/daughter (inclusive of widow daughter) married/remarried or attainment of age of 25 years or till survival whichever is earlier.

7. In nutshell, what is being sought to be argued by the learned counsel for the petitioner is that the petitioner being the son of the deceased employee is entitled to the benefit of family pension for life time and same cannot be restricted till the attainment of the age of 25 years.

8. Per contra, learned Standing Counsel has argued that the Government Order dated 8.12.2008, as referred to above, in so far as it pertains to Clause-7(3) as a whole, is intra vires and it needs no interference as no individual has an unfettered right to get family pension till his death as the same is to be governed by the statutory enactments issued from time to time and in vogue.

9. Learned Standing Counsel has also drawn attention of this Court at page 46 of the paper book being an order dated 16.3.2021 which has also been challenged whereby the claim set up by the petitioner for grant of life time family pension has been denied on the ground that the petitioner at the time of passing of the order dated 16.3.2021 was aged about 45 years.

10. Having gone through the pleadings and the arguments canvassed by the learned counsel for the parties, it is undisputed that the grant of family pension is to be regulated and governed by the statutory enactments. So far as Government Order dated 8.12.2008 is concerned, it admittedly provides that in case of a son/daughter (including widow daughter) after marriage/remarriage, they are entitled to grant of family pension till attaining the age of 25 years or till survival whichever is earlier. They cannot be placed on same footing vis-a-vis dependents being father, mother, unmarried daughter/widow daughter, as they form a separate class and merely because they are being granted the benefit of life time family pension that cannot be a ground to grant life time family pension to the petitioner.

11. The basic idea of grant of life time family pension is to provide immediate relief to the widow and children by way of compensation.

12. As a matter of fact, entitlement of life time family pension is neither an unfettered nor a fundamental right, as the same is governed by the statutory enactments so issued from time to time and in vogue.

13. Counsel for the petitioner has drawn our attention towards paragraph 11 of the writ petition which reads as under:-

"11. That the provisions of Pension Scheme is discriminatory on the ground of Sex (gender) as only unmarried daughter is entitled to get the family pension life time on other hand there is discrimination with male who are also unmarried and depend upon the Family pension which is against the provisions of Article 15(1) of the Constitution of India."

14. Thus, the challenge made to the offending provisions of the Government Order dated 8.12.2008 is with regard to the fact that the same is in violation of Article 15(1) of the Constitution of India as the same is discriminatory on the ground of Sex (gender) that only unmarried daughter is entitled to get life time family pension. On the other hand, the petitioner being male and also unmarried and dependent upon the family pension, is being denied family pension after his attainment of age of 25 years.

15. Article 15(1) of the Constitution of India is reproduced herein-under:-

"15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth-(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them."

16. Though the argument raised by the counsel for the petitioner appears to be attractive but the same is liable to be rejected at the threshold as the petitioner being the son of the dependent forms a different class vis-a-vis the father, mother, married/divorcee/widow daughter. The Rule enacting authority have themselves protected interest of the son of the dependent of a deceased employee by

granting benefit of family pension till the attainment of 25 years.

17. The logic behind the grant of family pension to a male (son) till the age of 25 years or till his survival whichever is earlier, is just in order to provide him financial support by way of compensation for untimely death of the deceased employee and to provide an environment so as to sustain him during interregnum period when they become major but also get educated to seek employment in order to excel in life.

18. Article 15(1) of the Constitution of India is not attracted in the present case and there is no violation of the same as the Government Order dated 8.12.2008 does not discriminate between same class of persons. Instead it protects interest of the petitioner to get family pension till the age of 25 years.

19. The Hon'ble Apex Court had the occasion to consider the issue with regard to the entitlement of family pension in the case of **Smt. Violet Issac and others Vs. Union of India and others 1991(62) FLR** and observed as under:-

"The dispute between the parties relates to gratuity, provident fund, family pension and other allowances, but this Court while issuing notice to the respondents confined the dispute only to family pension. We would therefore deal with the question of family pension only. Family Pension Rules, 1964 provide for the sanction of family pension to the survivors of a Railway Employee. Rule 801 provides that family pension shall be granted to the widow/widower and where there is no widow/widower to the minor children of a Railway servant who may have died while in service. Under the Rules son of the deceased is entitled to family pension until he attains the age of 25 years, and unmarried daughter is also entitled to family pension till she attains the age of 25 years or gets married, which ever is earlier. The Rules do not provide for payment of family pension to brother or any other family member or relation of the deceased Railway employee. The Family Pension Scheme under the Rules is designed to provide relief to the widow and children by way compensation for the untimely death of the deceased employee. The Rules do not provide for any nomination with regard to family pension, instead the Rules designate the persons who are entitled to receive the family pension. Thus, no other person except those designated under the Rules are entitled to receive family pension. The Family Pension Scheme confers monitory benefit on the wife and children of the deceased Railway employee, but the employee as no title to it."

20. Recently, the Apex Court in the case of **Nitu Vs. Sheela Rani and others (2016) 16 SCC 229 (in para 17)** has observed, as under:-

17. It is pertinent to note that in this case the pension is to be given under the provisions of the Scheme and therefore, only the person who is entitled to get the pension as per the Scheme would get it. Similar issue had arisen before this Court in the case of Violet Issaac (Smt.) v. Union of India (1991) 1 SCC 725 and after considering the relevant provisions, this Court came to the conclusion that family pension does not form part of the estate of the deceased and therefore, even an employee has no right to dispose of the same in his Will by giving a direction that

someone other than the one who is entitled to it, should be given the same. In the instant case, as per the provisions of the Scheme, the appellant widow is the only family member who is entitled to the pension and therefore, the respondent mother would not get any right in the pension. Of course, it cannot be disputed that if there are other assets left by late Shri Yash Pal, the respondent mother would get 50% share, if late Shri Yash Pal had not prepared any Will and it appears that late Shri Yash Pal had died intestate and no Will had been executed by him.

21. The law so enumerated by the Supreme Court in the case of **Smt. Violet Issac and Nitu (Supra)** clearly mandates that no other person except those designated under the Rules/Scheme are entitled to receive family pension.

22. Thus, the net logical conclusion which emerges from the proposition of law as mandated by the Hon'ble Supreme Court, it is clear that nobody has right to receive family pension except otherwise provided by the Rules and the Schemes in that regard.

23. The Apex Court in the case of **Kallakkurichi Taluk Retired Officials Association, Tamil Nadu and others Vs. State of Tamil Nadu (2013) 2 SCC 772** had the occasion to consider the issue relating to valid classification and held as under:-

"33.At this juncture it is also necessary to examine the concept of valid classification. A valid classification is truly a valid discrimination. Article 16 of the Constitution of India permits a valid classification (see, State of Kerala vs. N.M. Thomas (1976) 2 SCC 310). A valid classification is 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. Legalistically, the test for a valid classification may be summarized as, a distinction based on a classification founded on an intelligible differentia, which has a rational relationship with the object sought to be achieved. 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) must necessarily be satisfied."

24. Counsel for the petitioner has not been able to point out any legal ground so as to assail the Government Order dated 8.12.2008 as reproduced herein above. Classification made in the Government Order dated 08.12.2008 is a valid classification founded on an intelligible differentia which has a rational relationship with the object **sought to be achieved.**

25. There is another ground for not entertaining present writ petition i.e. the date-of-birth of the petitioner is 1.1.1975. At the time of filing of the present writ petition, the petitioner as per the affidavit is 46 years. The petitioner in paragraph 5 of the writ petition has stated as under:-

"That the petitioner was completely depend upon the Family Pension of his mother and also did not get

married after the death of his father and now his marital status is bachelor."

26. There is nothing on record to suggest as to what is the educational qualification of the petitioner and whether he is working anywhere or not. It is hardly inconceivable that a person (male) who is aged about 46 years is not working anywhere to sustain himself and rather dependent upon the family pension of the deceased (mother).

27. In the aforesaid factual and legal backdrop, the prayer made by the petitioner for declaration of the offending provisions of the Government Order being violative of Article 15(1) of the Constitution of India as well as quashing of the order dated 16.3.2021 denying family pension to the petitioner, is rejected.

28. No other points have been raised by the learned counsel for the petitioner.

29. Hence, petition fails and accordingly is hereby **dismissed.**

(2022)01ILR A680
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.12.2021

BEFORE

THE HON'BLE J.J.MUNIR, J.

Writ A No. 14833 of 2020

Renu Chaudhary ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Sri Indra Dev

Counsel for the Respondents:
C.S.C., Sri Ram Bilas Yadav

A. Service Law – Maternity leave - Maternity Benefit Act, 2017: Section 2 or 3(e), 5, 5-A, 5-B, 9, 9-A, 10, 11, 12, 27; U.P. Fundamental Rules, Vol. II Part II to IV of the Financial Handbook: Rule 153(1) - In the case of establishments to which the Maternity Act does not apply, there is no question of conflict with the leave rules of the employers of such establishments and the Maternity Act, so as to bring in S. 27 of the said Act that gives it overriding effect. There is clearly no conflict between the second proviso to Rule 153 of the Rules and the Maternity Act, which does not apply to the establishment of the Basic Education Board or its maintained schools. The petitioner, therefore, cannot claim any right founded on the provisions of the Maternity Act in derogation of Rule 153 of the Rules. (Para 8, 9, 25)

The petitioner here is an Assistant Teacher, employed with an institution established and maintained by the Uttar Pradesh Basic Education Board. She is governed by the Service Rules applicable to teachers of primary schools maintained by the Board and other rules, including the Rules that apply, amongst other things, in the matter of grant of leave. The petitioner is, in no way, employed in an establishment as defined in Section 3(e) of the Maternity Act read with Section 2(1) thereof. The petitioner is not an employee of an establishment to which the Maternity Act applies. (Para 24)

The restriction on the Right to Maternity Leave of a female government servant, with regard to the birth of her child, would be reckoned with reference to the number of children living at the time she applies for maternity leave, irrespective of the fact whether the two children living were born before or after she entered government service. (Para 6, 13, 26)

Writ petition dismissed. (E-4)

Precedent followed:

1. St. of Uttarakhand Vs Urmila Masih & ors., 2019 SCC OnLine Utt. 927 (Para 9)

Precedent distinguished:

1. Municipal Corporation of Delhi Vs Female Workers (Muster Roll) and another, (2000) 3 SCC 224 (Para 7)

2. Rachna Chaurasiya Vs St. of U.P. & ors., 2017 (6) ALJ 454 (Para 7)

3. Anshu Rani Vs St. of U.P. & ors., 2019 (3) AWC 2049 (Para 7)

4. Mini K.T. Vs Senior Divisional Manager (Disciplinary Authority), Life Insurance Corporation of India, Divisional Officer, W.P. (C) No. 22007 of 2012 (A), decided on 21.12.2017 (Para 19)

5. Smt. Neelam Shukla Vs State of U.P. & ors., Writ – A No. 45265 of 2011, decided on 28.04.2015 (Para 7)

Present petition challenges order dated 20.11.2020, passed by Basic Education Officer, Development Block, Shamshabad, District – Agra.

(Delivered by Hon'ble J.J. Munir, J.)

The petitioner, an Assistant Teacher at the Prathmik Vidyalaya, Uncha (Composit), Shamshabad, District - Agra, impugns an order dated 20.11.2020 passed by the Basic Education Officer, Development Block, Shamshabad, District - Agra, refusing to sanction her maternity leave.

2. The petitioner is an Assistant Teacher, working with the Prathmik Vidyalaya Uncha (Composit), Shamshabad, Agra. The Institution aforesaid is established and maintained by the Uttar Pradesh Basic Education Board. The petitioner functions under the overall supervision and control of the Basic Education Officer, Agra and under the immediate control of the Headmaster, Prathmik Vidyalaya Uncha (Composit), Shamshabad, Agra. Admittedly, the petitioner was appointed to the post of Assistant Teacher on 29.06.2011 and joined services w.e.f. 01.07.2011. It is common ground between parties that at the time of entry into service, the petitioner was a married woman. Her service record shows that a son was born to her on August the 19th, 2007 and a daughter on September the 15th, 2011. Thus, a daughter was born to the petitioner soon after she joined service on July the 1st, 2011. It is perhaps for the said reason that the current leave balance account of the petitioner, that has been annexed as Annexure No. S.A.1 to the supplementary affidavit dated 18.06.2021, shows that she has availed 180 days of maternity leave, out of the total admissible of 540, leaving a balance of 360 days in the category. Though not very explicitly said by the petitioner, the availed maternity leave would relate to the second child born to the petitioner soon after she joined service.

3. The petitioner made an application for grant of maternity leave, submitting it online on November the 10th, 2020. This application of the petitioner's has come to be rejected by the order impugned dated 20.11.2020, passed by the Basic Education Officer, Shamshabad, Agra, employing words that express reason for the rejection, that say : *"Leave applied for third child without any specific reason"*. It is this order

which the petitioner seeks to assail by means of the present petition.

4. Parties have exchanged pleadings.

5. Heard Mr. Indra Dev Singh, learned Counsel for the petitioner, Mr. J.N. Maurya, the learned Chief Standing Counsel appearing for respondent no. 1 and Mr. R.V. Yadav, learned Counsel appearing for respondent nos. 2, 3 and 4.

6. Mr. Indra Dev Singh, learned Counsel for the petitioner, submits that the right to maternity leave flows from a Central Statute, that is to say, the Maternity Benefit Act, 1961, as amended by Maternity Benefit (Amendment) Act, 2017. The said Act shall hereinafter be referred to as the *"Maternity Act*". It is urged by the learned Counsel for the petitioner that the Maternity Act has increased the maternity leave from eight weeks to twenty-two weeks. There is no restriction envisaged in the Act last mentioned regarding the count of children, on whose birth, sanction of maternity leave would depend. It is further pointed out, on the strength of the supplementary affidavit on behalf of the petitioner, that though the child now born is the third child, this is the second instance that the petitioner had applied for maternity leave. It is emphasized by Mr. Indra Dev, learned Counsel for the petitioner, that the petitioner has not applied for maternity leave thrice. She has applied twice. The first has been granted, and the second, the present one, refused. It is refused on the ground that the child, in relation to whose birth the maternity leave is sought, is her third child, and no particular or specific reason has been pointed out why maternity leave ought not to be granted on the birth of a third child. It is submitted by the learned Counsel for the petitioner that the respondents seek to support the impugned order before this Court by falling back on the provisions of Rule 153 (1) of the U.P. Fundamental Rules, Vol. II Part II to IV of the Financial Handbook. The said rules are hereinafter referred to as "the Rules".

7. Mr. Indra Dev, learned Counsel for the petitioner, further submits emphatically that the first and the second child, with regard to whose birth, a female government servant is entitled to maternity leave, as a matter of right, with restriction in the case of a third child, is to be regarded as one bearing reference to children born after the government servant's entry into service. He submits that the Rule postulates two instances of maternity leave, with a gap of two years, and the right given by the Rule, if read the way the respondents urge, would be nullified in case of a female government servant, who enters service with two living children, and none of whom suffer from any kind of disability or handicap. It is urged by the learned Counsel for the petitioner that this is not the purpose or the intent of Rule 153 of the Rules. He argues that Fundamental Rule 153 is not a charter about family planning, but a concession in favour of the female government servant. It has been introduced in order to afford equal right to women to work with men in accordance with the mandate of Article 15 without any discrimination, balancing at the same time their special role in society as birth-givers to the next generation. He submits that placing a restriction of this kind on the right of a woman to maternity leave would be a violation of the Maternity Act, as amended by the Act of 2017. It is argued that the Maternity Act does not envisage any kind of a restriction in the workplace on extension of maternity benefit, and the Rules cannot be given effect to in conflict with the Central

Statute. In support of his contention, learned Counsel for the petitioner has placed reliance on the decision of the Supreme Court in **Municipal Corporation of Delhi v. Female Workers (Muster Roll) and another1**. Besides the authority, reliance has also been placed on the decision of this Court in **Anshu Rani v. State of U.P. and others2.** Learned Counsel for the petitioner further relies on the decision of a Division Bench of this Court in **Rachna Chaurasiya v. State of U.P. and others3**. To particularly support his submission, learned Counsel for the petitioner has relied on an unreported decision of Pradeep Kumar Singh Baghel, J. in **Smt. Neelam Shukla v. State of U.P. and others4.**

8. Mr. R.V. Yadav, Advocate, who has been joined in his submissions by Mr. J.N. Maurya, the learned Chief Standing Counsel, submits on behalf of the respondents that under Rule 153 of the Rules, the provision for maternity leave postulates a leave specific to female government servant for a period of 180 days vis-à-vis one child, but, in the submission of the learned Counsel for the respondents, maternity leave cannot be sanctioned more than twice, as a matter of right or entitlement. It can be sanctioned a third time, with the condition that of the two children of a female government servant living, one suffers from an incurable disease or is handicapped. Learned Counsel for the respondents submit that it is only in case of those special circumstances about an incurable disease or handicap, afflicting one or the two living children of a female government servant, that maternity leave in case of birth of a third child is admissible under Rule 153 of the Rules. It is not admissible in any event, if the government servant has two healthy children living, and is blessed with a third child, with regard to whom she seeks maternity leave.

9. Mr. R.V. Yadav has reposed faith in the decision of a Division Bench of the Uttarakhand High Court in **State of Uttarakhand v. Urmila Masih and others5** to submit that the Maternity Act does not apply to a government servant, or for that matter, anyone except those specific kind of employees who are referred to under Section 2 or 3(e) thereof. It is urged that since the petitioner is an Assistant Teacher and not an employee of any of the kind of employers or establishments envisaged under Section 2(1)(a) or (b), or the establishment of the kind envisaged under Section 3(e) of the Maternity Act, it cannot be argued that the provision of Rule 153(1) of the Rules are in conflict with the Maternity Act, which is a Central Statute, covering the same field. The decision in **Municipal Corporation of Delhi** *(supra)* is one that relates to female workers engaged by the Municipal Corporation of Delhi, who are daily wagers working on muster roll. They had raised a demand for grant of maternity leave that was available to regular female workers of the Corporation, but denied to muster roll employees. An industrial dispute was raised by the Delhi Municipal Workers' Union, which led to a reference to the Industrial Tribunal in terms whether the female workers working with the Corporation on muster roll should be given any maternity benefit. Admittedly, it was a case, to which no service rules, and more particularly, leave rules, would apply. These were women workers, whose conditions of employment were hardly any and absolutely unregulated by statutory

rules, except the protection of industrial laws.

10. The Court has considered rival submissions advanced by learned Counsel for both parties, perused the record and the Rules.

11. The moot question involved here is :

Whether the restriction on the Right to Maternity Leave of a female government servant with regard to a third child would reckon towards the total count of her children living, when she makes the leave application, or the Rule takes into reckoning only such of her children as are born after her entering government service?

12. Rule 153 of the Rules (as amended in its application to U.P. vide Office Memorandum No. सा-2-2017/दस-2008-216/79, dated 8th December, 2008) reads :

"**153**. किसी महिला सरकारी सेवक को, चाहे वह स्थायी हो या अस्थायी, प्रसूति अवकाश ऐसे पूर्ण वेतन पर जो वह इस प्रकार के अवकाश पर जाने के दिनांक को आहरित कर रही हो, विभागाध्यक्ष द्वारा या किसी निम्न प्राधिकारी द्वारा, जिसे इस निमित्त शक्ति प्रत्यायोजित की जाये, निम्नलिखित के अधीन रहते हुए स्वीकृत किया जा सकता है-

(1) प्रसवावस्था के मामले में, प्रसूति अवकाश की अवधि अवकाश के प्रारम्भ के दिनांक से 180 दिन तक हो सकती है:

परन्तु ऐसा अवकाश सम्पूर्ण सेवा के दौरान जिसके अन्तर्गत अस्थायी सेवा भी है, तीन बार से अधिक स्वीकृत नहीं किया जायेगा:

परन्तु यह भी कि **यदि किसी महिला सरकारी सेवक के दो या अधिक जीवित बच्चे हो तो उसे प्रसूति अवकाश स्वीकृत नहीं किया जायेगा, भले ही उसे ऐसा अवकाश अन्यथा अनुमन्य हो।** फिर भी यदि महिला सरकारी सेवक के दो जीवित बच्चों में से कोई भी बच्चा जन्म से किसी असाध्य रोग से पीड़ित हो या विकलांग या अपंग हो या बाद में किसी असाध्य रोग से ग्रस्त हो जाये या विकलांग या अपंग हो जाये, तो उसे अपवाद के रूप में इस शर्त पर कि प्रसूति अवकाश सम्पूर्ण सेवा के दौरान तीन बार से अधिक स्वीकृत नहीं किया जायेगा, एक बच्चा और पैदा होने तक प्रसूति अवकाश स्वीकृत किया जा सकता है:

परन्तु यह और कि ऐसा अवकाश तब तक अनुमन्य नहीं होगा, जब तक कि इस नियम के अधीन स्वीकृत पिछले प्रसूति अवकाश की समाप्ति के दिनांक से कम से कम दो वर्ष की अवधि व्यतीत न हो जाये।

(2) गर्भपात के मामलों में, जिसके अन्तर्गत गर्भस्राव भी है, प्रसूति अवकाश की अवधि सम्बन्धित महिला सरकारी सेवक के जीवित बच्चों की संख्या का ध्यान दिये बिना प्रत्येक अवसर पर कुल छः सप्ताह तक हो सकती है, बशर्ते कि अवकाश के आवेदन-पत्र के साथ प्राधिकृत चिकित्सक का प्रमाण-पत्र हो।" (emphasis by Court)

13. A perusal of Rule 153 shows that a female government servant, whether permanent or temporary, would be entitled to maternity leave on full pay for a period of 180 days in case of confinement from the date of commencement of leave. The first proviso restricts the right to a maximum of three maternity leaves during the entire tenure of a government servant. The second proviso restricts the right in regard to maternity leave in case the female government servant has two

or more living children, in which case, she would not be entitled to maternity leave. The restriction on the entitlement to maternity leave of a female government servant, if she has two or more children living, is subject to the relaxation that where either of the two children living is suffering from an incurable disease or disabled or crippled since birth or contracts some incurable disease or becomes disabled or crippled later, the female government servant may be granted maternity leave in relation to the birth of one more child. However so, the entire maternity leave during the service tenure would not exceed thrice of what can be granted in a single instance. In other words, the maternity leave, in any case, cannot exceed the total period of 180 x 3 = 540 days. It is due to the operation of Rule 153 of the Rules that the petitioner's leave account shows the maximum leave due as 540 days. When the petitioner joined service, she had a single child, a son. The second child was born to her soon after she joined service. It is on that account that she was sanctioned maternity leave on the birth of her second child, that has been debited from her leave account.

14. In **Municipal Corporation of Delhi** there was absolutely no facility extended to women workers working for the Corporation on daily-wage basis by way of maternity benefits, though these were available to their counterparts working on regular basis. Their Lordships, therefore, went into the rights of women, when engaged in any kind of work about their special needs relating to maternity leave. The principle there proceeded on the basis that needs of women in employment emanate from their inherent nature and motherhood, where the nature and tenure of employment is irrelevant. Also, in **Municipal Corporation of Delhi**, it was held, though a dispute was raised about it, the employer fell into one of the categories to which the Maternity Act applied.

15. It was in the context of the aforesaid facts and the nature of employment that their Lordships of the Supreme Court held that the Maternity Act would apply to such women, who would be entitled to the various maternity benefits available under Sections 5, 5-A, 5-B, 9, 9-A, 10, 11 and 12 of the Act under reference. It was in the context of the aforesaid facts and nature of employment that it was held in **Municipal Corporation of Delhi** *(supra) :*

6. Not long ago, the place of a woman in rural areas had been traditionally her home; but the poor illiterate women forced by sheer poverty now come out to seek various jobs so as to overcome the economic hardship. They also take up jobs which involve hard physical labour. The female workers who are engaged by the Corporation on muster roll have to work at the site of construction and repairing of roads. Their services have also been utilised for digging of trenches. Since they are engaged on daily wages, they, in order to earn their daily bread, work even in an advanced stage of pregnancy and also soon after delivery, unmindful of detriment to their health or to the health of the new-born. It is in this background that we have to look to our Constitution which, in its Preamble, promises social and economic justice. We may first look at the fundamental rights contained in Part III of the Constitution. Article 14 provides that the State shall not deny to any person equality before law or the equal protection of the laws within the

territory of India. Dealing with this article vis-à-vis the labour laws, this Court in Hindustan Antibiotics Ltd. v. Workmen [AIR 1967 SC 948 : (1967) 1 SCR 652 : (1967) 1 LLJ 114] has held that labour to whichever sector it may belong in a particular region and in a particular industry will be treated on equal basis. Article 15 provides that the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. Clause (3) of this article provides as under:

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

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11. It is in the background of the provisions contained in Article 39, specially in Articles 42 and 43, that the claim of the respondents for maternity benefit and the action of the petitioner in denying that benefit to its women employees has to be scrutinised so as to determine whether the denial of maternity benefit by the petitioner is justified in law or not.

12. Since Article 42 specifically speaks of "just and humane conditions of work" and "maternity relief", the validity of an executive or administrative action in denying maternity benefit has to be examined on the anvil of Article 42 which, though not enforceable at law, is nevertheless available for determining the legal efficacy of the action complained of.

13. Parliament has already made the Maternity Benefit Act, 1961. It is not disputed that the benefits available under this Act have been made available to a class of employees of the petitioner Corporation. But the benefit is not being made available to the women employees engaged on muster roll, on the ground that they are not regular employees of the Corporation. As we shall presently see, there is no justification for denying the benefit of this Act to casual workers or workers employed on daily-wage basis.

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27. The provisions of the Act which have been set out above would indicate that they are wholly in consonance with the Directive Principles of State Policy, as set out in Article 39 and in other articles, specially Article 42. A woman employee, at the time of advanced pregnancy cannot be compelled to undertake hard labour as it would be detrimental to her health and also to the health of the foetus. It is for this reason that it is provided in the Act that she would be entitled to maternity leave for certain periods prior to and after delivery. We have scanned the different provisions of the Act, but we do not find anything contained in the Act which entitles only regular women employees to the benefit of maternity leave and not to those who are engaged on casual basis or on muster roll on daily-wage basis.

28. The Industrial Tribunal, which has given an award in favour of the respondents, has noticed that women employees have been engaged by the Corporation on muster roll, that is to say, on daily-wage basis for doing various kinds

of works in projects like construction of buildings, digging of trenches, making of roads, etc., but have been denied the benefit of maternity leave. The Tribunal has found that though the women employees were on muster roll and had been working for the Corporation for more than 10 years, they were not regularised. The Tribunal, however, came to the conclusion that the provisions of the Maternity Benefit Act had not been applied to the Corporation and, therefore, it felt that there was a lacuna in the Act. It further felt that having regard to the activities of the Corporation, which had employed more than a thousand women employees, it should have been brought within the purview of the Act so that the maternity benefits contemplated by the Act could be extended to the women employees of the Corporation. It felt that this lacuna could be removed by the State Government by issuing the necessary notification under the proviso to Section 2 of the Maternity Act. This proviso lays down as under:

"Provided that the State Government may, with the approval of the Central Government, after giving not less than two months' notice of its intention of so doing, by notification in the Official Gazette, declare that all or any of the provisions of this Act shall apply also to any other establishment or class of establishments, industrial, commercial, agricultural or otherwise."

29. It consequently issued a direction to the management of the Municipal Corporation, Delhi to extend the benefits of the Maternity Benefit Act, 1961 to such muster-roll female employees who were in continuous service of the management for three years or more and who fulfilled the conditions set out in Section 5 of the Act.

16. In the present case, the petitioner is an employee of a primary school run by the Basic Education Board, under the overall control of the Directorate of Basic Education. It is not in issue that the Right to Maternity Leave is available to the petitioner in terms of Rule 153 of the Rules. The right, though available like any other leave, is well regulated. The question involved in this case is, therefore, quite different from that involved in **Municipal Corporation of Delhi**. Here, there is no case of a discrimination between one class of women employees and another, on the basis of the nature of their services or tenure. It is simply about the true import of the Right to Maternity Leave flowing from Rule 153. **Municipal Corporation of Delhi** is not a decision that interprets the extent of Right to Maternity Leave under Rule 153 of the Rules, or one that lays down the principle that the Maternity Act would prevail over Rule 153. The said decision does not, therefore, come to the the petitioner's rescue.

17. The next decision that has been pressed in aid by the learned Counsel for the petitioner is **Rachna Chaurasiya** *(supra)*. There, again, the issue involved a contractual employee and a doctor, at that. In that case, the petitioner was appointed on the post of Lecturer (Radio Diagnosis) on contractual basis at the M.L.B. Medical College, Jhansi. She was appointed in the year 2009. She applied for maternity leave for a period of six months in the year 2016, which was granted. The petitioner, in the case under reference, found later on that the child was not comfortable in the maid's

care, retained for the purpose. She applied for Child Care Leave for a period of three months to the Principal of the Medical College. The said application was rejected on the ground that the petitioner was a contractual employee, and therefore, not entitled to Child Care Leave. The provisions of Maternity Act, the policy of the Central Government about Child Care Leave for women employees and the State Government Policy that adopted the Central Government's, were all considered together by their Lordships of the Division Bench to hold in Rachna Chaurasiya thus :

23. Maternity benefit is a social insurance and the Maternity Leave is given for maternal and child health and family support. On a perusal of different provisions of the Act, 1961 as well as the policy of the Central Government to grant Child Care Leave and the Government Orders issued by the State of U.P. adopting the same for its female employees, we do not find anything contained therein which may entitle only to women employees appointed on regular basis to the benefit of Maternity Leave or Child Care Leave and not those, who are engaged on casual basis or on muster roll on daily wage basis.

18. The issue in **Rachna Chaurasiya,** thus, again was about the nature of Child Care Leave that is innate to a woman. It was held that it cannot be denied on the ground of the nature of her services being contractual or regular. Nothing was decided in **Rachna Chaurasiya** that may bear upon the validity of the second proviso to Rule 153 of the Rules, limiting maternity leave to a female government servant as a matter of right to a maximum of two children, with a qualified right in the case of a third.

19. In **Anshu Rani** *(supra)*, the Court had to consider the Right to Maternity Leave of a woman who was an *Anudeshak* appointed at a Purwa Madhyamik Vidyalaya. She applied for maternity leave from 01.10.2018 to 31.03.2019. She was sanctioned leave for 90 days with honorarium. She asked for the grant of maternity leave for 180 days, that was ignored by the District Basic Education Officer of Bijnor. The Officer did not assign any reason for declining the 180 days' maternity leave and limiting it to 90. In the counter affidavit, the State took a stand that it was not possible to grant maternity leave to the petitioner beyond 90 days, because of the provision made in Government Orders dated 20.11.2017 and 03.01.2018, that were annexed to the return. The Maternity Act and its provisions were dealt with after an extensive reference to various decisions about maternity leave, including that in **Municipal Corporation of Delh**i and the decision of the High Court of Kerela in **Mini. K.T. v. Senior Divisional Manager (Disciplinary Authority), Life Insurance Corporation of India, Divisional Office6**, where it was held that the petitioner is entitled to maternity leave for a period of six months that had been refused illegally. There is no principle discernible from the decision, nor any question involved, that may have bearing on the point whether the Right to Maternity Leave provided under Rule 153 of the Rules, limited to a maximum number of two children, is, in any way, an invasion of the Right to Motherhood or a violation of the Maternity Act. The decision in **Anshu Rani** does not even examine the question whether the Maternity Act at all applies to a Purwa Madhyamik Vidyalaya, established and run by the Basic Education Board. There is no

principle in **Anshu Rani,** therefore, that may be of assistance to the petitioner.

20. The last case relied upon by the learned Counsel for the petitioner, is the decision of this Court in **Smt. Neelam Shukla** *(supra).* The petitioner there was an Assistant Teacher in a primary school run by the Basic Education Board. She sought maternity leave from 28.10.2010 to 27.04.2011. She said in her application that she had two children before her appointment as an Assistant Teacher, and after joining service, given birth to a third child. Thus, the leave now sought was her first maternity leave during service. It was urged that she was entitled to 180 days leave under Rule 153 of the Rules. Her application was rejected by the authorities on the ground that the petitioner had three children, and under the Government Order dated 08.12.2008, maternity leave is admissible twice during the period of service. The stand taken by the authorities before the Court was that under Rule 153 read with Government Orders dated 04.06.1999 and 08.12.2008, the petitioner was not entitled to maternity leave for her third child. The Court, repelling the contention of the respondents in **Smt. Neelam Shukla** held :

Admittedly the petitioner has moved an application for maternity leave for the first time in her service. Thus she is entitled for the leave in terms of the Government Order dated 4.6.1999 and 8.12.2008. The view taken by the Basic Shiksha Adhikari is erroneous and based on misconception. Accordingly, I find that the Basic Shiksha Adhikari has not properly appreciated the grievance of the petitioner in the light of the aforementioned two Government Orders and Rule 153 of the Financial Hand Book (2) Part II to IV and has passed the order arbitrarily without application of mind.

21. A perusal of the decision in **Smt. Neelam Shukla** does not show that the provisions of Rule 153 of the Rules were brought to the Court's notice in all their detail about the right of a female government servant to seek maternity leave for the birth of her third child. A careful perusal of the second proviso to Rule 153(1) of the Rules shows that the Right to Maternity Leave is hedged in with the clear restriction that any female government servant, who has two or more children living, shall not be granted maternity leave, though such leave may otherwise be admissible to her. The words of the second proviso are disentitling in nature and an exception to the right otherwise conferred upon a female government servant. The restriction is dependent on the fact that at the time the female government servant applies for maternity leave, whether she has two or more living children; if she has two or more living children as a rule, she is not entitled to maternity leave. It is entirely irrelevant in the scheme of Rule 153 of the Rules, whether the children were born before entering service or afterwards. The only relevant fact is that the time when she applies for leave, she has two or more children living or less than two. This clear import of the words of the second proviso in Rule 153 not being noticed by the Court in S**mt. Neelam Shukla,** the decision must be held *per incuriam.* In the clear opinion of this Court, Rule 153 of the Rules read as a whole, particularly, the second proviso to the Rule, does not spare a shadow of doubt that a female government servant, who has two children living born to her, whether before she entered service or afterwards, is not entitled to avail maternity leave, if a third child is born afterwards. The only exception would be the case where, of the two children living, one is suffering from

an incurable disease or is disabled or crippled since birth, and the other contingencies envisaged in the latter part of the second proviso to Rule 153(1). The petitioner does not assert a case on the lines, where, for the third child, the second proviso makes relaxation.

22. So far as the question of Rule 153 of the Rules being in conflict with the Maternity Act or ultra vires the Constitution is concerned, the question fell for consideration before a Division Bench of Uttarakhand High Court on an appeal from a judgment of a learned Single Judge in **State of Uttarakhand v. Urmila Masih** *(supra)*. It appears that the writ petitioner in the aforesaid case filed a writ petition, seeking to quash an order denying her maternity leave and benefits for the third child born to her. She further sought a *mandamus*, commanding the respondents to grant maternity leave and benefits according to the Maternity Act, and to declare Rule 153 of the Rules, as adopted in the State of Uttarakhand, ultra vires and unconstitutional, to the extent that restrictions were placed on the grant of maternity leave to women who had two or more children living. The learned Single Judge upheld the challenge, holding in terms that are set out in the judgment of the Division Bench. It is recorded by their Lordships of the Division Bench in **State of Uttarakhand v. Urmila Masih** in the following words :

8. In the order under appeal, the learned Single Judge relied on a Division Bench judgment of the Punjab and Haryana High Court, in Ruksana v. State of Haryana, 2011 SCC OnLine P&H 4666 and Article 42 of the Constitution of India, to hold that the second proviso to FR 153 was not in conformity with Section 27 of the 1961 Act, and was also against the spirit of Article 42 of the Constitution of India. The second proviso to FR 153 of the U.P. Fundamental Rules, as adopted by the State of Uttarakhand, was declared ultra vires and unconstitutional, and was struck down. The State Government was directed to provide maternity leave from 30.06.2015 to 09.12.2015 within six weeks from the date of the order under appeal. .....

23. The question about the overriding effect of the Maternity Act vis-à-vis Rule 153 of the Rules (the said Rule as amended in its application to Uttarakhand being in no way materially different from the Rules in force in U.P.) was considered with reference to the provisions of Section 27 of the Maternity Act in **State of Uttarakhand v. Urmila Masih**, holding thus :

11. As noted hereinabove, Section 27 of the 1961 Act relates to effect of laws and agreements inconsistent with the 1961 Act, and, in the light of the non-obstante clause in Section 27(1), the 1961 Act shall have effect notwithstanding anything inconsistent therewith contained in any other law whether made after or before the coming into force of the 1961 Act. Any law inconsistent with the 1961 Act would cease to apply in view of the non-obstante clause in Section 27 of the 1961 Act. It is only if the 1961 Act is applicable, would the question of inconsistency between the said Act and the second proviso to FR 153 arise for consideration.

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13. Section 3(e) of the 1961 Act defines "establishment" to means (i) a

factory; (ii) a mine; (iii) a plantation; (iv) an establishment wherein persons are employed for the exhibition of equestrian, acrobatic and other performances; (iv) a shop or establishment; or (v) an establishment to which the provisions of this Act have been declared under sub-section (1) of Section 2 to be applicable.

14. Reference to an establishment belonging to Government in Section 2(1)(a) of the 1961 Act must be read in conjunction with Section 3(e) thereof, and, when so read, it would only mean that a factory, a mine, a plantation of the Government, would alone fall within the ambit of Section 2(1)(a) of the 1961 Act.

15. The respondent-writ petitioner is, admittedly, a government servant. Government servants are not employed in Government factories, mines and plantations, and would not therefore fall within the ambit of Section 2(1)(a) of the 1961 Act, as the Act itself is inapplicable to Government servants. The question of the second proviso to FR 153, being contrary to the provisions of 1961 Act, does not therefore arise. The applicability of 1961 Act to government servants was not in issue before the Punjab and Haryana High Court in Ruksana v. State of Haryana, 2011 SCC OnLine P&H 4666. Likewise, this question did not arise for consideration even before the Madras High Court in J. Sharmila v. The Secretary to Government Education Department, 2010 SCC OnLine Mad 5221.

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18. Since the 1961 Act is, itself, inapplicable to government servants, the question, of the second proviso to FR 153 being inconsistent with the provisions of the 1961 Act, does not arise. Section 27 of the 1961 Act cannot, therefore, form the basis of declaring the second proviso to FR 153 ultra vires the provisions of the 1961 Act.

24. Like the writ petitioner in **State of Uttarakhand v. Urmila Masih,** the petitioner here is an Assistant Teacher, employed with an institution established and maintained by the Uttar Pradesh Basic Education Board. She is governed by the Service Rules applicable to teachers of primary schools maintained by the Board and other rules, including the Rules that apply, amongst other things, in the matter of grant of leave. The petitioner is, in no way, employed in an establishment as defined in Section 3(e) of the Maternity Act read with Section 2(1) thereof. She is not employed in a factory, a mine, a plantation, an establishment wherein persons are employed for the exhibition of equestrian, acrobatic and other performances or a shop or establishment of any kind or a factory, a mine or a plantation of the Government. Clearly, the petitioner is not an employee of an establishment to which the Maternity Act applies.

25. I am in respectful agreement with their Lordships of the Division Bench in **State of Uttarakhand v. Urmila Masih** that in the case of establishments to which the Maternity Act does not apply, there is no question of conflict with the leave rules of the employers of such establishments and the Maternity Act, so as to bring in Section 27 of the said Act that gives it overriding effect. There is clearly no conflict between the second proviso to Rule

153 of the Rules and the Maternity Act, which does not apply to the establishment of the Basic Education Board or its maintained schools. The petitioner, therefore, cannot claim any right founded on the provisions of the Maternity Act in derogation of Rule 153 of the Rules. The submissions of learned Counsel for the petitioner that assert rights based on Section 27 of the Maternity Act must, therefore, be rejected.

26. In view of what has been said above, the answer to the question involved is that the restriction on the Right to Maternity Leave of a female government servant, with regard to the birth of her child, would be reckoned with reference to the number of children living at the time she applies for maternity leave, irrespective of the fact whether the two children living were born before or after she entered government service.

27. In the result, this petition **fails** and stands ***dismissed.***

28. Costs easy.

(2022)01ILR A692
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.12.2021

BEFORE

THE HON'BLE PRAKASH PADIA, J.

Writ A No. 15678 of 2021

Akhilesh Pratap ...Petitioner
Versus
Registrar General, High Court of Judicature at Allahabad & Ors. ...Respondents

Counsel for the Appellant:
Sri Amardeo Singh

Counsel for the Respondents:
Sri Ashish Mishra, Sri Chandan Sharma

A. Service Law – Compassionate appointment - Uttar Pradesh Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974: Rule 5(1) - The first requirement u/Rule 5 of Rules, 1974 is that the spouse of the deceased should not be already employed by the Central or State Governments or by a Corporation owned or controlled by them. From perusal of the record, it is clear that the mother of the petitioner is already in employment as Government Servant. (Para 11, 12, 25)

B. Compassionate appointment is an exception to the general provision and, being an exception, it should not interfere unduly with the rights of other persons. (Para 15)

C. Scope of Article 14 - Citizens have assumed wrong notions regarding the scope of Article 14 of the Constitution which guarantees equality before law to all citizens. **Benefits extended to some persons in an irregular or illegal manner cannot be claimed by a citizen on the plea of equality** as enshrined in Article 14 of the Constitution by way of writ petition filed in the High Court.

Writ petition dismissed. (E-4)

Precedent followed:

1. Sushma Gosain & ors. Vs U.O.I. & ors., (1989) 4 SCC 468 (Para 13)

2. Umesh Kumar Nagpal Vs St. of Har. & ors., (1994) 4 SCC 138 (Para 14)

3. Director of Education (Secondary) & anr. Vs Pushpendra Kumar & ors., (1998) 5 SCC 192 (Para 15)

4. General Manager (D&PB) & ors. Vs Kunti Tiwary & anr., (2004) 7 SCC 271 (Para 16)

5. Punjab National Bank & ors. Vs Ashwini Kumar Taneja, 2004 AIR SCW 4602 (Para 17)

6. National Hydroelectric Power Corporation & anr. Vs Nanak Chand & anr., AIR 2005 SC 106 (Para 18)

7. Commissioner of Public Instructions & ors. Vs K.R. Vishwanath, (2005) 7 SCC, 206 (Para 19)

8. State of Bihar Vs Kameshwar Prasad Singh, AIR 2000 SC 2306 (Para 20)

9. Gursharan Singh & ors. Vs NDMC & ors., 1996 (2) SCC page 459 (Para 21)

10. Secretary Jaipur Development Authority, Jaipur Vs Daulat Mal Jain & ors., 1997 (1) SCC 35 (Para 22)

11. St. of Har. & ors. Vs Ram Kumar Mann, 1997 (3) SCC page 321 (Para 23)

Present petition challenges order dated 21.04.2018, passed by Registrar (J) (S&A/Establishment) High Court, Allahabad and order dated 21.08.2019 passed by Assistant Registrar, Accounts-D, High Court, Allahabad.

(Delivered by Hon'ble Prakash Padia, J.)

1. Today when the matter is taken up, learned counsel for the respondents placed instruction in the matter, the same is taken on record.

2. Heard learned counsel for the petitioner and Sri Chandan Sharma, learned counsel for the respondents.

3. The petitioner has preferred the present writ petition with the prayer to issue a writ in the nature of certiorari to quash the order dated 21.04.2018 passed by the respondent No.2 namely Registrar (J) (S&A/ Establishment) High Court, Allahabad and order dated 21.08.2019 passed by the respondent No.3 namely Assistant Registrar, Accounts-D, High Court Allahabad. A further prayer has been made to issue a writ of mandamus to consider the claim of the petitioner for compassionate appointment.

4. Facts in brief as contained in the writ petition that the father of the petitioner was initially appointed on 15.03.1990 and was posted as Review Officer in the High Court at Allahabad. While working on the aforesaid post he died on 21.08.2016. Father of the petitioner left behind his dependants as old parents, widow, two unmarried sons and one unmarried daughter. The petitioner claims to be qualified and is holding educational qualification of B.A. & Diploma Holder in Computer from NIELIT. After the death, the mother of the petitioner submitted an application on 22.09.2017 before the respondent No.1 by which a request has been made to provide compassionate appointment in favour of the dependant. The respondent No.2 by its order dated 21.04.2018 has rejected the claim set up by the petitioner on the ground that the spouse of the deceased employee is already in employment. The order passed by the respondent No.2 dated 21.04.2018 is reproduced below:-

"With reference to his application dated 22.09.2017 and other supplementary applications regarding appointment in this Hon'ble High Court, on the post of Routine Grade Clerk on compassionate ground under U.P. Recruitment of Dependants of Government Servants Dying in Harness Rules 1974 (as amended upto date), Sri Akhilesh Pratap, Son of Late Satyendra Pratap, Ex-Review Officer, High Court, Allahabad, is hereby informed that Hon'ble the Court has declined it since the spouse of the deceased employee is already

employed in government service as such the applicant's claim is not covered under "The Uttar Pradesh Recruitment of Dependants of Government Servants Dying In Harness Rules.'

5. After the aforesaid order was passed another representation was made by the mother of the petitioner before the respondent No.1 on 14.02.2019, the same was also rejected by the respondent No.3 vide order dated 21.08.2019. The aforesaid order is reproduced below:-

"With reference to her representation dated 14.02.2019 seeking appointment of her son Sri Akhilesh Pratap, Son of Late Satyendra Pratap, Ex-Review Officer, High Court, Allahabad,. In this Hon'ble High Court, on compassionate ground under U.P. Recruitment of Dependants of Government Servants Dying In Harness Rules, 1974 (as amended upto date), Smt. Lakshmi Devi. Wife of Late Satyendra Pratap, Ex Review Officer (Emp. No.3342), High Court, Allahabad, is hereby informed that Learned Registrar General vide hs order dated 19.08.2019 has rejected it in light of resolution dated 10.04.2018 of Hon'ble Recruitment Committee."

6. Subsequently, the petitioner himself made a representation dated 06.02.2020 through proper channel addressed to Hon'ble the Chief Justice of this court for providing compassionate appointment.

7. It is argued that on the same set of facts, certain persons were given appointment on compassionate ground. It is argued that the order passed by the respondents which are under-challenge in the present writ petition are absolutely illegal and are liable to be set aside.

8. On the other hand, it is argued by learned counsel appearing for the respondents that the claim set up by the petitioner was rightly rejected by the respondent No.2 while passing the order dated 24.02.2018. Counsel for the respondent relied upon Rule 5(1) of Uttar Pradesh Recruitment of Dependants of Government Servants Dying in Harness Rules, 1974. The aforesaid rule is quoted below:-

Rule 5(1) - Recruitment of a member of the family of the deceased. -

(1) In case a Government servant dies in harness after the commencement of these rules and the spouse of the deceased Government servant is not already employed under the Central Government or a State Government or a Corporation owned or controlled by the Central Government or a State Government, one member of his family who is not already employed under the Central Government or a State Government or a Corporation owned or controlled by the Central Government or a State Government shall, on making an application for the purposes, be given a suitable employment in Government service on a post except the post which is within the purview of the Uttar Pradesh Public Service Commission, in relaxation of the normal recruitment rules, if such person-

(i) fulfils the educational qualifications prescribed for the post,

(ii) is otherwise qualified for Government service, and

(iii) makes the application for employment within five years from the date of the death of the Government servant:

Provided that where the State Government is satisfied that the time limit fixed for making the application for employment causes undue hardship in any particular case, it may dispense with or relax the requirement as it may consider necessary for dealing with the case in a just and equitable manner."

9. As per aforementioned Rules, the petitioner does not fulfil the condition laid down in Sub Rule (1) of Rules 5 of the Rules 1974 as the spouse of the deceased employee was already under employment as Government Servant. It is stated in the instructions that the matter was placed before the Committee in its meeting dated 10.04.2018 wherein the request was "***declined"*** by the Committee after due deliberation. Consequently after the aforesaid resolution, the order in question has been issued by the respondent No.2.

10. Heard learned counsel for the parties and perused the record.

11. From perusal of the record, it is clear that the mother of the petitioner is already in employment as Government Servant. It is clearly provided under Rule 5(1) of the Rules 1974 that member of the family of the deceased could only be given appointment in case a government servant dies during service and ***the spouse of the deceased Government servant is not already employed under the Central Government or a State Government or a Corporation owned or controlled by the Central Government or a State Government.***

12. The first requirement under Rule 5 of Rules, 1974 is that the spouse of the deceased should not be already employed by the Central or State Governments or by a Corporation owned or controlled by them.

13. The Hon'ble the Apex Court In the case of ***Sushma Gosain & Ors. Vs. Union of India & Ors., reported in (1989) 4 SCC, 468***, observed as under:-

"The purpose of providing appointment on compassionate ground is to mitigate the hardship due to death of the bread-earner in the family. Such appointments should, therefore, be provided immediately to redeem the family in distress. The fact that the ward was a minor at the time of death of his father is no ground, unless the scheme itself envisages specifically otherwise, to state that as and when such minor becomes a major he can be appointed without any time consciousness or limit. The above view was reiterated in Phoolwati (Smt.) v. Union of India and Ors., reported in (1991) Supp (2) SCC, 689 and Union of India and Ors. v. Bhagwan Singh, repoted in (1995) 6 SCC, 476. In Director of Education (Secondary) and Anr. v. Pushpendra Kumar and Ors, (1998) 5 SCC 192, it was observed that in matter of compassionate appointment there cannot be insistence for a particular post. Out of purely humanitarian consideration and having regard to the fact that unless some source of livelihood is provided the family would not be able to make both ends meet, provisions are made for giving appointment to one of the dependants of the deceased who may be eligible for appointment. Care has, however, to be taken that provision for grant of compassionate employment which

is in the nature of an exception to the general provisions does not unduly interfere with the right of those other persons who are eligible for appointment to seek appointment against the post which would have been available, but for the provision enabling appointment being made on compassionate grounds of the dependant of the deceased-employee. As it is in the nature of exception to the general provisions it cannot substitute the provision to which it is an exception and thereby nullify the main provision by taking away completely the right conferred by the main provision."

14. In ***Umesh Kumar Nagpal Vs. State of Haryana & Ors., reported in (1994) 4 SCC, 138***, the Supreme Court explained the basic purpose of providing compassionate appointment to the dependent of a deceased employee who has died in harness:

"The object is not to give a member of such family a post much less a post for post held by the deceased. What is further, mere death of an employee in harness does not entitle his family to such source of livelihood. The Government or the public authority concerned has to examine the financial condition of the family of the deceased, and it is only if it is satisfied, that but for the provision of employment, the family will not be able to meet the crisis that a job is to be offered to the eligible member of the family. The posts in Classes III and IV are the lowest posts in non-manual and manual categories and hence they alone can be offered on compassionate grounds, the object being to relieve the family, of the financial destitution and to help it get over the emergency. ... For these very reasons, the compassionate employment cannot be granted after a lapse of reasonable period which must be specified in the rules. The consideration for such employment is not a vested right which can be exercised at any time in future. The object being to enable the family to get over the financial crisis which it faces at the time of the death of the sole breadwinner, the compassionate employment cannot be claimed and offered whatever the lapse of time and after the crisis is over."

15. In **Director of Education (Secondary) & Anr. Vs. Pushpendra Kumar & Ors., reported in (1998) 5** SCC, 192, the Supreme Court held that compassionate appointment is an exception to the general provision and, being an exception, it should not interfere unduly with the rights of other persons. The Supreme Court held thus:

"The object underlying a provision for grant of compassionate employment is to enable the family of the deceased employee to tide over the sudden crisis resulting due to death of the bread earner which has left the family in penury and without any means of livelihood. Out of pure humanitarian consideration and having regard to the fact that unless some source of livelihood is provided, the family would not be able to make both ends meet, a provision is made for giving gainful appointment to one of the dependents of the deceased who may be eligible for such appointment. Such a provision makes a departure from the general provisions providing for appointment on the post by following a particular procedure. Since such a provision enables appointment being made without following the said procedure, it is in the nature of an exception to the general provisions. An exception cannot subsume the main

provision to which it is an exception and thereby nullify the main provision by taking away completely the right conferred by the main provision. Care has, therefore, to be taken that a provision for grant of compassionate employment, which is in the nature of an exception to the general provisions, does not unduly interfere with the right of other persons who are eligible for appointment of seek employment against the post which would have been available to them, but for the provision enabling appointment being made on compassionate grounds of the dependent of a deceased employee."

16. The Supreme Court in the case of ***General Manager (D&PB) & Ors. Vs. Kunti Tiwary & Anr., reported in (2004) 7 SCC, 271*** held that under the Scheme which had been adopted by the Indian Banks Association, the terminal benefits received by the family of the deceased employee had to be considered together with the income of the family, employment of other members, the size of the family and liabilities, if any. The Supreme Court in that case held that the family of the deceased employee had not been left in penury or without any means of livelihood and its income was not such as to lead to the conclusion that the family was living hand to mouth.

17. The same view was followed in ***Punjab National Bank & Ors. Vs. Ashwini Kumar Taneja, reported in 2004 AIR SCW, 4602.***

18. In ***National Hydroelectric Power Corporation & Anr. Vs. Nanak Chand & Anr., reported in AIR 2005 SC, 106,*** the principle was formulated as follows:

"It is to be seen that the appointment on compassionate ground is not a source of recruitment but merely an exception to the requirement regarding appointments being made on open invitation of application on merits. Basic intention is that on the death of the employee concerned his family is not deprived of the means of livelihood. The object is to enable the family to get over sudden financial crises."

19. In ***Commissioner of Public Instructions & Ors. Vs. K.R. Vishwanath, reported in (2005) 7 SCC, 206***, the following principles were laid down by the Supreme Court:

"...the claim of person concerned for appointment on compassionate ground is based on the premises that he was dependent on the deceased employee. Strictly this claim cannot be upheld on the touchstone of Article 14 or 16 of the Constitution of India. However, such claim is considered as reasonable and permissible on the basis of sudden crisis occurring in the family of such employee who has served the State and dies while in service. That is why it is necessary for the authorities to frame rules, regulations or to issue such administrative orders which can stand the test of Articles 14 and 16. Appointment on compassionate ground cannot be claimed as a matter of right. ...High Courts and Administrative Tribunals cannot confer benediction impelled by sympathetic considerations to make appointments on compassionate grounds when the regulations framed in respect thereof do not cover and contemplate such appointments."

20. Insofar as the arguments made by learned counsel for the petitioner is that the petitioner is entitled for the similar benefit as has been provided to the several other persons it is clear that if any wrong order

was passed earlier, petitioners can't seek the benefit of the same. There is no concept of negative equality under Article 14 of the Constitution of India. The Hon'ble Supreme Court in the case of State of ***Bihar v Kameshwar Prasad Singh AIR 2000 SC 2306*** held that:-

"The concept of equality as envisaged under Article 14 of the Constitution is a positive concept which cannot be enforced in a negative manner. When any authority is shown to have committed any illegality or irregularity in favour of any individual or group of individuals other cannot claim the same illegality or irregularity on ground of denial thereof to them. Similarly wrong judgment passed in favour of one individual does not entitle others to claim similar benefits."

21. In this regard the Hon'ble Supreme Court in the case of ***Gursharan Singh & Ors. v. NDMC & Ors. 1996 (2) SCC page 459*** held that citizens have assumed wrong notions regarding the scope of Article 14 of the Constitution which guarantees equality before law to all citizens. Benefits extended to some persons in an irregular or illegal manner cannot be claimed by a citizen on the plea of equality as enshrined in Article 14 of the Constitution by way of writ petition filed in the High Court. The Court observed:

"Neither Article 14 of the Constitution conceives within the equality clause this concept nor Article 226 empowers the High Court to enforce such claim of equality before law. If such claims are enforced, it shall amount to directing to continue and perpetuate an illegal procedure or an illegal order for extending similar benefits to others. Before a claim based on equality clause is upheld, it must be established by the petitioner that his claim being just and legal, has been denied to him, while it has been extended to others and in this process there has been a discrimination."

22. Again in the case of ***Secretary, Jaipur Development Authority, Jaipur v. Daulat Mal Jain & Ors. 1997 (1) SCC page 35*** the Hon'ble Supreme Court considered the scope of Article 14 of the Constitution and reiterated its earlier position regarding the concept of equality holding:

"Suffice it to hold that the illegal allotment founded upon ultra vires and illegal policy of allotment made to some other persons wrongly, would not form a legal premise to ensure it to the respondent or to repeat or perpetuate such illegal order, nor could it be legalised. In other words, judicial process cannot be abused to perpetuate the illegalities. Thus considered, we hold that the High Court was clearly in error in directing the appellants to allot the land to the respondents."

23. The similar view was again taken by the Hon'ble Supreme Court in the case of ***State of Haryana & Ors v. Ram Kumar Mann 1997 (3) SCC page 321*** wherein it was observed that:

"The doctrine of discrimination is founded upon existence of an enforceable right. He was discriminated and denied equality as some similarly situated persons had been given the same relief. Article 14 would apply only when invidious discrimination is meted out to equals and similarly circumstanced without any rational basis or relationship in that behalf. The respondent has no right, whatsoever

*and cannot be given the relief wrongly given to them, i.e., benefit of withdrawal of resignation. The High Court was wholly wrong in reaching the conclusion that there was invidious discrimination. If we cannot allow a wrong to perpetrate, an employee, after committing mis-appropriation of money, is dismissed from service and subsequently that order is withdrawn and he is reinstated into the service. Can a similarly circumstanced person claim equality under Section 14 for reinstatement? The answer is obviously "No". In a converse case, in the first instance, one may be wrong but the wrong order cannot be the foundation for claiming equality for enforcement of the same order. As stated earlier, his right must be founded upon enforceable right to entitle him to the equality treatment for enforcement thereof. A wrong decision by the Government does not give a right to enforce the wro*ng order and claim parity or equality. Two wrongs can never make a right."

24. After the death of Sri Satyendra Pratap, the petitioner submitted an application for considering his case for compassionate appointment, rejected by order dated 21.04.2018 passed by respondent No.2 & 21.08.2019 passed by respondent No. 3 on the ground that his mother is already working in a State Government establishment.

25. In the facts and circumstances of the case and taking into consideration of all the aspects of the matter, it is not disputed that the mother of the petitioner is already in employment and is working as Government Servant.

26. In this view of the matter, this Court is of the opinion that no relief could be granted. The writ petition lacks merits and the same is liable to be dismissed and is hereby dismissed.

27. No Order as to costs.

(2022)01ILR A699
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.12.2021

BEFORE

THE HON'BLE SARAL SRIVASTAVA, J.

Writ A No. 17042 of 2021

Kamaluddin ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Sri Syed Mohammad Abbas Abdy, Sri Arshi Abdy, Sri Neeraj Kant

Counsel for the Respondents:
C.S.C., Sri Arun Kumar, Sri Vijay Bahadur Maurya

A. Service Law – Pension - The record reflects that petitioner has been engaged as daily wager Clerk on 14.06.1989. It also transpires from the record that since the date of engagement of petitioner as daily wager, he was continuously working till his services was regularised by order dated 22.09.2008, therefore, in view of the judgment of Apex Court in the case of *Prem Singh* (infra) as well as judgment of this Court in the case of *Kaushal Kishore Chaubey* (infra), the services rendered as daily wager is liable to be counted for the purpose of grant of pensionary benefit after retirement, and if that be so, obviously the date of appointment of petitioner would be treated to be 14.06.1989. Hence, the services of the

petitioner will be governed under the Old Pension Scheme. (Para 7)

This Court in Special Appeal Defective No. 116 of 2016 has held that **date of appointment is relevant for determining applicability of Old or New Pension Scheme** as the date of appointment of petitioner is 14.06.1989 which is prior to 01.04.2005, therefore, case of the petitioner is covered under Old Pension Scheme. (Para 8)

The reason assigned by the authority concerned in rejecting pensionary benefit to petitioner based upon the GO dated 17.07.2019 according to which an employee appointed subsequent to 01.04.2005 shall be governed by New Pension Scheme is misconceived and not sustainable in law as the appointment of the petitioner is 14.06.1989 which is prior to 01.04.2005. (Para 9)

Writ petition allowed. (E-4)

Precedent followed:

1. Prem Singh Vs St.of U.P. & ors., (2019) 10 SCC 516 (Para 4)

2. Kaushal Kishore Chaubey & ors. Vs St. of U.P. & ors., Writ-A No. 5817 of 2020 (Para 4)

Present petition challenges order dated 22.02.2021, passed by Executive Engineer P.W.D. Etah.

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

1. Heard learned counsel for the petitioner, learned Standing Counsel for respondent no.1 and Sri Arun Kumar, learned counsel for respondent no.2.

2. The petitioner by means of the present writ petition has assailed the order dated 22.02.2021 by which claim of petitioner for grant of pensionary benefits and other retiral dues has been rejected.

3. The case of the petitioner is that he has been appointed as daily wager Clerk by Deputy Administrator by order dated 14.06.1989. As the petitioner had been in service since before 11.10.1989, therefore, his services has been regularised by order dated 22.09.2008. The petitioner has retired on 31.08.2018.

4. Learned counsel for the petitioner submits that petitioner has continued in service since 1989, therefore, his services rendered as daily wager from 14.06.1989 till the date of regularisation is liable to be counted with regular service for the purpose of grant of retiral dues. The aforesaid contention has been advanced by the learned counsel for the petitioner on the basis of judgement of Apex Court in the case of *P**rem Singh Vs. State of Uttar Pradesh and Others 2019 (10) SCC 516*** *and judgement of this Court in the case of* ***Kaushal Kishore Chaubey and Others Vs. State of U.P. and Others*** in Writ-A No.5817 of 2020. Accordingly, it is submitted that impugned order is not sustainable in law.

5. Learned counsel for the respondents submits that petitioner has worked as daily wager and his services has been regularised w.e.f. 22.09.2008, and therefore, he shall be governed under the New Pension Scheme, which has been made applicable to all State Government employees w.e.f. 01.04.2005. Accordingly, it is contended that there is no illegality in the impugned order, and no case for interference by this Court is made out under Article 226 of Constitution of India.

6. I have considered the rival submissions of the parties and perused the record.

7. The record reflects that petitioner has been engaged as daily wager Clerk on 14.06.1989. It also transpires from the record that since the date of engagement of petitioner as daily wager, he was continuously working till his services was regularised by order dated 22.09.2008, therefore, in view of the judgement of Apex Court in the case of ***Prem Singh (supra)*** as well as judgement of this Court in the case of ***Kaushal Kishore Chaubey (supra)***, the services rendered as daily wager is liable to be counted for the purpose of grant of pensionary benefit after retirement, and if that be so, obviously the date of appointment of petitioner would be treated to be 14.06.1989. Hence, the services of the petitioner will be governed under the Old Pension Scheme as has been held by this Court in Writ-A No.55607 of 2008 which has been upheld by this Court in Special Appeal Defective No.116 of 2021.

8. This Court in Special Appeal Defective No.116 of 2016 has held that date of appointment is relevant for determining applicability of Old or New Pension Scheme as the date of appointment of petitioner is 14.06.1989 which is prior to 01.04.2005, therefore, case of the petitioner is covered under Old Pension Scheme. Paragraph 8 of the said judgement is extracted herein below:-

"8.The issue aforesaid has been factually discussed by the learned Single Judge by referring to the judgment of this Court in the case of Satyesh Kumar Mishra and others vs. State of U.P. and others 2016(6) ADJ 808 (LB) and so as the judgment of Delhi High Court in the case of Inspector Rejendra Singh vs. Union of India 2017 SCC Online Del. 7879. We do not find any error in the judgment. It is not only the date of appointment is relevant but candidate lower in merit out of same selection are governed by the old pension scheme because appointments and joining were given from time to time before even 01.4.2005 thus appellant cannot be deprived from the same benefits. The judgments on the issue has been discussed by the learned Single Judge."

9. In view of the aforesaid fact, this Court finds that the reason assigned by the authority concerned in rejecting pensionary benefit to petitioner based upon the Government Order dated 17.07.2019 according to which an employee appointed subsequent to 01.04.2005 shall be governed by New Pension Scheme is misconceived and not sustainable in law as the appointment of the petitioner is 14.06.1989 which is prior to 01.04.2005.

10. Thus, for the reasons given above, the impugned order so far as it relates to petitioner is set aside, and a mandamus is being issued to respondent no.2-Nagar Ayukt, Nagar Nigam Prayagraj to grant pensionary and other retiral benefits to the petitioner within a period of three months from the date of production of certified copy of this order.

11. The writ petition is ***allowed*** subject to the observations made above.

12. However, respondents are at liberty to file recall application if petitioner is obtained this order by concealing material fact.

(2022)01ILR A702
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.12.2021

BEFORE

THE HON'BLE J.J. MUNIR, J.

Writ A No. 58889 of 2017

Bali Ram Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Sri Daya Shanker Yadav, Sri Mahendra Kumar

Counsel for the Respondents:
C.S.C.

A. Service Law – Qualifying service for the purpose of pension - Uttar Pradesh Retirement Benefit Rules, 1961 - Rule 3(8); Uttar Pradesh Qualifying Service of Pension and Validation Ordinance, 2020 (U.P. Ordinance 19 of 2020).

Uttar Pradesh Qualifying Service of Pension and Validation Act, 2021 - Section 2, 3 (U.P. Act No. 1 of 2021) - The clear purport of the Act is to define qualifying service in terms of Section 2 thereof retrospectively, and not in terms of Rule 3(8) of the Rules of 1961 of Regulation 3 of Civil Services Regulations. (Para 12)

The appointment letter dated 07.05.1978, does not reflect at all that the petitioner was appointed in accordance with the provisions of the Service Rules governing recruitment, selection or appointment. The mere fact that the appointment has been labeled or dubbed as temporary, does not implicitly mean that it is one made in accordance with the Service Rules. Ex-facie, the petitioner's appointment is *dehors* the Rules. (Para 14)

Petitioner's service book reflects that he has continued in service uninterruptedly since 07.05.1987, until regularisation on 13.09.2006, with his status being reflected earlier as temporary. There is no hint in the service book to show that the petitioner's appointment prior to his regularisation granted after requisite training, was one made in accordance with the Service Rules. Rather, the fact that the petitioner had to undergo training for three months from 01.05.2006 to 31.07.2006, before he was granted regularisation by the Appointing Authority, shows that the service rendered by him earlier, though uninterrupted and in a regular pay scale, was one on the basis of an appointment *dehors* the rules. (Para 15)

The rights of the petitioner judged under the shadow of Section 2 and 3 of the Act cannot be regarded as ones entitling him to qualifying service. The reason is that the petitioner's retention in service, though dubbed as temporary, was not made in accordance with the relevant Service Rules. The appointment between 07.05.1987 and 13.01.2006, until he was regularised in service, was one *dehors* the Rules. Post regularisation, the petitioner has admittedly not completed 10 years of qualifying service to entitle him to pension, gratuity and other post-retiral benefits that he seeks. As such, the petitioner is not entitled to relief. (Para 16)

Writ petition dismissed. (E-4)

Precedent cited:

1. Habib Khan Vs St. of Uttarakhand & ors., (2019) 10 SCC 542 (Para 8)

Precedent distinguished:

1. St. of U.P. through Secretary, Secondary education & ors. Vs Kamlesh Babu Gaur& anr., Special Appeal Defective No. 157 of 2021, decided on 19.02.2021 (Para 13)

2. St. of U.P. Vs Bhanu Pratap Sharma, decided on 09.06.2021 (Para 16)

3. Prem Singh Vs St. of U.P. & ors., (2019) 10 SCC 516 (Para 9)

Present petition challenges order dated 24.09.2017, passed by Additional/Joint Director, Treasury and Pension, Varanasi, Uttar Pradesh.

(Delivered by Hon'ble J.J. Munir, J.)

This petition is directed against an order passed by the Additional/Joint Director, Treasury and Pension, Varanasi, Uttar Pradesh dated 24.09.2017, requiring the Sub-Divisional Magistrate, Raja Talab, Varanasi to submit a revised proposal for consideration of the petitioner's case for the grant of pension and other post-retiral benefits, after excluding the period of service rendered by him, prior to his regularisation, as a Lekhpal.

2. A counter affidavit on behalf of respondent nos. 3 and 5 jointly, and a separate counter affidavit on behalf of respondent no. 4 have been filed. In reply to both these counter affidavits, the petitioner has filed two separate rejoinders.

3. This petition was admitted on 08.12.2020, and the hearing had proceeded on that date. Later on, it was brought to the Court's notice that the rights of the petitioner to pension, reckoning the period of his continuous service rendered as a Lekhpal prior to regularisation, would now be governed by the provisions of the Uttar Pradesh Qualifying Service of Pension and Validation Ordinance, 2020 (U.P. Ordinance 19 of 2020). The service book of the petitioner was summoned and retained on record.

4. Heard Mr. Daya Shanker Yadav, Advocate, along with Mr. Mahendra Kumar, learned Counsel for the petitioner, Mr. L.K. Tiwari, the learned Additional Chief Standing Counsel along with Mr. Sharad Chand Upadhyaya, the learned State Law Officer on behalf of the State-respondents.

5. The moot question involved in this petition is :

Whether the petitioner, a retired Lekhpal, has put in qualifying service, entitling him to receipt of pension, gratuity and other post-retiral benefits?

6. The Additional/Joint Director, Treasury and Pension, Varanasi, Uttar Pradesh, by his order impugned dated 24.09.2017, has opined that the petitioner's service, prior to his regularisation as a Lekhpal w.e.f. 13.09.2006, cannot be counted towards his qualifying service for the purpose of pension etc. The Additional/Joint Director, Treasury and Pension, has relied on an order of the Board of Revenue dated 17.10.2016 to discount the services of the petitioner rendered as an untrained Lekhpal prior to his regularisation. If that Board order alone were to be the law governing the right of the petitioner to receive his retirement pension and other post-retiral benefits, the matter would have to be considered from a different perspective altogether, and, may be, to reach a very different conclusion. The rights of parties, however, have suffered a change, in view of the Uttar Pradesh Qualifying Service of Pension and Validation Act, 2021 (U.P. Act No. 1 of 2021). The aforesaid Act shall hereinafter be referred to as "the Act".

7. The brief facts of the petitioner's case are that he was appointed by the Sub-Divisional Officer, Tehsil Raja Talab,

District - Varanasi on the post of a temporary Lekhpal vide order dated 30.03.1987. It is the petitioner's case that he continuously worked on the post of Lekhpal in several Tehsil of the Varanasi district, and did so always to the satisfaction of his superiors. He was sent for training from 01.05.2006 to 31.07.2006. His services were regularised w.e.f. 13.09.2006. He retired from service on 31.03.2016, upon attaining the age of superannuation. Post retirement, the petitioner submitted his documents before the respondents for sanction and disbursement of his pension and other post-retiral benefits. It is at this stage that the Additional/Joint Director, Treasury and Pension, Varanasi, passed the order impugned dated 24.09.2017, addressed to the Sub-Divisional Officer, Raja Talab, Varanasi, requiring him to revise the proposal for sanction of the petitioner's retirement pension, after excluding from qualifying service the period prior to 13.09.2006, that is to say, the period of service rendered by the petitioner prior to regularisation.

8. It is the petitioner's case, relying on the decision of the Supreme Court in **Habib Khan v. State of Uttarakhand** and others1 that services rendered continuously in a work-charged establishment, let alone temporary or officiating service rendered without interruption and followed by confirmation, would all reckon towards qualifying service for the grant of pension. It is pointed out that according to the respondents' stand in the counter affidavit filed by respondent no. 4, the period of the petitioner's services rendered post regularisation, that is to say, from 13.09.2006 to 31.03.2016, does not qualify him for the grant of retirement pension and other benefits. The respondents, it is pointed out, have pleaded in Paragraph No. 4 of the counter affidavit filed on behalf of respondent no. 4, that in terms of the Board of Revenue's orders dated 16.10.2016, service rendered as an untrained Lekhpal prior to regularisation does not qualify for the purpose of pension. The petitioner's services post regularisation being less than ten years, do not entitle him to pension, according to the respondents.

9. The petitioner also pleads discrimination, by citing cases of other Lekhpals like him, who have been regularised later on, after a long and continuous untrained temporary service, but are in receipt of retirement pension, though they have not put in the minimum number of years post regularisation. Attention of the Court is invited, in this connection, to an order dated 19.03.2018, annexed as Annexure RA-1, filed in reply to the return on behalf of respondent nos. 3 to 5, which lists fifteen Lekhpals, whose services were regularised on 06.12.2006, and they retired from service between 30.11.2010 and 31.12.2015, and yet were sanctioned retirement pension, which they are enjoying. Their names figure in the said order, which the Court has perused. Reliance, in particular, has been placed on the decision of the Supreme Court in **Prem Singh v. State of U.P. and others2**, where, interpreting the provisions of the Uttar Pradesh Retirement Benefit Rules, 19613 and Regulation 361, 368 and 370 of the Uttar Pradesh Civil Service Regulation, it was held that service rendered in a work-charged establishment would reckon as qualifying service for the grant of retirement pension, where Rule 3(8) of the Rules of 1961 was read down by their Lordships of the Supreme Court to hold that services rendered prior to regularisation in a work-charged

establishment shall count towards qualifying service for pension etc. Regulation 370 of the Civil Services Regulations and the directions carried in Paragraph No. 669 of the Financial Handbook, were struck down as discriminatory. In **Prem Singh** *(supra)*, it was held :

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 regularised. 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 the Note to Rule 3(8) of the 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 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.

36. There are some of the employees who have not been regularised 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 regularised under the Government instructions and even as per the decision of this Court in State of Karnataka v. Umadevi (3) [State of Karnataka v. Umadevi (3), (2006) 4 SCC 1 : 2006 SCC (L&S) 753] . 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 regularised of such employees. In the facts of the case, those employees who have worked for ten years or more should have been regularised. 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.

10. By virtue of the Rule in **Prem Singh,** the petitioner would certainly be entitled to reckon his services rendered as a temporary Lekhpal since the year 1987 for the purpose of grant of pension and other post-retiral benefits. His case would stand on a much better footing than those like the petitioner in **Prem Singh**, who spent most of his time in the work-charged establishment continuously, though, until regularisation in service. The petitioner has worked continuously as a temporary Lekhpal ever since his initial appointment and eventlessly regularised in service on 13.09.2006. This would certainly have been the correct assessment of the petitioner's right to receive pension under the rule in Prem Singh, but for legislative intervention in the first instance by Uttar Pradesh Ordinance 19 of 2020, that has since been replaced by the Act w.e.f. 05.03.2021.

11. It would be profitable to extract the provisions of the Act verbatim, together

with its prefatory note, carrying the statements of objects and reasons :

The Uttar Pradesh Qualifying Service for Pension and Validation Act, 2021

[U.P. Act No. 1 of 2021]

[As passed by the Uttar Pradesh Legislature]

An Act to provide for qualifying service for pension and to validate certain actions taken in this behalf and for matters connected therewith or incidental thereto

It is hereby enacted in the Seventy-second Year of the Republic of India as follows-

Prefatory Note-Statement of Object and Reasons.-Pension and gratuity admissible to a retired Government servant are determined in relation to the length of qualifying service of the Government servant. Although the term "Qualifying Service" is described in the Uttar Pradesh Civil Service Regulation and the Uttar Pradesh Retirement Benefit Rules, 1961, however the definition of the said term is open to subjective interpretation which leads to administrative difficulties.

It has, therefore, been decided to make a law defining the term "Qualifying Service" and to validate such definition with effect from April 1, 1961 which is the date of commencement of the Uttar Pradesh Retirement Benefit Rules, 1961.

Since the State Legislature was not in session and immediate legislative action was necessary to implement the aforesaid decision, the Uttar Pradesh Qualifying Service for Pension and Validation Ordinance, 2020 (U.P. Ordinance 19 of 2020) was promulgated by the Governor on October 21, 2020.

The Bill is introduced to replace the aforesaid Ordinance.

1.Short title, extent and commencement.-(1) This Act may be called the Uttar Pradesh Qualifying Service for Pension and Validation Act, 2021.

(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.Qualifying Service for Pension.- 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.Validation.- Notwithstanding any Judgment, decree or order of any Court, anything done or purporting to have been done and any 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 Act, shall be deemed to be and always to have been done or taken under the provisions of this Act and to be and always to have been valid as if the provisions of this Act were in

force at all material times with effect from April 1, 1961.

4.Overriding effect.- Save as otherwise provided, the provisions of this Act 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 Act.

5.Repeal and saving.- (1) The Uttar Pradesh Qualifying Service for Pension and Validation Ordinance, 2020 (U.P. Ordinance 19 of 2020) is hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken under the provisions of the principal Act, as amended by the Ordinance referred to in sub-section (1) shall be deemed to have been done or taken under the corresponding provisions of the principal Act as amended by this Act as if the provisions of this Act were in force at all material times.

12. It is evident that the Act nullifies the effect of the decision in Prem Singh, and there could be an issue about its constitutional validity. The petitioner, however, has chosen not to challenge the vires of the Act, though the changed position was brought to the notice of the learned Counsel for the petitioner at the instance of the State, when U.P. Ordinance 19 of 2020 was promulgated, which has since been repealed and replaced by the Act. A look at Section 2 of the Act does not brook doubt that services rendered by an officer appointed on a temporary or permanent basis, in accordance with the provisions of the Service Rules, would reckon for qualifying service under the Act. Section 3 validates all actions in terms of the Act that were hitherto governed by sub-rule (8) of Rule 3 of the Rules of 1961 retrospectively w.e.f. April 1, 1961, notwithstanding any judgment, decree or order of any Court. The clear purport of the Act is to define qualifying service in terms of Section 2 thereof retrospectively, and not in terms of Rule 3(8) of the Rules of 1961 of Regulation 3 of Civil Services Regulations.

13. The learned Counsel for the petitioner, within the frame of the writ petition and its limited scope that does not question the vires of the Act or any of its provisions, relies on the decision of a Division Bench of this Court in **State of U.P. through Secretary, Secondary Education and others v. Kamlesh Babu Gaur and another4.** He submits that in that case, it was held by this Court that the petitioner, who was appointed on ad hoc basis on 25.01.1996 as an Assistant Teacher, but denied pensionary benefits on ground that he was regularised in service on 22.03.2016 and therefore, had not completed ten years of qualifying service, entitling him to pension, was indeed entitled to reckon for qualifying services the period of his ad hoc services. It is pointed out that in **State of Uttar Pradesh v. Kamlesh Babu Gaur (supra)** it was held that the ad hoc appointment being approved by the District Inspector of Schools on 03.07.1997, in a case where the petitioner had been initially retained on ad hoc basis against a sanctioned post, the appointment was one made as per the Service Rules. It is urged that here, the petitioner was appointed as a temporary employee against a sanctioned post, which is a case much better than that before the Division Bench in **State of Uttar Pradesh v. Kamlesh Babu Gaur**. The submission is

that temporary appointment against a substantive post, that has continued uninterrupted over a long period of time, has to be reckoned towards qualifying service, as envisaged under Section 2 of the Act. In **State of Uttar Pradesh v. Kamlesh Babu Gaur,** the facts and the principle on which the decision turned, can best be appreciated in the words of their Lordships, which read to the following effect :

3. The facts on record shows that petitioner was appointed on ad hoc basis on 25.01.1996. It was bearing approval of District Inspector of Schools, Hathras. The approval for it was given after a writ petition bearing number 3321 of 1997. The approval by the District Inspector of Schools by the order dated 03.7.1997 shows appointment of the petitioner/non-appellant to be as per the rules.

4. It is not in dispute that petitioner/non-appellant retired after rendering 22 years of service. The claim of pension was yet denied despite the fact that petitioner was even regularized in service subsequently. The denial of pensionary benefit by order dated 05.11.2019 was challenged before the learned Single Judge. Denial was per se on the ground that petitioner was substantially appointed as Assistant Teacher on 22.3.2016 and he has not completed 10 years' service thereupon. The order dated 05.11.2019 was passed in ignorance of the fact that the order dated 22.3.2016 was to regularize the service of the petitioner without nullifying his ad hoc appointment made as per rules. If the ad hoc appointment of petitioner would not have been made as per rules, there was no reason for District Inspector of Schools to grant approval by order dated 03.7.1997 and that too the approval from the date of appointment dated 25.01.1996.

5. The present appeal has been filed in reference to Uttar Pradesh Qualifying Service For Pension And Validation Ordinance 2020 (in short "Ordinance of 2020"). It is stated that period of service on ad hoc or temporary basis should not have been counted by learned Single Judge as has been nullified by the Ordinance of 2020. Thus, even the judgment by the Apex Court in the case of Prem Singh vs. State of U.P. (2019) 10 SCC 516 could not have been applied by the learned Single Judge.

6. We find that identical issue came up for consideration before this Court in the case of State of U.P. through its Secretary and others vs. Mahendra Singh, Special Appeal Defective No.1003 of 2020. Therein the case was considered in the light of the Ordinance of 2020 and finding that appointment of the petitioner therein on temporary basis was as per rules, period of servicewas ordered to be counted towards qualifying service for pensionary benefits.

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 regularization 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. .....

.....

.....

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 moreso 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.

14. It is apparent that the ad hoc appointment of the Assistant Teacher in State of **Uttar Pradesh v. Kamlesh Babu Gaur** was found to be in accordance with the relevant Service Rules, when initially made, and against a substantive post. Here, what this Court finds, from a reading of the letter of appointment dated 07.05.1978, that the petitioner was appointed by the Sub-Divisional Magistrate (द), Varanasi as a temporary Lekhpal, on the basis of a report submitted by the Tehsildar, Sadar, Varanasi. The appointment letter does not reflect at all that the petitioner was appointed in accordance with the provisions of the Service Rules governing recruitment, selection or appointment. The mere fact that the appointment has been labelled or dubbed as temporary, does not implicitly mean that it is one made in accordance with the Service Rules. *Ex-facie*, the petitioner's appointment is dehors the Rules.

15. This Court has also gone through the petitioner's service book, which reflects that the petitioner has continued in service uninterruptedly since 07.05.1987, until regularisation on 13.09.2006, with his status being reflected earlier as temporary. There is no hint in the service book to show that the petitioner's appointment prior to his regularisation granted after requisite training was one made in accordance with the Service Rules. It also needs to be remarked that during the entire period of service rendered as a temporary Lekhpal, the petitioner has received recurring increments, pay revisions and Assured Career Promotion, but all that does not show that the petitioner was selected and appointed in accordance with the Service Rules. Rather, the fact that the petitioner had to undergo training for three months from 01.05.2006 to 31.07.2006, before he was granted regularisation by the Appointing Authority, shows that the service rendered by him earlier, though uninterrupted and in a regular pay scale, was one on the basis of an appointment dehors the rules. Therefore, the learned Counsel for the petitioner is not correct in his submission, that the principle in **State of Uttar Pradesh v. Kamlesh Babu Gaur** *(supra)* would be attracted to the petitioner's case. Section 2 of the Act that is *pari materia* with Section 2 of the predecessor ordinance, would bear differently upon the petitioner's rights, and not the way it did in the case before the Division Bench under reference. The reason is that in the case before the Division Bench, the initial ad hoc appointment of the writ petitioner was

found to be in accordance with the relevant Service rules, whereas, in this case, the petitioner's appointment, though labelled as temporary and in its turn, uninterrupted, is not found to be one made in accordance with the Service Rules.

16. Learned Counsel for the petitioner further relied on the decision of the Division Bench in **State of U.P. v. Bhanu Pratap Sharma5**. In the said decision also, it was held that it is not the State-appellant's case that the respondent was not appointed in accordance with the provisions of the Service Rules. Here, it is a case where the petitioner has not been able to show that he was appointed at any time before his regularisation in accordance with the Service Rules, though he was appointed against a sanctioned post on a temporary basis. The appointment, nevertheless, was dehors the rules. Thus, the decision in **State of Uttar Pradesh v. Kamlesh Babu Gaur** *(supra)* would also be of no help to the petitioner. The rights of the petitioner judged under the shadow of Section 2 and 3 of the Act cannot be regarded as ones entitling him to qualifying service. The reason is that the petitioner's retention in service, though dubbed as temporary, was not made in accordance with the relevant Service Rules. The appointment between 07.05.1987 and 13.01.2006, until he was regularised in service, was one dehors the Rules. Post regularisation, the petitioner has admittedly not completed 10 years of qualifying service to entitle him to pension, gratuity and other post-retiral benefits that he seeks. As such, the petitioner is not entitled to relief.

17. In the result, the writ petition **fails** and stands ***dismissed.***

18. There shall be no order as to costs.

(2022)01ILR A711
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.01.2022

BEFORE

THE HON'BLE J.J. MUNIR, J.

Writ A No. 60998 of 2010

Naveen Chand Sharma ...Petitioner
Versus
Ramu Babu ...Respondent

Counsel for the Petitioner:
Sri Rahul Sahai, Sri Aditya Singh Parihar

Counsel for the Respondents
Sri B.P. Verma, Sri Bhanu Prakash Verma

A. Civil Law - The U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 - Section 21(1)(b) - Experience in a particular business is not a pre-condition under the statute nor is there any principle requiring a landlord to prove his experience in the particular business, which he desires to establish in the premises that he seeks to be released. All that he is required to prove is his need, which should be bona fide. **The landlord has a right to earn his livelihood by attempting any business permissible by law, even if he does not have any experience with it.** Thus, this Court finds that the finding recorded by the Appellate Court on the question of bona fide need based on the landlord's lack of experience with the business of a grocer or a general merchant, ex facie proceeds on an irrelevant consideration. **(Para 20 & 22)**

Writ Petition Allowed. (E-10)

List of Cases cited:

1. Mohinder Prasad Jain Vs Manohar Lal Jain (2006) 2 SCC 724

2. Ram Babu Agarwal Vs Jay Kishan Das (2010) 1 SCC 164

3. Munni Lal Gupta Vs VIIth A.D.&S.J. & ors. 1997 (1) AWC 530

4. Kaushal Kumar Gupta Vs Bishun Prasad & Ors. 2006 (1) ARC 73

5. Prakash Chandra Vs Ritesh Bhargawa 2020 (9) ADJ 81

(Delivered by Hon'ble J.J. Munir, J.)

1. This is a landlord's writ petition assailing an order passed by the Additional District Judge, Court No.2, Mathura dated 16.08.2010, passed in P.A. Appeal No.19 of 2018, partly allowing the tenant's appeal under Section 22 of U.P. Act No. XIII of 1972. By the order impugned, the Additional District Judge, sitting as the Appellate Authority under the Act last mentioned, has set aside the order of the Prescribed Authority dated 04.08.2008, under Section 21(1)(a), but upheld the part, by which release has been granted under Section 21(1)(b) of the Act, subject to the tenant's right of re-entry.

2. The demised premises here is a 200 year-old shop, wherein Ram Babu, the sole original respondent to this petition, was a tenant since the year 1962. He was in occupation of the shop situate at Govardhan Tehsil, Mathura at a monthly rent of Rs.30/-. The shop was part of a larger property owned by the family of the sole petitioner, Naveen Chanda Sharma. Naveen Chanda Sharma received to his exclusive share the shop last mentioned in a partition brought about through Suit No.34 of 1988, Arvind Kumar vs. Naveen Chanda Sharma and others. Besides the aforesaid shop, the landlord also received in partition one room and another residential accommodation. The shop under reference shall hereinafter be referred to as the 'demised shop'. The landlord moved a composite application before the Prescribed Authority, Mathura under Section 21(1)(a) and (b) of the U.P. Act No. XIII of 1972 (for short, 'the Act'), seeking release of the demised shop on the ground of his bona fide need to set up business of a general merchant/ grocer, besides asking for release on ground that the demised shop was so dilapidated that it required demolition and new construction, which would then be utilised by the landlord to establish his proposed business of a general merchant. The application aforesaid was instituted in the month of November, 2002 and numbered on the file of the Prescribed Authority, Mathura as P.A. Case No.50 of 2002.

3. The *bona fide* need set up by the landlord was that he *bona fide* needed the demised shop to earn his livelihood. It was alleged that the landlord was an electrician and used to undertake jobs connected to the trade outside Govardhan However, he suffered a fracture to his foot, in consequence of which he had to give up his trade. He now stayed at Govardhan. He further said that he has no other shop to establish his business. In the circumstances, the landlord claimed that he is much troubled mentally, besides facing financial hardship. He requires the demised shop to establish his business. In addition, it was pleaded that the demised shop is in a dilapidated condition with its eastern and western walls completely gone and the northern and southern walls delicately holding. The roof has also fallen down. The structure is more than 200 year-old and is not fit for use by any person.

4. It was pleaded that the landlord had sufficient funds with him, which he would employ in getting a new shop constructed after demolishing the standing structure. It was also pleaded that the tenant-respondent would not suffer much hardship by comparison to the landlord, in case he were asked to vacate the shop, because he does not do any business there. He is holding on to the shop because it is occupied by him on a meager rent. One son of the tenant by the name Kedar is engaged in in the trade of tailoring and works as a tailor. He has no need for the said ship. The landlord has a family, comprising his wife, a son and a daughter to support. It was pleaded further that the landlord asked the tenant to vacate the demised shop a number of times over, but the tenant-respondent did not oblige, because he wants to extort money for the purpose. The tenant-respondent refused to vacate finally in the month of November, 2002, which led the landlord to institute these proceedings.

5. The tenant filed a written statement denying the landlord's allegations, except the fact that he was a tenant in the said shop. It was pleaded that the landlord has no bona fide need for the demised shop, which he desires to get vacated, so that he can sell it of for a good price. It was also alleged that the tenant would suffer much on the score of comparative hardship because he had no other place to establish or run his business that he does in the demised shop. He had no other source of income. It was also pleaded in the written statement that the landlord-petitioner is a powerful and rich man and had several other shops in the same market-place at Govardhan, where the demised shop is located. He sold off those shops at a good price. The tenant pleaded that he is filing copies of the sale deeds executed by the landlord relating to other shops that he owned. The case regarding the demised shop being dilapidated was also traversed. It is pleaded that the demised shop, though old, like many old constructions, was in a safe and sound condition. It had no signs of giving way. It was also pleaded that the tenant carries on his business of a blacksmith since a long period of time. He has acquired a reputation in his trade. There are many customers, who come over to the tenant for jobs related to the trade, particularly, the fabrication of hand tools. It was specifically pleaded that the landlord-petitioner had sufficient space available to him to establish his business, but on 23.08.1999 he sold off two shops to one Pradeep Kumar Verma and another Mahesh Kumar Verma. If he had to establish a shop to earn his livelihood, he would not have sold off those shops.

6. The Prescribed Authority framed four issues for determination, that read (translated into English from Hindi):

"1. Whether the applicant/ petitioner bona fide requires the disputed property?

2. Whether the disputed property is in a dilapidated condition and requires to be re-constructed per necessity?

3. Whether the applicant/ petitioner has complied with the requirements of Rule 17 of the Rules framed under U.P. Act No. XIII of 1972?

4. In whose favour does comparative hardship lie?"

7. The petitioner-landlord filed his affidavit bearing Paper No.50-ग in support

of the application, specifying his need further in Paragraph Nos.8 and 9 of the affidavit to the effect that he required the demised shop *bona fide* for the purpose of establishing a general merchant-cum-gift shop, after demolition and re-construction. Apart from the said fact, the demised shop was dilapidated with the eastern and western boundaries non-existent. The northern and southern boundaries were testified to be in a precarious state. It was further deposed that on 03.03.2005, the *Nagar Panchayat* had served a notice asking the landlord to demolish and reconstruct the shop as it was in such a dilapidated state that it could endanger human life.

8. The case about the shop being dilapidated that required demolition and reconstruction need not be dwelt upon further because that is a case which both the Authorities below have accepted and granted release under Section 21(1)(b) of the Act. The issue is primarily about release of the demised shop under Section 21(1)(a) of the Act, which has been granted by the Prescribed Authority, but set aside on appeal. There are affidavits by the landlord and the tenant in support of their respective cases, besides those of their witnesses, to which allusion would be made, wherever necessary.

9. Parties have exchanged affidavits. This petition was heard finally by consent of parties and judgment reserved.

10. Heard Mr. Aditya Singh Parihar, learned Counsel holding brief of Mr. Rahul Sahai, learned Counsel for the petitioner and Mr. B.P. Verma, learned Counsel appearing on behalf of respondent nos. 1/1 and 1/2.

11. There is no challenge laid to the order of release passed by the Appellate Authority under Section 21(1)(b) of the Act on behalf of the tenant. The landlord assails the order of the Appellate Authority to the extent that the Prescribed Authority's order granting release under Section 21(1)(a) has been set aside.

12. It is submitted by the learned Counsel for the landlord that the Appellate Authority has taken into consideration irrelevant facts and evidence that have no bearing on the *bona fide* need of the landlord. Elaborating on his submission, it is said that the Appellate Authority has looked into facts and evidence about the sale of two shops, earlier made by the landlord in favour of Pradeep Kumar Verma and Mahesh Kumar Verma, to hold that the landlord has no bona fide need. It is argued that the sale of the two shops was effected in the year 1999 whereas the release application was moved in the year 2002. It was, therefore, not at all relevant evidence to consider whether the landlord bona fide required the demised shop. It has also been submitted that the Appellate Authority has recorded a perverse finding that the landlord could not prove that he had any experience to carry on business that he proposed to set up in the new shop, after the demised shop was demolished and constructed afresh. Learned Counsel emphasizes that the settled position of the law is that a landlord need not require experience in the business that he seeks to commence, in order to satisfy his bona fide need for his livelihood.

13. The approach of the Appellate Authority has been also castigated as manifestly illegal and flawed on ground that the learned Judge has remarked that the landlord has failed to establish the fact that

he sustained a fracture to his limb, and on that basis, drawn adverse inference against the case of *bona fide* need urged by the landlord. It is argued that there was sufficient medical and other evidence to prove that the landlord had sustained a fracture, which was not rebutted by the tenant leading evidence to the contrary.

14. It is also urged that the Appellate Authority has given misplaced weightage to the provisions of Rule 16(2) of the Rules framed under the Act, in answering the issue of comparative hardship. It is pointed out that the tenant had not adduced any evidence to establish his good will. Learned Counsel says that because the tenant has a business running in the demised shop since long, would not itself disentitle the landlord to relief. It is also urged that the fact that the tenant has not made efforts to search out alternative accommodation pending proceedings and earlier, would be a circumstance that would heavily weigh against the tenant while judging comparative hardship.

15. Contrary-wise, Mr. B.P Verma, learned Counsel for the tenant submits that the original tenant, Ram Babu is now dead and respondent nos.1/1, Nabli, who is Ram Babu's widow is 60 years old. The tenant's son, Kedar, respondent no.1/2 is 40 years old. It is argued that except the avocation of a blacksmith, that is carried on in the demised shop, the family of the deceased Ram Babu have no other source of livelihood. The findings recorded by the learned Additional District Judge on question of bona fide need have been supported by the learned Counsel for the tenant. He has urged that the case of bona fide need set up by the landlord that he required the shop to earn his livelihood, where the landlord would set up a general merchant's shop or grocery has been rightly discarded by the Appellate Authority. It is argued by the learned Counsel that the landlord's need was not genuine or *bona fide* as he did not possess any experience of doing business of a grocer or general merchant. It is also argued that the landlord had sold out two adjacent shops on 23.08.1999, which would *ex facie* demonstrate that he was not in need of any accommodation to set up business in order to earn his livelihood. It is also argued that there is material on record that on the rear side of the demised shop, there is ample vacant land belonging to the landlord, where he could conveniently construct a shop for himself. It is next submitted that the landlord had purchased a plot of land on 30.03.2003 admeasuring 334.40 square metres, situate at Mauza Bangar, Tehsil and District Mathura through a registered sale deed in the name of Nisha Sharma, his wife. It is also urged that the landlord has not brought on record any evidence about the fact that he ever sustained a fracture to his lower limb or that he has experience of undertaking the trade of electrician, on the edifice of which the case of *bona fid*e need in the changed circumstances is now built. In view of the aforesaid submissions founded on whatever pleadings and evidence figures on the record, the learned Counsel for the tenant submits that the Appellate Authority has committed no error in not accepting the case of bona fide need urged on behalf of the landlord.

16. On the issue of comparative hardship, learned Counsel for the tenant has elaborately addressed the Court. It is submitted that the tenancy is in existence since the year 1962 and the sole source of livelihood available to the tenant. It is submitted that the Appellate Authority has rightly taken into consideration the mandate of Rule 16(2)(a) of the Rules, framed under the Act to conclude that the long subsisting tenancy tips the scales on the issue of comparative hardship in favour of the tenant. It is emphasized that the landlord has existing land on the rear side of the demised shop and had two shops that he sold off. It is submitted that the finding regarding comparative hardship is based on the evidence available, about which there is no illegality. It is, particularly, argued that the Appellate Authority is the last Court of fact and its opinion on the issue of bona fide need as well as comparative hardship that is based on relevant evidence cannot be interfered with by this Court in exercise of powers under Article 226 or for that matter, under Article 227 of the Constitution.

17. This Court has considered the rival submissions of parties, perused the impugned judgment as well as the order of the Prescribed Authority and the record.

18. The Appellate Authority has remarked that in the release application, the landlord has not said what kind of business he wishes to establish in the demised shop, that he would demolish and reconstruct. It has further been remarked that it has not been pleaded or proved by the landlord that he has experience to undertake any kind of trade or business, or the one that he intends to establish in the demised shop. It has, particularly, been remarked that in the affidavit 50ग, the landlord has said that he intends to establish the business of a general store in the demised shop, but no evidence has been adduced to show that the landlord has the requisite experience of establishing or handling that business. The Prescribed Authority had accepted the landlord's bona fide need and the case that the landlord intends to establish a general store or grocer's shop after the demised shop is vacated, demolished and reconstructed.

19. To the understanding of this Court, the findings of the Appellate Authority are hairsplitting and destructive of the purpose of Section 21(1)(a) of the Act. The provision for release is one that is designed to secure the landlord's interest by freeing his accommodation of the tenancy, if he bona fide requires it. The term 'bona fide need' cannot be confounded for a dire or desperate need. The Appellate Court has opined that the landlord's case about a fracture to his lower limbs, that disabled him from undertaking the job of an electrician he used to do earlier outside Govardhan is not believable for want of evidence. The Appellate Authority has not believed that case because a fracture to one of the limbs, seemingly is a short lived disability, which would not prevent the landlord from carrying on his trade. This approach of the Appellate Authority cannot be countenanced. If the landlord desires to establish a general merchant's shop or a grocery in a premises owned by him in order to earn his livelihood, he is within his rights to give up the trade of an electrician and pursue the business of a grocer. That is the freedom which the landlord has and he cannot be asked to restrict his choice for a livelihood to his former trade.

20. So far as the experience to do business of a general merchant or grocer is concerned, the absence of evidence about that

experience is a factor which the Appellate Authority has taken into consideration in manifest error. Experience in a particular business is not a pre-condition under the statute nor is there any principle requiring a landlord to prove his experience in the particular business, which he desires to establish in the premises that he seeks to be released. All that he is required to prove is his need, which should be bona fide. The landlord has a right to earn his livelihood by attempting any business permissible by law, even if he does not have any experience with it. In this connection, reference may be made to the decision of the Supreme Court in **Mohinder Prasad Jain v. Manohar Lal Jain, (2006) 2 SCC 724.** The question arose in the context of release of a shop on the ground of bona fide need urged by the landlord to establish a wholesale business in Ayurvedic medicines. The case arose under the Haryana Urban (Control of Rent and Eviction) Act, 1973, where the provisions about the issue of bona fide need are substantially the same as those under the Act. In that context, upon the tenant objecting to the ground set up by the landlord for release on basis that he did not have any experience in the relevant business, it was held in the **Mohinder Prasad Jain**:

"11. ..... The submission of the learned counsel for the appellant to the effect that before initiating the proceedings, the respondent was required to show that he had experience in running the business in Ayurvedic medicines, has to be stated to be rejected. There is no law which provides for such a precondition. It may be so where a licence is required for running a business, a statute may prescribe certain qualifications or preconditions without fulfilment whereof the landlord may not be able to start a business, but for running a wholesale business in Ayurvedic medicines, no qualification is prescribed. Experience in the business is not a precondition under any statute. Even no experience therefor may be necessary. ....."

21. Similarly, in **Ram Babu Agarwal v. Jay Kishan Das, (2010) 1 SCC 164,** the Supreme Court, while deciding the issue of bona fide need in the context of Madhya Pradesh Accommodation Control Act, 1961, held:

"7. We are of the opinion that a person can start a new business even if he has no experience in the new business. That does not mean that his claim for starting the new business must be rejected on the ground that it is a false claim. Many people start new businesses even if they do not have experience in the new business, and sometimes they are successful in the new business also. Hence, we are of the opinion that the High Court should have gone deeper into the question of *bona fide* need and not rejected it only on the ground that Giriraj has no experience in footwear business."

22. In view of the aforesaid position of the law, in the opinion of this Court, the finding recorded by the Appellate Authority, on the question of *bona fide* need based on the landlord's lack of experience with the business of a grocer or a general merchant, *ex facie* proceeds on an irrelevant consideration. The finding is, therefore, manifestly illegal.

23. The other facet on which the Appellate Authority has premised its finding about the absence of *bona fide* need is the fact that the landlord sold off two shops, adjacent to the demised shop, in

favour of Pradeep Kumar Verma and Mahesh Kumar Verma. For one, this finding ignores from consideration the very relevant fact that the sale of the two shops was a transaction that was done in the year 1999, whereas the release application was made in the year 2002 for an emergent *bona fide* need. The landlord cannot be held to account for the disposition of a property that he made three years antecedent in point of time to making the application.

24. The other crucial point that the Appellate Authority has critically missed is the finding that the Prescribed Authority backed by evidence referred to therein has recorded in his order, which says that the two sale deeds had to be executed by the landlord in constraining circumstances in favour of Pradeep Kumar Verma and Mahesh Kumar Verma. It has been held by the Prescribed Authority that the two tenants were rich-men and had fought the landlord and his father. Both the father and the son had been beaten up by the tenants. The landlord had made a complaint to the Police, but they did not take any action. The landlord had a threat to his life and property. It was in those circumstances that the property was sold at a lower price to the tenants. It has also been remarked by the Prescribed Authority that the landlord had made a release application in the year 1984 against the tenants, which was rejected. The Prescribed Authority has noticed the order rejecting the release application as well as the police complaint. It has then been remarked by the Prescribed Authority that compelled by the rejection of his efforts to secure release of those shops, adjacent to the demised shop, the landlord was compelled into selling the shops to the tenants. This crucial finding of the Prescribed Authority and the material in support thereof has gone unnoticed by the Appellate Authority. He has not dealt with those findings or reversed the same; let alone for a good reason assigned.

25. This Court is of opinion that the finding of the Prescribed Authority has not been demonstrated before this Court also to be bereft of evidence or otherwise illegal. Since the aforesaid finding has not been reversed by the Appellate Authority, and on the basis of relevant material is well founded, it must be held to govern the rights of parties. Even otherwise, the said finding is inevitable to be drawn from the evidence on record and the Appellate Authority has committed a manifest error in ignoring it. In view of the aforesaid error, that is manifest, it has to be held for the added reason, indicated that the Appellate Authority, has gone manifestly wrong in holding that the landlord had no bona fide need to seek release of the demised shop, because he had sold two adjacent shops to the men named, Pradeep Kumar Verma and Mahesh Kumar Verma.

26. In the circumstances, this Court is of opinion that the findings recorded by the Appellate Authority that the landlord has not been able to establish his bona fide need is manifestly illegal and flawed. To the contrary, the finding on the point by the Prescribed Authority is unassailable and deserves to be upheld.

27. So far as the issue of comparative hardship is concerned, the Appellate Authority has held in favour of the tenant falling back upon the provisions of Rule 26(2) of the Rules, framed under the Act. The Appellate Authority has depended on the said Rule to opine that the length of the tenancy is a factor that cannot be ignored. The Appellate Authority has held that the

tenancy here being one dating back to the year 1962, there was feeble justification to grant release. This Court must remark at once that the Appellate Authority has interpreted the provisions of Rule 16(2) going by its understanding on the first principles. That is a good way to interpret a statute provided it is not pronounced upon by authority. Surprisingly, the Appellate Authority, who has rendered the decision impugned, as late as the year 2010, has not referred to the several authorities that were by then holding field interpreting the Rule. One principle that has come to stay in interpreting Rule 16(2) or judging the issue of comparative hardship in the context of an application for release under Section 21(1)(a) of the Act, is the pre-dominent importance of the efforts made by the tenant to search for alternative accommodation, pending proceedings for release, or even before that. The words in clause (a) of sub-Rule (2) of Rule 16 framed under the Act, attaching importance to the length of the tenancy, have also fallen for consideration, with the judicial opinion being that the Rule cannot be interpreted in a manner so as to constitute a tenant of very long duration into a virtual landlord or owner. In this connection, reference may be made to the decision of this Court in **Munni Lal Gupta v. Vllth Addl. District and Sessions Judge and Ors., 1997 (1) AWC 530.** In **Munni Lal Gupta** *(supra)*, it was held:

"4. It admits of no doubt that according to Clause (a), Sub-rule (2) of Rule 16, greater the period since when the tenant has been carrying on his venture in the building, less the Justification for allowing the application but at the same time, having regard to over-all facts and circumstances of the case, I am pursuaded to the view that the findings recorded by the Authorities under the Act in relation to bona fide requirements of the landlord cannot be assailed and whittled down merely because the Petitioner had been carrying on his business in the shop in question since the year 1977. It is explicitly postulated in Clause (b) Sub-rule (2) of Rule 16 that where the tenant has available with him suitable accommodation to which he can shift his business without the perils of substantial loss, there shall be greater justification for allowing the application. The expression "available with him" in this Sub-rule does not necessarily mean actual physical availability. A suitable alternative accommodation which may become available on an effort being made in that direction is also in the comprehension of the expression and in the facts and circumstances of the case, it has been held that the Petitioner was wanting in earnest efforts in looking for suitable alternative accommodation, notwithstanding the fact that the litigation between the parties had protracted to considerable stretches. In Rajendra Kumar Gupta v. Gopal Kishan and Ors., AIR 1995 All 82, it has been held by Sudhir Narain, J., and I concur with the view taken therein in that "one of the principles for considering comparative hardships of the parties is to find out as to whether the tenant had made a sincere effort to find out alternative accommodation and had placed materials before the authorities to come to their conclusions that he made such an effort." The fact that earlier applications for release, met the fate of rejection some 10 years ago, could not be projected backward to operate as an obstacle In the way of the release application being allowed as with the passage of time, the situation has undergone considerable change.

Indubitably, Landlord Sanjai Gupta did his M.A. after rejection of the earlier applications and his failure to secure employment for himself, lends cogency to his moving the present application."

28. Again in **Kaushal Kumar Gupta v. Bishun Prasad and Ors., 2006 (1) ARC 73** it was held:

"6. The finding of the trial Court that the landlord could ask his son Ram Prakash to assist him in his business of repairing utensils and stove rather fantastic. It has been held by the Supreme Court in Susheela v. A.D.J., 2003 (1) ARC 256, that landlord and every adult member of his family is entitled to have separate business. The other ground taken by the Prescribed Authority was that tenant was doing his business from the shop in dispute since 1935 hence there was no justification to evict him. Mere long possession of tenant is no ground to reject the release application when bonafide need is clearly established. In this regard also reference may be made to the aforesaid authority the Supreme Court in the case of Shushila (supra)." (Emphasis by Court)

29. In a very recent decision in **Prakash Chandra v. Ritesh Bhargawa, 2020 (9) ADJ 81,** it was held:

"53. So far as comparative hardship is concerned, it is undisputed fact that the petitioner has never attempted to search alternative space for shifting his business and law is very well settled on this point. The Apex Court as well as this Court has repeatedly held that it is necessarily required on the part of tenant to make full endeavour to search alternative accommodation to prove his comparative hardship after receiving copy of release application. In the matter of Rajasthan State Road Transport Corporation (supra), the Court has clearly held that it is required on the part of tenant to make effort for searching alternative accommodation. Again in the matter of Salim Khan (supra), this Court, relying upon the judgments of the Apex Court as well as this Court, was of the view that it is required on the part of petitioner to search accommodation after filing the release application and in the present case there is no dispute that the petitioner had never made any effort to search alternative accommodation. Not only this, the Court has also considered the Rule 16 of the Rules, 1972 and considering the another judgment of Ganga Devi (supra), Court has taken the view that Rule 16 of Rules, 1972 would not come in the rescue of petitioner, in case, petitioner-tenant has not made any effort to search another accommodation. Here in the present case, there is no dispute on the point that petitioner has not made any effort to search alternative accommodation.

54. In the matter of Sarju Prasad (supra), this Court has again taken the same view and held that in case effort was not made for alternative accommodation, this would be sufficient to tilt the balance of comparative hardship against the tenant. This view was again repeated by this Court in the case of Bachchu Lal (supra) and held that to prove the comparative hardship, it is necessarily required to make effort to search alternative accommodation, which is absolutely missing in the present case.

....."

30. In this case, there is no material to show or a finding recorded by the Appellate Authority that the tenant has made any efforts to search for alternative accommodation. Rather, the report of the

Amin Commissioner shows that during inspection he noticed the tenant sitting with a few tools of his trade, but the furnace had not been fired. This would not go to show that the original tenant was utilizing the demised premises for carrying on his trade of a blacksmith. A blacksmith's trade in the absence of a working furnace is unimaginable. The description of the tenant sitting in his shop, though this Court does not intend to record any finding about it, leaves an impression of doubt about the case of the tenant doing business of a blacksmith.

31. Now, about the surviving tenants, or the landlord's son and the widow, there is no material brought on record to show that they are also engaged in the trade of blacksmith. Apparently, the tenant has not discharged his burden on the question of comparative hardship, which again for a principle is required to be proved by the tenant once the landlord establishes his case of bona finde need. It must also be remarked that the Prescribed Authority has held on the question of comparative hardship clearly in favour of the tenant for good reasons assigned, including the tenant's failure to look for alternative accommodation. That finding of the Prescribed Authority is again unassailable, which the Appellate Authority has disturbed on manifestly illegal premises.

32. In the result, this petition succeeds and is **allowed**. The impugned order passed by the Appellate Authority dated 16.08.2010, to the extent that it rejects the landlord's application under Section 21(1)(a) of the Act, is set aside and that of the Prescribed Authority dated 04.08.2008 restored. There shall be no order as to costs.

(2022)01ILR A721

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 17.01.2022

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Writ C No. 4156 of 2017

Khemraj Smarak Rashtritya Vidyapeeth ...Petitioner

Versus

State Of U.P. & Ors. ....Respondents

Counsel for the Petitioner:
Rakesh Kumar Srivastava, Kartiket Dubey, Vinod Kumar Pandey

Counsel for the Respondents:
C.S.C., Akhilesh Kalra, Alqa Samreen, Apoorva Tewari, Atul Kumar Dwivedi, Faiz Ali Khan, Puneet Chandra, Shailendra Kr. Singh, Siddharth Vikram Asthana, Surendra Lal, Virendra Pd Srivastava

A. Society Registration Act, 1860 – Section 25 (1) – Amended provision made by the UP Legislature – Proviso to Section 4 (1) – Election dispute – Reference before the Prescribed Authority, when called for – Power of Deputy Registrar considered – Held, if any objection is filed by Ex members and they raise the dispute of the election, it cannot be said that the Deputy Registrar cannot decide such dispute and he is bound to refer the dispute to the Prescribed Authority. The Deputy Registrar in every case cannot be forced to refer the dispute to the Prescribed Authority – Section 25 (1) provides for settlement of dispute in summary manner and it does not all together oust the authority of the Deputy Registrar to accept the list of members. If such interpretation is accepted, then the power conferred on the Deputy Registrar by the proviso to Sub Section (1) of Section 4 will become redundant and *otiose*. (Para 93)

B. Society Registration Act, 1860 – Sections 4-B – Change in the list of members – Role of Deputy Registrar – Held, the Deputy Registrar is not supposed to make adjudication of dispute of correctness of membership like a court, but whenever the list is submitted or there is any change in the list of members, and objection is raised or otherwise, Deputy Registrar has to prima facie satisfy himself that change has been made in accordance with the provisions of the bylaws and is prima facie genuine. (Para 103)

C. Society Registration Act, 1860 – Inter-se dispute – Finding of facts recorded by the Deputy Registrar – Scope of interference – Lacking of necessary pleading in writ petition – Effect – Held, in the entire writ petition there is no foundation to assert that findings of fact recorded in the order impugned are erroneous. No ground has been taken to challenge the findings of fact recorded by the Deputy Registrar – High Court refused to interfere in the impugned order. (Para 109 and 116)

D. Society Registration Act, 1860 – Proceeding before the Deputy Registrar – Nature – Remedy of approaching the Civil Court – Scope – Held, the proceedings before the Deputy Registrar are summary proceedings and are not conclusive findings of fact – Any person aggrieved must go to the civil court where the Presiding Officer has the training to sift grain from chaff. (Para 112)

Writ petition dismissed. (E-1)

List of Cases cited :-

1. Committee of Management, Janta Shiksha Niketan Intermediate College Vs Deputy Registrar Basti; 1979 ALJ 314, (DB)

2. Sarafa Committee, Panchayati Dharam Kanta, Mathura Vs St. of U.P. & ors.; 2011 (2) ADJ 262

3. Gram Shiksha Sudhar Samiti Junior High School Sikandara, 2010 (7) ADJ 643

4. Chandigarh Administration Vs Manpreet Singh; 1992 (1) SCC 380

5. St. of Andhra Pradesh Vs Chitra Venkata Rao; 1975 (2) SCC 557

6. Syed Yaqoob Vs K.S. Radhakrishnan AIR 1964 Supreme Court 477

7. Allahabad High School Society Vs St. of U.P.; 2011 (3) ESC 2034

8. Sanatan Dharma Sabha Vs Registrar; AIR 1989 All 189

9. Gram Shiksha Sudhar Samiti Vs Registrar; 2010 (7) ADJ 643

10. Anjuman Khairul Almin Allahganj Vs St. of U.P.; 2014 (1) ADJ 44

11. Adarsh Krishak Junior High School; 2009 5 ESC 3506

12. Darul Uloom Ahle Sunnat Gulshan Taiyyaba Banthewa Vs Deputy Registrar; 2016 (11) ADJ 844

13. Sarafa Committee, Panchayati Dharam Kanta Mathura Vs St. of U.P. & ors.; 2011 (2) ADJ 262

14. Shailendra Singh; 2017 (3) UPLBEC 2035

15. Malati Devi Vs St. of U.P. & ors.; 2016 (4) ESC 2146

16. Babu Ram Shiksha Prasar Samiti, District Etah & anr.Vs Deputy

Registrar; 2007 (9) ADJ 262

17. T.P. Singh Vs Registrar/Assistant Registrar, Firms Societies and Chits; 2019 (132) ALR 480

18. Committee of Management A. S. Degree College Association Vs St. of U.P.; 2016 (4) ADJ 207

19. Anjuman Farogh E Islam Vs St. of U.P.; 2014 (5) ADJ 673

20. Sri Jain Dharam Pravarardhini Sabha, Lucknow Vs St. of U.P.; 2016 (34) LCD 503

21. Adarsh Sanskrit Vidyalaya Vs Committee of Management Ambedkar Nagar; 2016 (9) ADJ 679

22. Special Appeal No. 261 and 263 of 2015; Syed Akhtar Hussain Rizvi Vs St. of U.P. decided on 07.01.2016

23. A.P. Abubakar Musaliar Vs District Registrar; 2004 11 SCC 247

24. Allahabad High School Society Vs St. of UP; 2011 (4) ADJ 341

25. Allahabad High School Society Vs St. of U.P.; 2011 (6) SCC 118

26. R.R. Verma versus Union of India; 1980 (3) SCC 402

27. Shiksha Prasar Samiti Vs Deputy Registrar, 2002 (2) UPLBEC 1866

28. Ashok Kumar Singh Vs St. of U.P., 2012 AWC 2930

(Delivered by Hon'ble Mrs. Sangeeta Chandra, J.)

1. This writ petition has been filed by the petitioner which is a Society through its Secretary Tej Pratap Singh and one Pawan Kumar Singh son of Babban Singh, the President of the Society with the State of UP through the Deputy Registrar Faizabad and the SDM Ambedkar Nagar as respondents nos. 1,2 & 3 receptively and Narendra Pratap Singh, Raj Bahadur Vishwakarma, Vikramaditya Goswami, Rajkaran Verma, and Narendra Pratap Narain Singh as respondents no. 4 to 8 respectively. It is the case of the petitioners that Khemraj Smarak Rashtriya Vidyapeeth Sangh (hereinafter referred to as "the Society') was registered on 19.11.1965 under the provisions of the Societies Registration Act at File No. 15328 and at the time of its registration the General Body of the Society had 15 members and the strength has now increased to 44. The Elections of the Committee of Management of the Society were held on 30.11.1965, 30.11.1967, 30.11.1969, 30.11.1971, 30.11.1973, 30.11.1975, 30.11.1977, and 30.11.1979.

2. On 11.10.1980 the registered by-laws of the Society were amended and the Amendment duly registered on 29.11.1980 in the office of the respondent n. 2 by which the term of the Committee was increased to 5 years and periodical elections were thereafter held on 30.11.1983, 4.4.1988, 30.4.1993, 1.4.1998, 1.4.2003, and 1.4.2008 and the next elections were due in the month of April 2013. It has also been submitted that after registration of the Society its renewal has been done from time to time and the last renewal was done for a period of five years with effect from 10.10. 2005.

3. On 31.02.1985 one Hira Singh along with five others made a complaint before the opposite party no.2 against the amendment in the by-laws and Renewal Certificate being issued to the office bearers of the petitioner-Society. The complaint of Hira Singh and five others was rejected by the opposite party nos. 2 on 05.07.1986 with liberty to the complainant to file a case under Section 25 (1) of the Act before the Prescribed Authority for redressal of their grievance. Hira Singh along with others filed a case under Section 25 (1) of the Act on 23.10.1986 but it was dismissed for non prosecution on 09.05.1988. No application for recall of the order was made thereafter and the order became final.

4. The Society continued to function since 1980 under the amended by-laws. One Shri Dinesh Pratap Singh son of Hira Singh, who was a stranger to the Society made a frivolous complaint before the opposite party no. 2 on 19.12.2009 and notices were issued by the opposite party no. 2 to the petitioners. The petitioners replied and raised a preliminary objection regarding the maintainability of the complaint and about the locus of Dinesh Pratap Singh. Thereafter, Shri Dinesh Pratap Singh again made a complaint on 24.4.2010 raising a question about the

affairs of the petitioners- Society. The petitioners again raised objections regarding locus of the complainant. Thereafter for the first time the opposite party number 4 to 8 and three other persons Late Surendra Bahadur Singh, Late Thakur Prasad Singh and Late Udaybhan Singh filed an affidavit on 16.05. 2010 that they were life members of the Society right from the time of its creation and that no meeting was held in the Society after its establishment and forged proceedings were submitted for Renewal Certificates and the Deputy Registrar should declare the Managing Committee of the Society time-barred and recognise the applicants as valid members. On 15.4.2011, the opposite party no.2 erroneously declared all elections of the Society after 29.11.1967 to have been held by a Committee of Management which was defunct and that such elections could not be recognised.

5. The petitioners being aggrieved filed a writ petition before this Court namely Writ Petition No. 2816 (MS) of 2011 challenging the order dated 15.04.2011. The writ petition was dismissed. The Court directed the opposite party no. 2 to hold fresh elections under his supervision by its order dated 09.01.2012. Several applications for modification and review of the order dated 09.01.2012 were made and the order modified by the learned Single Judge several times which complicated the matter and Special Appeal No. 265 of 2014 and Special Appeal No. 84 of 2015 were filed thereafter by the parties.

6. In purported compliance of the order passed by the writ court dated 09.01.2012, it has been argued that the opposite party no.2 erroneously declared a list of eight persons as life members of the General Body of the Society on 17.03.2012 and requested the opposite party no. 3 to hold the elections. The petitioners assailed the order dated 17.3.2012 in a fresh Writ Petition No.1804 (MS) of 2012. There was no interim order and fresh elections as directed by the order dated 17.3.2012 were held. The petitioner amended the Writ Petition No. 1804 (MS) of 2012 and challenged the result of the elections so held. The writ petition was dismissed on the ground that subject matter of the writ petition was pending adjudication in Special Appeal No. 265 of 2014. Another Special Appeal was, therefore, filed as Special Appeal No. 81 of 2015 challenging the order of the Writ Court dated 24.02.2015. All three special appeals,namely, Special Appeal No. 265 of 2014 , Special Appeal No. 81 of 2015 and Special Appeal No. 84 of 2015 were clubbed together and decided by a common judgment and order dated 31.08.2016.

7. The Division Bench of the Court allowed the three Special Appeals and quashed the various orders passed in Writ Petition No. 2816 of 2011 and the order passed in Writ Petition No. 1804 (MS) of 2012 by the writ court. The Court also quashed the order dated 15.04.2011 passed by the opposite party no.2 which was challenged in the writ petition as also the orders dated 17.03.2012 and 26.04.2012 passed by the opposite party no.2, and directed the opposite party no. 2 to decide the dispute afresh and in case he found that the tenure of the Committee had come to an end, to proceed and finalise the membership of the Society in accordance with the by-laws and hold the elections if necessary within a period of three months.

8. It has been submitted by the petitioners that the opposite party no.2 erroneously proceeded in the matter and

reiterated the earlier order dated 15.04.2011 by holding that the Committee of Management had become defunct since 1967. Opposite party number 2 issued a tentative list of eight members on 28.12.2016 which list was the same as had already been set aside by the Division Bench of the Court, and invited objections to finalise the list for holding elections. Objections were filed that three members of the list had already died. The opposite party no.2 was requested to examine the tentative list again but he proceeded in the matter and again finalised the list of five members on 09.02.2017 and directed the SDM, Ambedkar Nagar to hold elections on 02.03.2017.

9. The petitioners have, therefore, filed the Writ Petition No. 4156 (M/S) of 2017 praying for quashing of the orders dated 28.12.2016 (the tentative list) and 09.02.2017 (the final list), and also praying for a direction to the opposite party no.2 to renew the Registration Certificate of the Society with effect from 10.10.2010 for an extended period on the basis of last undisputed election of office bearers of the Committee of Management held on 01.04.2008, and also to conduct further election of office bearers of the Society after finalising the list of members of the General Body on the basis of list used in the last election held on 01.04.2008. A further prayer has been made for a direction to the opposite parties not to disturb the working and functioning of the petitioner-Society with the petitioner no.2 and 3 as its Secretary and President respectively.

10. It has been argued before this Court that it was observed by the Division Bench in its judgement dated 30.08.2016 that the term of the elected Committee of Management had expired long ago therefore the Deputy Registrar had no jurisdiction to decide an infructuous dispute. It has been argued by the petitioners that the Division Bench in its judgement and order dated 31.08.2016 had referred to several issues that needed to be framed by the Deputy Registrar and considered again.

11. The Division Bench recorded the arguments raised by the counsel appearing for Pawan Kumar Singh and Tej Pratap Singh, and the grounds for challenge to the orders passed by the Writ Court. The learned counsel for the appellants Pawan Kumar Singh had argued that (1) if fresh elections of the Society were to be held then they were to be held from amongst members of the General Body as existing on 1.4.2008. Putting the clock back to 1967 and reducing the membership to the members as existing on that date was a totally illegal exercise undertaken by the Deputy Registrar. The election even if they were not held within time could now be held only under the existing list of members of the General Body and not on the strength of electoral college of 1967; (2) By the time the Deputy Registrar had decided the dispute it had become infructuous; (3) the election and their status in 1967 could not have been the subject matter of consideration by the Deputy Registrar as the provisions of Section 25 (2) were incorporated in the Statute only with effect from 06.10.1975, any elections held prior to that date could not have been made subject matter of adjudication; (4) the Deputy Registrar exceeded his jurisdiction with regard to decision on disputed elections as that power had been specifically conferred upon the Prescribed Authority under Section 25 (1) of the Act; (5) if earlier elections had been delayed it would not invalidate the same as no order was passed by the Deputy Registrar or

any other authority declaring the Committee of Management defunct in the meantime. The Committee of Management continued to function in the absence of any order passed under Section 25 (2) and validly held elections initially after two years and then after an interval of five years regularly; (6) the Deputy Registrar could not have gone into the issue of membership of the General Body on the strength of observation with regard to amendment in the by-laws and Memorandum of Association. There was no power of the Registrar to review or cancel an amendment after its registration as the said power can be exercised only under Section 12 of the Act. The annulment could not have been made by the Deputy Registrar as the erstwhile Deputy Registrar had approved the amendment of the by-laws earlier; (7) Dinesh Pratap Singh had no locus to move the application on 9.12.2009 and 08.02.2010 for reopening the question of elections held in the past after it had been carried out. Hira Singh his father had moved a complaint on 03.12.1985 which could not have been taken up for adjudication after 16 years in 2011; (8) the Deputy Registrar did not frame any issue regarding validity of the elections and there was no opportunity given to Pawan Kumar Singh and others to substantiate their claims that regular elections were being held. The Deputy Registrar after holding the amendments in the by-laws to be invalid assumed that the Committee of Management had become defunct as it was holding elections on the basis of the amended by-laws after every five years; (9) if the Deputy Registrar had any doubt regarding the elections and the continuance of office bearers he should have referred the matter to the Prescribed Authority for a decision under Section 25(1).

12. Shri Anil Tiwari had appeared for the private respondents in special appeal filed by Tej Pratap Singh and Pawan Kumar Singh, and had argued on the basis of the order passed by the Deputy Registrar on 15.04.2011 that the Deputy Registrar had discovered serious irregularities, in the amendment of the by-laws in 1980 and in Memorandum of Association in 2001, and he had not found any evidence of any elections having been held after 1967,therefore, the only option left with him was to direct fresh elections to be held under under Section 25 (2) of the Act.

13. The Division Bench after recording the submissions made by the counsel for the contesting parties adverted to the orders passed by the Writ Court in Writ Petition No.2816 (MS) of 2011 which had challenged the order passed by the Deputy Registrar dated 15.04.2011. The writ petition was initially dismissed on 09.01.2012 but thereafter serious dispute arose with regard to the date of last undisputed election and the order dated 09.01.2012 was modified and reviewed at least four times by the writ court. The Division Bench disapproved the orders passed by the learned Single Judge from time to time on the ground that the writ court did not advert at all to the merits of the Deputy Registrar"s order dated 15.04.2011. The Division Bench observed that the Deputy Registrar while passing the order dated 15.04.2011 framed only three issues for deciding the matter namely, (1) the status of amendment in the original by-laws of 1965, (2)whether the Principal of the Institution established by the Society can also be the founder member of the parent Society and (3) the status of members and membership. Regarding the original bye-laws as against the amended by-laws of the Society, the Division Bench observed that the Deputy Registrar while discussing the validity of the amendment and membership went on to observe that all

elections after 29.11.1967 had become invalid , consequently , in the absence of valid elections after 1967, the committee had become defunct and,therefore, the provisions of sub-Section (2) of Section 25 were invoked. The Division Bench gave a finding that the date of 01.04.2008 recorded by the learned Single Judge in his order can nowhere be found in the entire order of the Deputy Registrar pertaining to the elections of the Society.

14. The appellant in the Special Appeal had mentioned the dates of periodical elections allegedly held on 30.11.1969, 30.11.1971, 30.11.1973, 30.11.1975, 30.11.1977, 13.11.1979, 30.11.1983, 04.04.1988, 03.04.1993, 01.04.1998, 01.04.2003. According to the contesting respondents all these dates were fake as no records/documents supporting the holding of any such elections could be found in the office of the Deputy Registrar. The Division Bench gave a finding that from the perusal of the order of the Deputy Registrar dated 15.04.2011 at least two elections were found to have been referred to in the correspondence. One that was intimated through registered letter of the Committee of Management dated 11.12.1985, and the other related to the list of office bearers and election proceedings dated 29.11.1981. However, the Division Bench observed that neither the Deputy Registrar nor the Writ Court had examined this issue to find out about the status of such elections, therefore there was no basis for the Writ Court to have arrived at the conclusion that no elections were held after 01.04.2008 or that they had been held periodically prior to that date. The Deputy Registrar in fact had not even framed an issue with regard to elections. The Division Bench set aside the orders passed by the Single Judge on 09.01.2012 and other orders modifying the original judgment. It also set aside the order passed by the Deputy Registrar on 15.04.2011 and allowed the Special Appeal Nos. 81 and 84 of 2015. It held that the order dated 15.04.2011 could not be sustained for the reason that it had not framed any issue pertaining to the holding of periodical elections. Secondly, the validity of such elections if held, the term thereof had expired long ago, could not have been gone into by the Deputy Registrar as otherwise it was within the jurisdiction of the Prescribed Authority. Also the elections or status of Committee of Management prior to 16.10.1975 could not have been gone into as the provisions of Section 25 came into effect only after 1975 and therefore the proceedings of 1967 could not have been made the subject matter of the decision of the Deputy Registrar.

15. The Division Bench rejected the argument raised by Shri Anil Tiwari that issue of the validity of amendments and its consequences could be looked into if the entire exercise was fraudulently done, on the ground that the Deputy Registrar had not adverted at all to the issue as to whether he had the power to review earlier orders passed by his predecessor approving such amendment in the by-laws. It also observed that there was no finding as to whether the said amendments had been obtained by fraud so as to invoke the power of review. If the amendments were indeed invalid and the renewal granted on the basis thereof was also invalid then a person had a right to question the same by raising an appropriate challenge. Such a challenge was in fact raised by Shri Hira Singh and others in 1985, but was defeated. The Division Bench observed that it is beyond

comprehension as to why such persons kept quiet for sixteen years and it was ultimately Dinesh Pratap Singh son of Hira Singh who moved two applications one in 2009 and one in 2010. The question of locus of Dinesh Pratap Singh was also therefore required to be examined. The Division Bench observed that if the Deputy Registrar was of the opinion that there was no document pertaining to the holding of any election after 1967, he should have framed such an issue calling upon the parties to submit the documents to establish as to whether valid periodical elections had been held or not and duly intimated to the authorities. The Deputy Registrar also did not take notice of the fact that he did not have the authority to enter into any factual dispute of Committee of Management when the tenure thereof had come to an end. The order passed by the Deputy Registrar dated 15.04.2011 was therefore set aside and that Writ Petition No. 2816 (M/S) of 2011 was allowed. The Division Bench thereafter observed that the *"Deputy Registrar should now proceed to pass a fresh order in the light of the observations made hereinabove after giving an opportunity of hearing to the parties and after noticing their contentions and framing issues arising out of the dispute raised before him."*

16. The Division Bench set aside the order of the Single Judge dated 09.01.2012. The Division Bench also set aside the writ Court's orders dated 17.01.2012, 20.09.2012, 04.12.2012 and 08.05.2014. Having set aside the order passed by the Deputy Registrar dated 15.04.2011, consequential actions like the order dated 17.03.2012 finalising the list of 40 members was also set aside, as also the order dated 26.04.2012, recognizing the new Committee of Management. A further direction was issued to the Deputy Registrar that in case he finds that the tenure of the Committee of Management had come to an end, he should proceed to finalise the membership in accordance with law and then proceed to hold elections under Section 25(2), if necessary.

17. In response to the writ petition, counter affidavit has been filed by the official respondent, the respondent no.2, and counter affidavits have also been filed by respondent nos.4, 5 and 6. The respondent no.4 is being represented by Sri Atul Kumar Dwivedi and respondent no.5 is being represented by Sri Anil Kumar Tiwari, learned Senior Advocate assisted by Sri Apoorva Tiwari and Sri Prakhar Mishra. Respondent no. 6 is being represented by Sri Puneet Chandra.

18. In the counter affidavit filed by the respondent no.2 the Deputy Registrar, it has been stated that no elections were held according to the earlier registered by-laws or even in accordance with the amended by-laws. After list of five members of the General Body was finalised by the respondent no.2, the elections of the Society were held on 08.03.2017 and Shri Raj Bahadur Vishwakarma was elected as President and Shri Narendra Pratap Singh was elected as Manager. The respondent no.2 further submitted that the Society did not furnish copies of election proceedings allegedly held on 30.09.1979 which date was later on changed to 30.11.1979. According to the amended by-laws the tenure of office bearers of the General Body was to be five years and that of the Committee of Management was to be two years. In case the ammended by-laws were accepted then after 1979, elections to the Committee of Management were to be held in 1984 but the petitioners were showing

elections to be held in the year 1983. The respondent no.2 in his counter affidavit has also emphasised that after the judgement of this Court in the Special Appeals on 31.08.2016, office orders dated 15.04.2011 as well as 17.3.2012 were cancelled. With regard to the hearing before the Deputy Registrar, it has been specifically stated that notice was issued to the parties on 15.09.2016 and 07.11.2016 was fixed as the date of hearing. Later on, another notice was issued on 30.11.2016 after hearing the parties some of whom appeared in person while others through counsel the order was issued on 28.12.2016. Similarly, when the tentative membership list was published, objections of both the parties were considered and the list finalised only on 09.02.2017. Elections of the Society were held in pursuance of the order dated 09.02.2017 and no challenge has been raised in respect of such elections therefore the writ petition deserved to be dismissed.

19. In the counter affidavit filed by the respondent no.4 it has been averred that the strength of the General Body at the time of initial registration of the Society was 27 and that of the Managing Committee elected on 30.11.1965 was 15. Such Managing Committee became time-barred after 29.11.1967, therefore, no member could have been added in the General Body by such Managing Committee nor could they have held any election. The elections that were held were forged and manipulated elections, only on paper. There was no observation of the Division Bench that undisputed elections were held on 01.04.2008. It has been submitted that the alleged election proceedings held on 30.09.1979 and 13.08.1981 were not produced in their original before the Deputy Registrar. Photo copies of election proceedings of the Society with effect from 1967 till 1979 were submitted by Tej Pratap Singh along with his application for the first time on 09.07.2010. It has also been stated that renewal of the Society was lastly made on 09.11.2005 and thereafter renewal certificate has been granted to the respondent nos.4 and 5 on 15.10.2015 which is operative till 2020. The grant of renewal certificate is only for the benefit of the Society and does not confer any rights on any of the members. Moreover, in the order passed by the Division Bench on 31.08.2016 there was a specific direction to the Deputy Registrar to grant renewal certificate in time. Therefore, the same has been granted. Dinesh Pratap Singh had died in 2014 before the judgement dated 31.08.2016. His locus to file any complaint therefore could not be seen after his death. Independent and separate complaints were filed by the respondent no.4 along with several other life members which could validly be looked into by the Deputy Registrar. The respondent no.4 has specifically stated that he had filed a separate written statement on 07.11.2016 and also submitted original documents on 11.11.2016 for perusal of the Deputy Registrar. It has further been submitted that the Division Bench had directed the Deputy Registrar to decide the dispute and at the time of deciding such dispute Section 25 had become operative and there was no prohibition, for the Deputy Registrar to act in accordance with Section 25 in the judgement and order dated 31.08.2016. The Deputy Registrar therefore rightly considered the issues raised before him with regard to whether any valid elections were held after 1967. The Division Bench in its judgement dated 31.08.2016 had made no observations with regard to the alleged amendment of the by-laws of the

Society by the petitioners. The court had left it open to the Deputy Registrar by issuing him a direction to consider all aspects of the matter. The Deputy Registrar therefore framed four issues on 30.11.2016 and after considering papers produced both by the petitioners as well as the opposite parties, and the records maintained in his office, has come to the conclusion that earlier orders passed by the Deputy Registrar were passed on the basis of fabricated documents. The members who were signatories in the Memorandum of Association of the Society were not given any notice or information with regard to termination of their membership on failure to deposit subscription with Babban Singh, nor were they given any notice of the proposed amendment in the by-laws of the Society. The proceedings dated 11.10.1980 submitted before the Deputy Registrar showing that life members names were deleted and the names of other persons who had not been validly inducted by the General Body had been mentioned. The Deputy Registrar rightly came to the conclusion that since papers regarding General Body of the Society were submitted by Babban Singh and not by the alleged Committee of Management elected in the periodical elections proved that no elections were held in time. The application for renewal therefore was also not in accordance with Section 3A of the Act.

20. The respondent no.4 in paragraph 16 of his counter affidavit states that the name of Dinesh Pratap Singh is mentioned in the list of members of the Society that has been filed as an annexure 21 to the petition. Name of the respondent no.4 can be found at serial number 16 in the said list of life members and that of respondent no.5 Raj Bahadur Vishwakarma can be found at serial number 24 of the same list. The name of respondent no.6 Vikramaditya Goswami can be found at serial number 25, the name of respondent no.7 Raj Karan Verma can be found at serial number 22, the name of respondent no.8 Narendra Pratap Narain Singh can be found at serial number 27 of the list filed as annexure 21 to the writ petition. Out of 27 life members of the Society in 1965, 15 were elected on 30.11.1965 as the Committee of Management.

21. The respondent no.5 in his counter affidavit has repeated most of the contents of counter affidavit of respondent no.4 and has also raised the question of the amended by-laws being registered fraudulently in 1980 and also the issue of no elections being conducted according to the registered by-laws before the passing of the order dated 28.12.2016. In pursuance of the order dated 28.12.2016 and 09.02.2017, elections were held on 08.03.2017. It has also been submitted by the respondent no.5 that there were 21 members originally when the Society was constituted and the respondent nos. 4 to 8 are all life members. No Agenda was circulated amongst the members of the General Body by the petitioners' predecessor-in-interest before the amendment was carried out and forged proceedings have been submitted by the petitioner no.3. No elections as have been mentioned in paragraph 5 of the writ petition, were ever held and no proceedings were submitted before the Deputy Registrar. The respondent nos. 4 to 8 had filed their separate applications challenging the right of the petitioners to hold elections. Such a complaint by life members was rightly looked into by the Deputy Registrar. He gave proper opportunity of hearing by issuing notices. The petitioners appeared and took time to file documents. They did not file documents in their original but only photo copies were submitted.

22. With regard to alleged amended by-laws, it has been submitted by the respondent no.5 that they were forged documents and earlier order dated 05.07.1986 had been passed by the Deputy Registrar on the basis of fraud and misrepresentation of the then Committee of Management, and therefore the current incumbent was authorised to look into the matter again by the Division Bench in Special Appeal. Since the earlier orders dated 15.04.2011, 26.04.2012 and 17.03.2012 had been set aside by the Division Bench, it was open for the Deputy Registrar to consider the matter afresh after framing issues as had been observed in the judgement and order dated 31.08.2016. The Division Bench did not express any opinion with regard to the date of last undisputed election. The order of the Writ Court which had referred to elections being held lastly on 01.04.2008 was also set aside by the Division Bench. It has also been reiterated that the elections held in pursuance of the order dated 9.2.2017 on 8.3.2017 have not been challenged by amending the writ petition. The petitioners were raising a dispute which died its natural death after fresh elections were held in pursuance of the order dated 09.02.2017.

23. In the counter affidavit of respondent no.5, it has also been stated that Sushila Devi wife of Babban Singh had submitted the papers for registration of amended by-laws through her letter dated 30.10.1980 without annexing a copy of the minutes of the meeting of the General Body allegedly held on 11.10.1980. Only a copy of the Resolution was submitted that the amended by-laws had been unanimously adopted by the General Body. However, the Resolution did not state what amendments were being proposed and adopted in the original by-laws. The amended by-laws were got fraudulently registered on 29.11.1980. The Deputy Registrar therefore in the impugned order dated 28.12.2016 has recorded a categorical finding of fact that no amendment to the by-laws was ever made by the General Body of the Society in the alleged meeting held on 11.10.1980. The Deputy Registrar has recorded a finding also that along with the letter dated 30.10.1980 a list containing 21 names, alleged to be members of the General Body of the Society who had attended the meeting on 11.10.1980, was filed but the said list did not contain the names of 13 out of 15 original signatories to the Memorandum of Association. The respondent no.5 has also pointed out in his counter affidavit that the Agenda for a meeting proposed to be held on 30.04.1972 is alleged to have been issued on 18.04.1972, under the signature of Babban Singh as Sansthapak/founder. In the said alleged meeting held on 30.04.1972, Resolution no.7 was passed resolving that deposit of subscription by the original members at the time of registration of the Society was mandatory and until the aforesaid members deposited the subscription they would not be sent intimation of future meetings. It was alleged that through letters dated 01.05.1972 and 16.08.1972, nine members had been directed to deposit their subscription with the Sansthapak Babban Singh, but they failed to deposit the same and another meeting was held on 10.09.1972 wherein through the Resolution no.6 it was resolved that membership of such nine original members be terminated as they had not deposited the subscription in spite of written intimation given to them through the two letters sent by Babban Singh. It has been pointed out that Babban

Singh was declared to be the Sansthapak of the Society and given special rights through the amended by-laws allegedly adopted on 11.10.1980 hence Babban Singh could not have acted as Sansthapak of the Society in 1972 nor could he have convened the alleged meeting on 10.09.1972 nor could he have issued notices to the life members of the Society on 01.05.1972 and 16.08.1972 as Sansthapak.

24. It has been submitted by learned counsel for the respondents that Clause 2A of the original by-laws of Society defines "Life Members' as those members who were associated with the Society prior to its registration, or those who deposited Rs.1001/- as subscription after its registration. The use of the word "OR" meant that either one had to be associated with the Society since its inception or who had deposited one thousand and one rupees as membership fees. Those signatories to the Memorandum of Association like the respondents herein would not be required to deposit subscription in violation of the original by-laws before such amended by-laws were actually adopted on 11.10.1980 and registered on 29.11.1980. The Deputy Registrar therefore has categorically held in the impugned order that the alleged termination of membership of founder members was in violation of the by-laws and was therefore unacceptable. The Deputy Registrar has also held that the amendment to the by-laws were registered by deliberately producing forged and fabricated list of members of the General Body wherein the names of 13 out of 15 original members were removed. Notice/Agenda for the alleged meeting held on 11.10.1980 was never circulated among the members of the General Body. When original members made complaint in respect of the alleged amendment and notice with regard to said complaint was issued by the office of the Deputy Registrar on 23.12.1985, the petitioners' predecessor-in-interest filed statements in the proceedings, contrary to the existing by-laws and false assertions was made with regard to the alleged amendment which was approved on 11.10.1980 by the General Body. Subsequently, also forged documents were filed for justifying the Resolution dated 11.10.1980. Such an amendment which was vitiated by fraud was nonest in the eyes of law.

25. It has also been submitted by learned counsel for the respondent no.5 that in the reply submitted by Shri Pawan Kumar Singh to the notice issued by the Deputy Registrar he had stated that election in the year 1979 was held on 30.11.1979 but the records in the office of the Deputy Registrar submitted by Shri Jata Shankar Singh stated that the elections were held on 30.09.1979. The Deputy Registrar therefore held that no elections were held in 1979 and both proceedings were fabricated. As per Clause 22 of the alleged amended By-laws dated 29.11.1980, the office bearers of the General Body were to be elected for a period of five years however as per Clause 25, the term of Committee of Management elected in accordance with Clause 23 was to be two years only. The members of the Committee of Management elected under Clause 23 are also the office-bearers of the Society, and therefore they could be said to be the Governing Body of the Society under Section 16 of the Societies Registration Act. The Deputy Registrar in his order dated 28.12.2016 has also observed that all election proceedings from the year 1983 to 2008 which were filed along with the written statement of Pawan Singh dated 14.12.2016, were for the first time submitted on 09.07.2010 by Tej

Pratap Singh and were never filed in accordance with Section 4 of the Act. The Deputy Registrar rightly came to the conclusion that in fact no elections were held and all the documents that were submitted were fabricated. Since no elections were held, there was no election dispute which could be referred to the Prescribed Authority. The Committee of Management was never elected and no list of office bearers was ever filed in time in his office.

26. It has been submitted by the learned counsel for the respondent no.5 that findings of fraud, forgery and attempted manipulation and fabrication of records indicated that the petitioners have attempted to grab the Society in an unscrupulous manner and any benefit acquired by fraud cannot be allowed to continue through orders of the Writ Court and every public authority is vested with the inherent jurisdiction to correct its record if it had been fraudulently manipulated. Moreover even in the writ petition there was no pleading to specifically controvert the findings of fact recorded by the Deputy Registrar in his order dated 28.12.2016. By the order dated 28.12.2016 the Deputy Registrar issued a tentative list of members of the General Body and asked for objections. The respondents as well as the petitioners filed their objections which were considered and Electoral College was finalised. The petitioners did not challenge the order dated 28.12.2016 in time and chose to participate in the election process by filing their objections in respect of tentative membership of the Society. Objections were decided by the order dated 09.02.2017. The petitioner having participated in finalising the Electoral College therefore participated in the election process and now were precluded from challenging the same. It has been reiterated that the petitioners filed only photo copies of their records despite Deputy Registrar's order to produce the original records.

27. A supplementary counter affidavit has been filed by the respondent no.5 wherein he has brought to the notice of the Court that Sri Babban Singh the father of the petitioner no.3 was the Principal of the Intermediate College established by the Society since 1965 and retired on 01.07.2009. As per the Original Bye-Laws of the Society, the records of the Society were to be kept in the custody of the Principal Babban Singh, who taking an advantage of this, manipulated the records and prepared forged proceedings with regard to elections and other meetings of the Society. Sri Babban Singh being Principal removed the original Proceedings Register and Agenda Register from the school office. He prepared the Agenda and Proceeding Register excluding the original founder members of the Society and inducting his near and close relatives as members of the General Body which included his sons, daughters, daughters-in-law, brothers-in-law, cousins, uncles, etc. Shri Babban Singh being Principal of the School could not attend any of the proceedings of the Committee of Management of the Society as there is a statutory bar under Rule 5 of Chapter III of the Regulations framed under the U.P. Intermediate Education Act 1921. The petitioner no.3 Pawan Kumar Singh, son of Babban Singh alleged himself to be the President of the Society for the past several years in the list submitted before the Deputy Registrar. However, he did not

disclose that he was an Assistant Teacher in Janta Inter College, Ambedkar Nagar which is a recognized aided college. The District Inspector of Schools Ambedkar Nagar in his reply dated 05.09.2014 to an application under Right to Information Act 2005 had disclosed this information. Sri Pawan Kumar Singh being an Assistant Teacher in a recognized and aided school, could not hold any office in the Committee of Management of any other recognized School in view of Rule 5 of Chapter III of the Regulations framed under Intermediate Education Act. The learned Counsel for the respondents have placed reliance upon ***Committee of Management, Janta Shiksha Niketan Intermediate College Vs. Deputy Registrar Basti*** **1979 ALJ 314, (DB)**, where the Division Bench Considered the language of Regulation 5 which provided that no member of the teaching staff or the Principal or Headmaster shall act as an office bearer of the Committee of Management of any recognized institution, to argue that Regulation 5 of Chapter III of the Intermediate Education Act places a complete embargo on the right of a person to be an office bearer of the Committee of Management, who is employed in a recognized institution irrespective of the fact whether it is the Committee of Management of the same institution or of some other institution. It has been argued that Babban Singh was the Principal of the same College And Pawan Kumar Singh was employed as an Assistant Teacher in another institution and simultaneously became Secretary of Khemraj Smarak Sanskrit Vidyapeeth.

28. A copy of the list of General Body members for the year 2014-15 submitted by the petitioner no.3 in the office of the Deputy Registrar has been filed along with the supplementary counter affidavit which shows that Babban Singh was the Principal of the College since 11.01.1965 till 01.07.2009. It shows the exact relationship of majority of members of the General Body with Principal Babban Singh.

29. It has also been submitted by learned counsel for respondent no.5 that the services of Pradeep Kumar Singh, Santosh Kumar Singh both sons of Babban Singh, Smt. Kundala Singh daughter of Babban Singh and Smt. Rekha Singh daughter-in-law of Baban Singh, were terminated in furtherance of directions issued by the Educational Authorities. An order of recovery of salary has been also issued by the District Inspector of Schools Ambedkar Nagar on 26.10.2017 against Shri Pradeep Kumar Singh, Smt. Kundla Singh, and Smt. Rekha Singh. The submission in the supplementary counter affidavit raised during the argument has not been denied by the learned counsel for the petitioner.

30. The petitioners in the rejoinder affidavit to the counter affidavits of respondent no.2, respondent no.4 and respondent no.5 have stated that the five persons shown in the list finalised on 09.02.2017 by the respondent no.2 were never members of the General Body and strangers to the Society. The locus of such members has never been addressed. The affairs of the Society were being managed by the petitioners for more than 45 years. Renewal certificates had been granted on the applications made by the Manager of the Society from time to time. The respondent no. 2 cannot now turn around and deny any election before the year 1980. The respondent no.2 cannot also deny the original records that were produced before him at the time of hearing by the petitioners for his perusal. The respondent no.2 did not

initiate any proceedings under Section 25 (2) of the Act after 1975 which goes to show that he was recognising all elections that were held in between 1967 to 1980 by the Society. The elections conducted by the respondent no.2 on 18.03.2017 were against the provisions of Sections 1, 13A and 13B of the Act as no Society can be validly formed with only five members. The Division Bench in its order dated 31.08.2016 had also stated that prior to the coming into force of the amendment in the Act on 16.01.1975, the Deputy Registrar could not have exercised the powers under Section 25(2) to look into the status of the Committee of Management and the validity of elections if held and the term of such Committee of Management. Even after coming into force of Section 25(2), such jurisdiction lies with the Prescribed Authority under Section 25(1).

31. Even if the papers submitted by the petitioners were suspected to be false and fabricated by the Deputy Registrar, he could only have submitted the dispute for decision of the Prescribed Authority. The order dated 28.12.2016 was without jurisdiction.

32. Learned counsel for the petitioner with regard to the death of Dinesh Pratap Singh in 2014, has submitted that the Division Bench had nevertheless observed that it was necessary for the Deputy Registrar to consider the locus of Dinesh Pratap Singh to file the complaint. The Deputy Registrar failed to consider the issues that were directed to be considered by the Court, and therefore, the impugned orders are liable to be set aside. The Deputy Registrar was also required by the Division Bench to take into account the challenge raised to the validity of the amendments by Hira Singh under Section 25(1) of the Act and the subsequent rejection of such challenge by the Prescribed Authority in 1988.

33 . The petitioners have denied Annexure 21 of the petition saying that it was a self attested list by Dinesh Pratap Singh. It was also stated that a minimum of seven members can constitute a valid Society. If the Deputy Registrar had found that there were only five valid surviving members, he had to issue notice of dissolution to such members, but in this case the Deputy Registrar ignored the statutory provisions and held elections on the basis of the list of five members finalised by him on 09.02.2017. Incidentally these five members also became office bearers of the Society in the elections held on 08.03.2017. It has also been submitted that petitioner Pawan Kumar Singh had submitted original records for perusal of the Deputy Registrar at the time of final hearing but he had not submitted these original documents in the office of the Deputy Registrar for his perusal. This argument has been made orally and it is not in the pleadings of the writ petition therefore the respondent no.2 had no occasion to deny or accept the same in his counter affidavit.

34. It has also been argued by the learned counsel for the petitioners that the Society was conceived by the family of Sri Khemraj Singh who was the great grand father of the Petitioner No.3, and was a very respected person in the village Khemapur which was named after him. The Society was established to perpetuate the memory of Late Khemraj Singh by his family and was registered with the Registrar of Societies on 19.11.1965. At the time of registration there were 15 members

of the Society who were named in the Memorandum of Association of the year 1965 itself. The list of 15 members were as follows : - (i) Sati Prasad Singh, (ii) Jantri Singh, (iii) Hira Singh, (iv) Raghupati Singh, (v) Taluqdar Singh, (vi) Jayaram Verma, (vii) Devi Prasad Singh, (viii) Satyanarayan Singh, (ix) Vishwanath Verma, (x) Trilok Chandra Jaiswal, (xi) Bhawani Baksh Singh, (xii) Shiv Karan Singh, (xiii) Hashim Beg, (xiv) Bhagwati Prasad Shukla and (xv) Shamsher Bahadur Singh.

35. It has been submitted further that Hira Singh having been advised to file a petition under Section 25(1) of the Societies Registration Act filed the same before the Prescribed Authority and in Paragraph-3 and 6 of his plaint, had categorically mentioned that there were 15 founder members at the time of registration of the Society on 23.11.1965, and the names were mentioned in Annexure-A to the plaint. The names of the Respondents Nos.4 to 8 were nowhere mentioned in the list filed by Shri Hira Singh, even though the respondents claim to have been made members by Sri Hira Singh himself on 01.11.1965.

36. This Court has however also noticed that Hira Singh had also mentioned that out of the 15 members mentioned in the Memorandum of Association at least 11 members were alive till 11.10.1980, and some of them were still alive at the time of filing the plaint however, no agenda was circulated to them of any meeting proposed to be held to amend the bye-laws. The amendment in the bye-laws having been carried out by Baban Singh only to monopolise all power in the Society in the hands of few of his family members.

37. It has been submitted by the learned counsel for the petitioners that after filing of the complaint by Sri Dinesh Pratap Singh, son of Hira Singh, the petitioners had made an application under Right to Information Act to the Deputy Registrar asking whether the complainant is a member of the Society and also whether renewal of the petitioner Society had been done from time to time. In the reply sent by the Deputy Registrar on 29.07.2010 it was stated clearly that the complainant had not disclosed any document proving his membership of the Society. In the list of General Body Members of Socieity maintained in the office of the Deputy Registrar the names of the complainants could not be found. The reply dated 29.07.2010 has been filed as an Annexure 19 to the writ petition which has not been denied by the respondents in their counter affidavit.

38. It has been argued by the learned counsel for the petitioner that the contesting respondent had never participated in any meeting for 47 years with effect from 1965 to 2012. Only in 2010, they filed complaints to supplement the complaint made by Dinesh Pratap Singh and asserted themselves to be life members of the Society. The contesting respondents are complete strangers having no locus and they came in only to rake up an infructuous dispute.

39. It has further been argued by the learned counsel for the petitioners that the elections held in 1979 have been admitted in the order passed by the Deputy Registrar and also in the counter affidavit in Paragraph 25 of the Opposite Party No.5. The Deputy Registrar has conveniently ignored elections held in 1979 only on account of difference in dates saying that

Jata Shankar Singh had disclosed the date of elections to be 30.09.1979 and the petitioners claimed the elections to be held on 30.11.1979. Such observation could not have been made by the Deputy Registrar as it related to an election as has been held by this Court in Sarafa ***Committee, Panchayati Dharam Kanta, Mathura Versus State of U.P. and others,*** **2011 (2) ADJ 262.** The Deputy Registrar could not have held that no elections were validly held after 1967.

40. It has also been argued by the learned counsel for the petitioner that the Deputy Registrar in the impugned order has far exceeded his jurisdiction as he could not have decided the dispute regarding holding of elections and continuance of office bearers in view of the judgements of Division Bench of this Court in ***Gram Shiksha Sudhar Samiti Junior High School Sikandara, 2010 (7) ADJ 643.*** It has also been argued that the Deputy Registrar was in collusion with the contesting respondents and this fact is evident by the conduct of the Deputy Registrar who having found that there were less than seven members in the Society, did not take any action under Sub Clause (A) of Section 13 of the Act wherein the Deputy Registrar is duty-bound to issue notice for dissolution of the Society if any of the grounds as mentioned in clauses (a) to (e) of Section 13-B existed.

41. The learned counsel for the petitioners has placed reliance upon judgement rendered by the Supreme Court regarding the jurisdiction of the High Court in considering findings of fact recorded by the lower courts. Reference has been made to *Chandigarh Administration versus Manpreet Singh* **1992 (1) SCC 380,** paragraph 21; *State of Andhra Pradesh versus Chitra Venkata Rao* **1975 (2) SCC 557**, para-21; and Syed Yaqoob versus K.S. Radhakrishnan **AIR 1964 Supreme Court 477**, paragraph 7; to say that the High Court exercises a jurisdiction of supervisory nature. One of the main objectives of this jurisdiction is to keep the government and several other authorities and Tribunals within the bounds of their respective jurisdiction. The Supreme Court had observed that the Court must determine whether the enquiry is held by an authority competent in that behalf and according to the procedure prescribed in that behalf, and whether the rules of natural justice were not violated. Second, where there is some evidence which the authority entrusted with the duty to hold enquiry has accepted, and which evidence may reasonably support the conclusion that it has arrived at, it is not the function of the High Court to review the evidence and to arrive at an independent finding on the evidence.

42. The learned counsel for the respondent has also placed reliance upon ***Allahabad High school Society versus State of U.P.*** **2011 (3) ESC 2034,** paragraph 20; to argue that the Deputy Registrar may examine the validity of the meetings relating to amendments of the Rules of the Society. This Court had relied upon Division Bench observations in ***Sanatan Dharma Sabha vs. Registrar*** AIR 1989 All 189, with regard to Section 4A of the Act. The Division Bench had observed that the Deputy Registrar could always examine as to whether the meeting for passing such a Resolution relating to Amendment in the Rules of the Society had or had not been validly convened in accordance with the existing Rules of the Society and the provisions of the Act. In

paragraph 13 and 14 of the report the Division Bench had observed - "*however the second question which arises in the present case and which has been raised on behalf of the respondent is that the aforesaid Resolution dated 21.04.1985, was not passed at all and the said meeting was not validly called and further even if it is held it was called and a meeting was held the Resolution amending the by-laws was only passed after the meeting was adjourned and thus there is no question of amendment of the by-laws in fact and on this ground the election held by the petitioner on 23.08.1987, on the basis of said amendment in the by-laws could not be said to be valid. - - - but no adjudication was made - - after careful consideration we are of the opinion that this question requires consideration by the authority concerned. Since this was a question specifically raised even before by the respondent No.4 and if a conclusion is drawn on the basis of record that there was no such Resolution passed, that there was no such meeting held, or if it was illegal, then there would be no question of any Amendment of the bye laws. Since this is pure question of fact it would not be right for this Court exercising Writ Jurisdiction under Article 226 of the Constitution to adjudicate the same. We therefore, direct the respondent to decide afresh the latter question, after giving opportunity to the parties on the basis of relevant records of the case. - - - "*

43. The learned counsel for the petitioner on the other hand has argued that the Division Bench in *Allahabad High School Society (supra)* observed that even if there was no requirement of registration of the Amendment in the Rules under Section 4A of the Act, the effect of such registration had to be considered as binding. The Deputy Registrar would not have any power to adjudicate on the merits of the Amendment. The only power vested in the Deputy Registrar under Section 4 A the Act was to determine the fact as to whether a meeting of the Society had been validly held in accordance with the provision of the Act and the Rules of the Society. The only scope of this aspect would be to make a factual verification as to whether the meeting was validly convened, due notice was given, quorum was complete, and it was passed by the required majority. Beyond that, the Assistant Registrar would not go into the question of the merits of the amendments and adjudicate upon the same while exercising powers vested under Section 4A of the Act.

44. With regard to the Deputy Registrar's power under Section 25 (2) of the Act, the learned counsel for the petitioner has placed reliance upon two Division Bench judgements rendered in *Gram Shiksha Sudhar Samiti Junior High School Sikandra Kanpur* **2010 (7) ADJ page 643,** and the judgement rendered in *Anjuman Khairul Almin Allahganj v State of U.P*. **2014 (1) ADJ 44;** where the observations of the Division Bench in Gram Shiksha Sudhar Samiti (supra) as also the observations of the Division Bench in *Adarsh Krishak Junior High School* **2009 5 ESC 3506** were considered and the Division Bench observed that the Deputy Registrar should have referred the objection to an election or continuance of office bearers as a dispute under Section 25 (1) to the Prescribed Authority. In *Adarsh Krishak kr Junior High School* (supra), no doubt the Division Bench had observed that the office of the Deputy Registrar is not a post office for referring any and every dispute, nevertheless the Division Bench

held that since more than three years had passed after holding of an election, there was no reason to entertain a petition at a belated stage. When an application for taking on record the names of office bearers was filed and an objection to the validity of the elected office bearers was placed before the Deputy Registrar, he ought to have referred the dispute to the Prescribed Authority under Section 25 (1) of the Act. In entertaining the dispute himself and going into the merits of the rival claims, the Deputy Registrar had clearly transgressed his jurisdiction.

45. The learned counsel for the petitioner has also placed reliance upon judgment rendered by this Court in *Darul Uloom Ahle Sunnat Gulshan Taiyyaba Banthewa Versus Deputy Registrar* **2016 (11) ADJ 844**, paragraphs 20 to 22 to argue that Section 25 (1) of the Act provides a statutory remedy wherever there is a dispute regarding elections and the continuance of office bearers. The Proviso and the Explanations available therein will be put to service by the Prescribed Authority while deciding the question regarding doubt or dispute in relation to elections, however such Proviso would not be applicable in respect of a dispute or doubt raised in respect of continuance in office bearers of the Society. For resolving a dispute or doubt in respect of continuance of office bearers recourse may be had to weighing of evidence led by the parties form against the continuance of such office bearers. The Deputy Registrar himself should not decide such a dispute. He ought to refer the matter to the Prescribed Authority who would, after leading of evidence by either parties and by weighing such evidence, decide the dispute.

46. The learned counsel for the petitioner has also placed reliance upon judgement rendered in *Sarafa Committee, Panchayati Dharam Kanta Mathura vs. State of U.P. and others* **2011 (2) ADJ 262,** paragraphs 8 to 11 to say that even if the Deputy Registrar was directed by the Division Bench to consider the questions regarding which observations had been made in the judgement dated 31.08.2016, it would not mean that he could act against the provisions of law. The Deputy Registrar should have proceeded to hear the objections of the nature raised by the parties to the dispute, and was required to satisfy himself on the issues, and then should have determined as to whether he could proceed to decide the same. The Deputy Registrar in this case annulled the membership of several persons on account of non-production of certain documents leading to suspicion being raised regarding their authenticity. The Deputy Registrar proceeded to hold the elections to be invalid, which jurisdiction he did not possess, in view of the law laid down by this court in various decisions like Gram Shiksha Sudhar Samiti (supra). The matter could have been decided only upon a reference under Sub Section (1) of Section 25 of the Act. Once the elections had been held, if any doubt or dispute had been raised, then the said dispute should have been decided by the Prescribed Authority and could not have been scrutinized by the Deputy Registrar.

47. After hearing the counsel for the parties, this Court finds it appropriate first to refer to the Memorandum of Association and Bye-Laws of the Society. This Court finds that annexure-4 to the writ petition is the original handwritten Certificate of Registration issued by the Registrar of Societies. The Bye-Laws, Memorandum of Association are dated 19/23.11.1965. The

Memorandum of Association says that the Committee of Management consists of the following Members whose signature were appended to it. It mentions the names, addresses and occupations of 15 members. It mentioned (i) Sati Prasad Singh as Adyaksha, (ii) Jantri Singh as Upadhyaksh, (iii) Hira Singh as Prabandhak, (iv) Raghupati Singh as Mantri and (v) Taluqdar Singh as Up-Mantri. The names of other members being (vi) Jai Ram Verma, (vii) Devi Prasad Singh, (viii) Satyanarayan Singh, (ix) Vishwanath Verma, (x) Trilok Chand Jaiswal, (xi) Bhawani Baksh Singh, (xii) Shiv Karan Singh, (xiii) Hashim Beg, (xiv) Bhagwati Prasad Shukla, and (xv) Shamsher Bahadur Singh. The signatures of all the 15 members were attested by the Block Development Officer on 01.11.1965.

48. Clause 2A of the bye-laws refers to **life** members as either those members who had associated themselves with the Society before its registration or who had deposited Rs.1001/- as subscription to the Society. **Ordinary** members were those who would deposit a subscription of Rs.101/- every third year with the Society.

Clause 4 of the Bye-Laws defines General Body as consisting of all members and Committee of Management as consisting of elected members who would look after the administration of the Society, it also talks of **patron** members being inducted, as those persons who were of extraordinary talent and had risen to high ranking office and one Auditor was also to be appointed by the General Body who would look after the accounts and submit a report to the Committee of Management.

49. Under Clause-7, the Committee of Management and it's Office bearers were to be elected by the General Body. Under Clause-8, the General Body had to meet at least once every year in the first week of April and it was to be convened by the Adhyaksh by notifying a definite place and time, or at any time on the request of at least seven members. The Annual meeting held in April would be called a General Meeting whereas any other meeting called on the request of seven members, was to be referred to as a Special Meeting. Under clause 11, five days Notice had to be given mentioning the date and place as also the time of holding the General meeting. If any member was left out from being communicated such date, the proceedings of such meeting would become invalid.

Under clause 12, three days prior notice was to be given for holding a special meeting. Under clauses 14 and 15 , it was specifically provided that in the absence of quorum the proceedings of the General Meeting would be considered invalid and the Quorum was defined as one third of the General Body members, the quorum for a special meeting was to be one fourth of the General Body members.In the absence of Quorum the Meeting was to be postponed to a later date duly notified to all the members. Under clause 13, were listed those matters which were to be considered by the General Body which included the election of Committee of Management, the election of office bearers of the Committee of Management and of "patrons", the consideration of the budget, the appointment of an Auditor and consideration of his report, Consideration of the report of the Committee of Management of the activities of the Society undertaken the past one year, to decide the policy of the Society and to consider any other important matter which is brought to its notice with the permission of the

President who was to chair the meeting; the Vice President was to chair the meeting in the absence of the President; It was further provided that if a meeting is postponed for more than 10 days for any reason then the manner of communicating the date, place and time of the meeting was to be the same as given earlier for holding a general meeting.

Under clause 22-A it was provided that no person would remain an office bearer for more than two consecutive terms i.e. for more than four years, unless there was a consensus amongst all members for his continuance. The office bearers have been mentioned as Adyaksha, Upadhyaksh, Prabandhak, Mantri and Up-Mantri.

50. Clause 23 further provides that the Committee of Management shall not exceed 15 which shall include the office bearers also. Under clause 24 power was given to the General Body of the Society to either increase or decrease the members of the Committee of Management in its Annual General Meeting. Under clause 25 the tenure of the Committee of Management was given as two years, the Committee of Management was to meet at least three times a year or even more.

Under clause 36 the Mantri or Secretary had to keep all documents with him and the Proceedings Register was to be written by him on which signatures of all the office bearers were to be taken. A Register of Membership of the General Body was also to be maintained clearly mentioning the names, address and occupation of the members, and any other document of importance which the General Body asked the Mantri to keep in his custody.

Under Clause 39, the Manager of the Society would also be the Manager of the Institution, Khemraj Raj Smarak Vidhya Peeth, and was to look after the affairs of the institution in compliance of the Education Code and the Intermediate Education Act.

Under clause 44 all the papers relating to the Sangh/ Society would remain in the custody of the Principal and under the control of the Manager and would remain open for inspection for any member of the Society after approval of the President.

Under Clause 45, the society's bye-laws could be amended from time to time. However, the Procedure to make such amendments was not given in the bye-laws.

51. This Court has also perused the order dated 28.12.2016 impugned in this writ petition. It is apparent from the same that the Deputy Registrar has first considered the facts relating to the registration of the Society in 1965 and the list of office bearers at the time of its initial registration. Sati Prasad Singh was the President and Hira Singh was the Manager. Deputy Registrar has observed that total membership including office bearers of the Society was 21. After the amendment in the statute in 1975 the first renewal of the Society was done on the basis of an application dated 4.10.1979 sent by Jata Shankar Singh as the Manager of the Society with effect from 10.10.1977 initially for a period of two years, thereafter Jata Shankar Singh kept on sending applications for renewal and each time renewal was done for a period of two years. Later on, Smt. Sushila Devi showing herself to be the Mantri of the Society sent

an application on 30.10.1980 bringing to the notice of the Deputy Registrar the proceedings relating to amendment in the bye-laws in the meeting held on 11.10.1980. The amended bye-laws were registered. The Society came to be renewed every two years till a second amendment in the Statute was notified in 1984 and thereafter renewal certificate had been granted for five years at a time. The last such renewal certificate was with effect from 10.10.2015. The Petitioner No.3 acting as President filed an application on 14.06.2001 communicating that the Memorandum of Association of the Society had also been amended. Such amendment was registered on 12.07.2001.

52. Thereafter, the Deputy Registrar in his order has referred to the complaint made by Hira Singh, the plaint filed before the Prescribed Authority being rejected in 1986, and Amarnath Singh and Dinesh Pratap Singh sons of Hira Singh filing complaints in 2009. Later complaints were made by several others in 2010 claiming to be life members, and the order passed thereon being challenged in writ petitions, and orders passed by learned Single Judge being challenged in Appeal before the Division Bench.

53. The Deputy Registrar has thereafter referred to proceedings taken after judgment and order dated 31.08.2016. In the order dated 31.08.2016, the Division Bench directed the Deputy Registrar to decide the matter afresh. In compliance of this judgement the office of the Deputy Registrar initially issued a notice on 15.09.2016 fixing date for appearance of the parties and for producing evidence on 7.11.2016. Sri Narendra Pratap Narain Singh submitted the Proceedings Register Starting from 26.04.2012 onwards, and Agenda item Register starting from 21.04.2012 onwards, a Membership Register verified by Hira Singh describing the Names, Addresses and occupations of the members with effect from 1965-66, a cashbook verified by Hira Singh with effect from 1.11.1965 till March 1980, one cashbook verified by Narendra Pratap Narain Singh with effect from 1.09.2012, and two Membership Fee Registers, starting from Sl.nos.1 to 50 and the other starting from Sl.Nos. 51 to 77 with effect from 23.09.2012 up to 8.04.2015. Pawan Kumar Singh took time but did not file any documents in their original. A Letter dated 30.11.2016 was issued framing specific issues and fixing date for hearing as 14.12.2016.

54. Pawan Kumar Singh submitted six replies dated 08.09.2016, 27.09.16, 13.10.2016, 18.10.2016, 7.11.2016 and lastly on 14.12.2016. All of these replies have been described in detail. Only photo copies of election proceedings dated 30.11.1965, taking place every two years till 1979 and thereafter from 30.11.1983 every five years up to 21.04.2015 were submitted. The General Body Membership list of 1979-80, Agenda notice dated 11.10.1980, minutes of the meeting dated 11.10.1980, office order dated 29.11.1986 recognising the bye-laws, office order dated 05.7.1986 rejecting the complaint made by Hira Singh and the Prescribed Authority's order dated 9.5.1988 , were all filed along with a copy of the plaint filed by Heera Singh before the Prescribed Authority. In the reply submitted by Shri Pawan Kumar Singh along with Tej Pratap Singh and Ashok Kumar Singh, they had contended that the Society was running an Intermediate College and there was no dispute for the past 45 years. Only because of political interference of The then MLA,

a sham dispute was raised which resulted in the order passed by the Deputy Registrar on 15.04.2011 declaring the Committee of Management to have become time barred from 29.11.1967.

55. Sri Pawan Kumar Singh had repeatedly emphasised in his reply that after setting aside of the orders passed by the Deputy Registrar dated 15.04.2011, 17.03.2012 and elections held in pursuance thereof on 26.04.2012, and the writ petition being allowed by the Division Bench, the Committee of Management elected on 01.04.2008 was entitled to continue till 01.4.2013. On 1.4.2013 Pawan Kumar Singh and other office bearers were again elected and the proceedings of the election and the names of members of the Committee of Management were submitted in the office of the Deputy Registrar which deserved to be recognised. The Committee of Management elected on 01.04.2013 was entitled to continue till 01.04.2018. Request was made for issuance of renewal Certificate on the application dated 05.10.2015 made by the office bearers of the newly elected Committee of Management.

56. In the replies submitted by Narendra Pratap Narain Singh dated 27.09.2016 and 7.11.2016 Narendra Pratap Narain Singh referred to the observations made by the Division Bench directing the Deputy Registrar to frame issues and to decide the whole controversy afresh. Hence, it was open for the Deputy Registrar to consider the validity of the elections held after 1967, the validity of the amendment in the bye-laws and the Memorandum of Association, the membership of the General Body, and the issue of the Committee of Management becoming defunct on failure to hold elections in time as per the provisions of the bye-laws, and to pass appropriate orders thereafter under Section 25 (2) of the Act. It was contended that the founder members of the Society were not given any notice of any meeting proposed to be held on 11.10.1980. Smt. Sushila Devi wife of Babban Singh the then Principal of the Inter College acting as Mantri of the Society had corresponded with the office of the Deputy Registrar showing her residential address only. As a result, all correspondence with the office of the Deputy Registrar remained out of the knowledge of the members of the Society. In the garb of the amendment made in the bye-laws the then Principal of the college Baban Singh had been successful in monopolising all power by inducting his own family members and other blood relatives. At least six surviving life members with the help of Hira Singh has filed a complaint that the proceedings relating to elections, alleged amendment in the bye-laws, their registration and induction of new members on the basis of the amended bye-laws and Memorandum of Association were held to be behind the back of the original 27 life members of the Society. The complaint was rejected without any opportunity of personal hearing given to Hira Singh and other complainants. A recall application was filed which was pending disposal in the office of the Deputy Registrar. No notice of any elections was ever given to the life members of the Society.

57. Narendra Pratap Narain Singh had also stated that there was no notice given of intention to remove the life members from the General Body on the basis of amended bye laws which required deposit of

Rs.1001/- as membership fee even by those persons who had initially associated themselves with the Society before its registration. The amended bye-laws were got registered through fraud similarly, the registration was also got renewed from time to time on the basis of fraud. It was alleged that no elections had taken place after 1965. It was contended that the letters dated 1972 onwards produced in the office of the Deputy Registrar allegedly referring to meetings of the Committee of Management of the Society resolving to remove all members who failed to deposit their subscription of Rs.1001/- despite repeated letters being issued to them by the Sansthapak were all forged.

58. It was contended that the post of Sansthapak was introduced for the first time in the amended bye laws in 1980 and therefore the alleged letters signed by Babban Singh the Principal of the Inter College referring to himself as Sansthapak showed the malafides of Baban Singh and others to somehow take control of the Society. It was also alleged that Baban Singh had never been inducted as member of the General Body of the Society as according to the Regulations attached to the Intermediate Education Act the Principal of the college being run by the Society could not become a member of the Society.

All the 27 members' list that had been submitted by Narendra Pratap Narain Singh had been attested by Hira Singh who was the then Manager. Original Receipt Book was also produced by Narendra Pratap Narain Singh and others to show the timely deposit of Subscriptions by them.

59. After recording in detail all submissions made by Pawan Kumar Singh and Narendra Pratap Narain Singh in the various replies made to the office of the Deputy Registrar, the Deputy Registrar proceeded to record his findings on the basis of documents in the office record. He referred to elections being held on 30.09.1979 being communicated by Jata Shankar Singh, the Manager, to the office of the Deputy Registrar, and also referred to the fact that as per the amended bye-laws the next elections were due in 1981. No elections were held in 1981. The amendment in the statute came in 1975 with the addition of Section 25 (2) in the Act. The Deputy Registrar could have gone into the validity of the alleged elections held on 30.09.1979 as communicated by Jata Shankar Singh the then Manager, and the elections set up on 30.11.1979 by Baban Singh communicated to the office of the Deputy Registrar as Sansthapak. A fraudulent amendment was carried out in 1980 increasing the tenure of the office bearers of the Committee of Management to 5 years. The Deputy Registrar after examining the documents submitted in his office on 9.7.2010 by Tej Pratap Singh and later by Pawan Kumar Singh came to the conclusion that all the election proceedings communicated with effect from 1981 onwards were on the basis of the Scheme of Administration of the Inter-College and were for the Committee of Management of the College and not for the Society.

60. The Deputy Registrar with respect to Issue No.1 framed by him as to (a) *"whether periodical elections were held on time in accordance with the bye-laws of the Society and the papers submitted in time to the office after coming into force of the amendment in the Act in 1975?"* came to the conclusion that original documents were not submitted by Pawan Kumar Singh. He had only stated that elections were held initially after every two years

and thereafter on amendment of the bye-laws, after every five years. Proceedings of the said elections were submitted in photo copies in the office of the Deputy Registrar. In the reply dated 14.12.2016 by Pawan Kumar Singh it was never stated by him as to whether and when these proceedings were forwarded to the office of the Deputy Registrar. The records maintained in the office of the Deputy Registrar showed that before the amendment in the bye-laws was registered, there was a letter sent by Jata Shankar Singh Mantri indicating that elections were held on 30.09.1979. However, in the reply submitted by Pawan Kumar Singh it was alleged that elections were held on 30.11.1979.

61. After looking into the reply submitted by Pawan Kumar Singh on 14.12.2016 and also the letter of Tej Pratap Singh dated 9.07.2010 and comparing the same with the papers submitted by Shri Jata Shankar Singh of election having been held on 30.09.1979, the Deputy Registrar expressed his doubt as to which of the two dates - the one mentioned by Jata Shankar Singh or by the petitioners could be said to be correct? He compared the names of office bearers of the Society said to have been elected in these elections and came to the conclusion that there were different names altogether and therefore the assertion that elections had in fact taken place in 1979 itself became doubtful. The Deputy Registrar therefore held that no elections were held in between 1965 and 1980, and the papers that was submitted by Tej Pratap Singh initially in 2010, and later on by Pawan Kumar Singh in 2016, being only photo copies could not be believed.

62. It was also observed by the Deputy Registrar that as per the amended bye laws dated 29.11.1980, Clauses 22, 23, 24 and 25, relating to the tenure of office bearers of the Society and of the Committee of Management, it could be safely assumed that the office of bearers of the Society were the President, the Vice President, the Treasurer, Secretary and Deputy Secretary. The Committee of Management said to be elected by Pawan Kumar Singh had such office bearers as President, Vice president, Manager, Deputy Manager, Treasurer, and the Principal as well as two Assistant Teachers as ex-officio members. As per the Bye-Laws, the Committee of Management was to consist of 15 members and it tenure was two years. On the other hand, the tenure of office bearers of the General Body was to be five years. As per Section 16 of the Societies Registration Act, the Governing Body of the Society was to be elected every five years and would be different from the Committee of Management of the Inter-College which was to be elected after every two years. The Deputy Registrar also considered the fact that Sushila Devi acting as Mantri (Secretary) of the Society had submitted two applications dated 03.10.2000 and 05.10.2005, annexing there with election proceedings dated 01.04.1998 and 01.04.2003. The members of the Committee of Management said to be elected in the said election proceedings were different from the members of the Committee of Management allegedly elected in the proceedings the photo copies of which was submitted by Tej Pratap Singh and Pawan Kumar Singh.

63. It was also found that after the elections held in 1979 the bye-laws of the Society were amended in October 1980. The Committee of Management elected in November 1979 should have conducted the

election in November 1981. As per settled law, the very same Committee of Management which had got the bye-laws amended and extended its tenure, could not get the benefit of the extension of term. In this case however instead of holding elections in November 1981, the said elections were held in November 1983 and thereafter in November 1988, in 1993, in 2003, in 2008 and in 2013. However the Committee of Management should have been elected as per the amendment of the Bye-Laws on 30.11.1981, thereafter in November 1986, 1991, 1996, 2001, 2006, 2011 and 2016. The Deputy Registrar observed that it was apparent that elections allegedly held by the Committee of Management presided by the petitioners were not held in time. Also, it was undisputed that all election proceedings right from 1980 to 2008 was submitted all at once in photo copies by Tej Pratap Singh through his letter dated 09.07.2010.

64. In response to issue number 2, regarding *"whether any amendment was carried out validly in the bye-laws and in the Memorandum of Association by the first Manager Babban Singh and his Committee of Management?"*, the Deputy Registrar in his order dated 28.12.2016 says that Pawan Kumar Singh in his letter dated 29.09.2016 had stated that he would produce all documents in the original but wanted them to be verified and returned the same day by the office. The Deputy Registrar considered the arguments that at least 18 out of 21 members had participated in the General Body meeting held on 11.10.1980 to amend the bye-laws and also that the such amendment in the bye-laws had been accepted by the then Deputy Registrar by his order dated 29.11.1980 thereby extending the tenure of the Committee of Management from 2 years to 5 years. The Deputy Registrar observed that if the amendment to the bye-laws is to be accepted as having been carried out in October 1980, providing that even life members had to deposit Rs.1001/- as Membership fee, there was no occasion to remove life members on the failure to do so before such amendment was actually carried out.

65. Shri Pawan Kumar Singh in his six replies to the notices issued by the Deputy Registrar did not file any documentary evidence to show that Agenda Notice was circulated and all persons informed of the meeting that was supposed to be held on 11.10.1980 for amendment in the bye-laws. Pawan Kumar Singh in his letter dated 29.09.2016 had stated that he was submitting the original copies of the proceedings relating to the amendment in the bye-laws and that he wished that all such papers be looked into and verified and returned the very same day, which request was quite unreasonable, and therefore not accepted by the Deputy Registrar. In the office records, the letter of Smt. Sushila Devi dated 30.10.1980 was found wherein she had informed that the General Body of the Society in its meeting dated 11.10.1980 had amended the bye-laws. She along with the said letter had enclosed a copy of list of the office bearers of the Society, as also the office bearers of the School. In response to the letter dated 30.10.1980 sent by Smt. Sushila Devi, the office of the Deputy Registrar had recognised such amendments by its order dated 29.11.1980. Referring to clause 45 of the bye-laws of the Society, the Deputy Registrar discussed the papers that were available in his office as submitted by Smt. Sushila Devi, and found that Agenda items to be discussed in the meeting related to a proposal by Jata Shankar Singh, the Manager, to amend the

bye-laws and get them approved by the Registrar of Societies. There is also reference of letter sent by the Deputy Director of Education, Ninth Region, Faizabad, dated 19.10.1973, annexing therewith the approved Scheme of Administration of the Inter-College, and it was decided that instead of the earlier registered bye-laws the "following" amended bye-laws be informed to the Deputy Registrar which would be effective henceforth. Right after such mention in agenda Item No.2, the signatures of Smt. Sushila Devi Mantri, and Guru Baksh Singh President of the Society, have been appended. There was no mention of any resolution which actually described the amendments that were carried out in the Bye-laws. Although the resolution adopted said it was making the "following" amendments.

66. The Deputy Registrar referred to the resolution and says that although there is a mention that in place of the earlier registered bye-laws the "following" bye-laws would be adopted, but the actual resolution amending the bye-laws and the language of the amended bye-laws had not been discussed anywhere. The Deputy Registrar came to the conclusion that in fact there was no Resolution enumerating in the proposed amendment, and therefore it could not be said that such amendment was validly adopted in the meeting held on 11.10.1980. On the basis of correspondence undertaken by Smt. Sushila Devi with the then Deputy Registrar the approval order dated 29.11.1980 was issued which could not have been issued, but for the misrepresentation and fraudulent assertion made in the correspondence undertaken by Smt. Sushila Devi. In the letter sent by Smt. Sushila Devi dated 30.10.1980 there was a mention of the Approved Scheme of Administration of the Inter-College dated 19.10.1973 and the need for making corresponding amendments in the bye-laws but actually what amendments were made in the bye-laws was never disclosed in the letter. The list of 21 names of members of the General Body annexed along with the letter dated 30.10.1980 also did not specify clearly the date or the year of such membership of the General Body. The Deputy Registrar says in the impugned order that on full examination of this list of 21 names, it showed that at least 13 out of the 15 original signatories to the Memorandum of Association had been removed from the said list.

67. The Deputy Registrar has further observed in his order dated 28.12.2016 that as per his office records when the complaint of Hira Singh and six others was received in the office objecting to the alleged amendment in the bye-laws, the office of the Deputy Registrar had issued a notice on 23.12.1985. In reply to the same Satya Dev Singh had submitted three letters dated 26.01.1986 and 27.02.1986 and 24.06.1986. In these letters it was communicated that in the absence of depositing the membership fees, the original signatories of the Memorandum of Association had been removed in an urgent meeting held on 30.04.1972, of which notice was circulated on 18.04.1972, the said notice was said to be sent under Certificate of Posting (U. P. C.) to only 10 members. In the Agenda Item No.7 of the meeting dated 30.07.1972, it had been stated that on the proposal of Surendra Singh it had been decided unanimously that the members who had not deposited the subscription fees despite repeated requests, would not be given any notice of any

forthcoming meetings of the Committee of Management and they shall not henceforth be eligible to attend such meeting till such subscription is deposited by them. In the letter dated 27.02.1986 sent by Satya Dev Singh there is a reference of a letter dated 16.08.1972 which was sent to 9 members and which stated that despite written notice being sent to them such members had not deposited the subscription fee of Rs.1001/-, and as such it had been resolved by the Society that they would not be allowed to participate in the meetings of the Society and their membership would be terminated. It had also been stated in the said letter dated 16.08.1972 that such members should deposit the fee latest by 10.09.1972 with the Sansthapak of the Society or else the membership would be terminated. Similarly, along with the letter dated 27.02.1986, letter dated 01.05.1972 had been annexed which was again sent to only nine members of the original 15 signatories of the Memorandum of Association, communicating to them that in the meeting 30.04.1972 the deposit of Membership fee of Rs.1001/- with the Sansthapak had been made compulsory even for those persons who were associated with the Society before its registration, and till such time that such subscription fee was deposited by such members, they would not be given any notice of any forthcoming meeting and they would also not be allowed to participate in such meetings. There was also annexed with the letter dated 27.02.1986, an alleged Resolution passed by the General Body of the Society on 10.09.1972. At Agenda item number 6, it had been stated that despite repeated reminders being sent to such members they had not deposited the subscription fee, and therefore a proposal was made by Shri Dev Nath Singh that the membership of (i) Hira Singh, (ii) Hashim Beg, (iii) Trilok Chand, (iv) Vishwanath, (v) Devi Prasad, (vi) Bhagwati Prasad, (vii) Taluqdar Singh, (viii) Satyanarayan Singh, (ix) Shamsher Bahadur Singh, and (x) Jai Ram Verma be terminated. Along with the letter dated 27.02.1986 a notice signed by Guru baksh Singh as president of the Society dated 25.09.1980 informing of the meeting to be held for amendment in the bye-laws on 11.10.1980 had been circulated to 21 members.

68. It was observed by the Deputy Registrar that the letter dated 27.02.1986 sent by Satyadev Singh had only photocopies of all the documents referred to therein, and original documents mentioned in the letter dated 27.02.1986 were not produced by Pawan Kumar Singh during the course of hearing.

69. The Deputy Registrar observed that notice dated 18.04.1972 of the meeting to be allegedly held on 30.04.1972, had been signed by Shri Babban Singh as Sansthapak. Similarly, the letters dated 1.5.1972, 7.2.1972, 08.09.1972 and 10.09.1972 were issued under the signatures of Babban Singh as Sansthapak. This was even before the post of Sansthapak was introduced in the amendment allegedly carried out on 11.10.1980. The Deputy Registrar came to the conclusion that all the papers filed along with Satya Dev Singh"s letter dated 27.02.1986 had been fabricated and antedated to meet out the objections raised by Hira Singh and other life members before the Deputy Registrar in their complaint that the amendment in the bye-laws, in the absence of the original signatories of the Memorandum of Association, was invalid and fraudulently done and therefore liable to be ignored. The Deputy Registrar therefore said that the

bye-laws as originally registered in 1965 would continue to operate as the order dated 29.11.1980 had been obtained by fraud and was liable to be ignored. Also, such amendment was liable to be ignored because it was carried out by a Committee which had become defunct on account of non-holding of elections in time after Section 25 (2) became effective in 1975, and also that original signatories to the Memorandum of Association had not participated in such amendment in the Bye-Laws.

70. In response to the third issue framed by the Deputy Registrar as to *"whether at the time of renewal of the Society in 1982, documents relating to duly elected office bearers of the Society and valid election proceedings had been submitted in the office of the Deputy Registrar, and in case they were not so deposited, the effect thereof?;* The Deputy Registrar on the basis of office records states that in 1982 three letters were sent by Shri Durga Singh as Manager of the Society dated 3.06.1982, 30.07.1982 and 04.10.1982, in pursuance thereof the Society's registration was renewed on 10.10.1982, for a period of two years. In the application submitted by Durga Singh, Manager, he had filed election proceedings dated 29.11.1981 and copy of list of the members of the Committee of Management for the years 1980-81 and 1981-1982. The contents of the election proceedings held on 29.11.1981 clearly showed that it related to Khem Raj Smarak Rashtriya Vidya Peeth Inter College whose Committee was elected for a period of two years. The list submitted of the members of the Committee of Management was for the year 1981-82. Shri Durga Singh had submitted papers for renewal of registration of the Society in 1982 but had not submitted with this letter any copy of election proceedings for electing of office bearers of the Committee of Management. The Deputy Registrar therefore said that such proceedings were doubtful.

71. The fourth issue dealt with The Deputy Registrar was the effect of earlier orders passed by *the office of the Deputy Registrar and the objections by the parties to such orders*. The Deputy Registrar referred to the reply submitted by Pawan Kumar Singh on 14.12.2016, wherein mention has been made that the objectors were neither members of the Society earlier nor at present, and that they had no locus to raise any complaint against the validly elected Committee of Management and its office bearers. The Deputy Registrar observed that the Committee of Management elected on the basis of alleged amendment in the bye-laws undertaken in 1980, and amendment in the Memorandum of Association undertaken in 2001, had no valid existence, as the amendment itself was found to have not been made validly. Bye laws as originally registered in 1965 were effective and the Committee of Management had not been elected in accordance with the provisions of these unamended bye-laws. The Deputy Registrar quoted the directions of the Division Bench that in case the Deputy Registrar finds that the tenure of the Committee had come to an end, he must proceed to finalise the membership in accordance with law and then proceed to hold elections, if necessary. The Deputy Registrar thereafter observed that since no valid elections had been held after 29.11.1967 and no valid amendments had been made in the bye-laws in 1980 and even if such elections were held after 1980

by the Committee of Management taking benefit of the amendment in the bye-laws, such action would be invalidated and the Committee of Management could be declared as defunct and not entitled to conduct the elections of the Society. The Deputy Registrar went on to observe that out of the 27 members' list attested by Shri Hira Singh, only eight members were found to be alive and therefore a tentative list of eight electors was issued, inviting objections with supporting documentary evidence to be given by each of the parties.

72. This Court has gone through the records which have been referred to in the impugned order. Volume-I of the record produced from the office of the Deputy Registrar and presented to this court by Sri J.P. Maurya, Additional Chief Standing Counsel, has correspondence made by Jata Shankar Singh, the Manager of the College regarding election of Committee of Management and Renewal of Society. The correspondence undertaken by Jata Shankar Singh shows two seals affixed under his name. One as Manager of the School and the other as Deputy Secretary or Up Mantri of the Society. The lists of elected members submitted from time to time refers to election of Adhyaksh, Upadhyaksh, Prabandhak, Up- Prabandhak and Koshadhyaksh and also contain names of Principal Babban Singh and two Assistant Teachers, which clearly make out that they were lists of office bearers of Committee of Management of the School.

73. It is not clear as to how Babban Singh being Principal and Member Ex-officio in the Governing Body of the Society, is also referred to as Sansthapak of the Society in 1980 in the said lists. The lists also show two seals being affixed under the name of Jata Shanker Singh as Manager of the Inter College and Dy. Secretary, Up-Mantri of the Society.

74. This Court has found also from the record that the letters have been routinely written by Shri Jata Shanker Singh and Durga Singh showing themselves as Manager of the Inter College, enclosing the list of Committee of Management for the year 1980-81, 1981-82 and 1982-83. All these letters also have the signatures of Babban Singh as Principal of the Inter College and not as Adhyaksh or Sansthapak of the Society.

75. In Volume I of the record at Page No.94 is a letter dated 27.02.1986 sent by Satyendra Deo Singh to the Deputy Registrar saying that the complaint that has been made by six members of the Society, cannot be proceeded with as these six persons are not the members of the Society any more and they were removed much earlier. Along with this letter certain enclosures can be found from Page 85 onwards till Page 93. They show the alleged notices issued through UPC and signed by Babban Singh as Sansthapak on 18.04.1972, 01.05.1972, 16.08.1972 informing the members that it had now been decided that the Membership fee has to be deposited periodically by the Founder Members who were the original signatories to the Memorandum of Association, and also by those who were Life members as per Bye-laws of the Society originally registered in 1965. The notice of termination of membership dated 15.09.1979 as well as notice regarding change in Bye-laws making it compulsory for even Founder Members to deposit the Membership Fee dated 25.09.1980 are all signed by Babban Singh as Sansthapak and Guru Baksh Singh as Adhyaksh. On Page No.85 of Volume-I can be found of list of

24 members of the General Body of the Society signed on 10.11.1975 by Guru Baksh Singh as Adhyaksh and Babban Singh as Sansthapak. Babban Singh is shown to have been allegedly inducted as Member of the General Body of the Society while serving as Principal of the School run by the Society, in 1969, and thereafter is shown to have been elected as Sansthapak in a meeting allegedly held on 30.11.1973. But he has signed the notices sent allegedly through UPC to all the original members in 1972 itself Sansthapak.

At page 56 of the Record can be found a list of 22 members of the General Body of the Society dated 17.10.85.

76. A complaint is also found at Page No.335 of Volume-II sent by Surendra Bahadur Singh and 10 others for taking action against the Society under Sections 23 and 24 and to declare the Committee of Management of the Society as defunct under Section 25 (2) of the Act, and affidavits filed in support of such complaint are all of the same date i.e. 06.05.2010 and in the same language, and they say that the deponents are life members of the Society. After the Society was established it started a School which was being run by Babban Singh as Principal. No meetings were held of the Society since the date of its registration, the then Principal Babban Singh used to note down the proceedings in the Proceedings Register regarding election etc. and the other members having faith in the conduct of Babban Singh used to sign the said Proceedings Register bonafide. These members came to know from Dinesh Pratap Singh that the Principal, Babban Singh has converted the Society into a family enterprise, and removed several life members from the General Body list and got the Society registration renewed from time to time, therefore action be taken against the office bearers of the Society under Sections 23-24 as aforesaid.

77. There is a letter dated 05.07.1986 in Volume I issued by one Shri R.S. Vishwakarma, the then Deputy Registrar, Funds, Societies and Chits, U.P., Lucknow. It refers to renewal of registration certificate being issued on 30.11.1985 and the complaint sent by Hira Singh, Trilok Chand Jaiswal, Sati Prasad Singh, Vishwanath and others, and notices having been issued and parties being heard. Since the complaint of Shri Hira Singh was not supported by documentary evidence, it was rejected and Hira Singh was directed to approach the Prescribed Authority under Section 25 (1) with at least 1/4th members of the General Body of the Society with regard to any complaint about the conduct of the current Committee of Management of the Society.

78. The record also has the lists of the year 1985-86, 1986-87 and 1987-88 being submitted under the signatures of Satyendra Deo Singh, Up-Mantri, Sushila Devi as Mantri of the Society. All these documents were submitted in original as the signatures of these persons can be found on such documents in Blue Pen/Ink whereas the documents/list are all typed in Black ink. Documents have also been submitted in original with regard to list of members of the Committee of Management of the year 1991. At Page No.114 of the Record is the list of the year 1995-96 showing a General Body of 28 members and Guru Baksh Singh as Adhyaksh, Satyendra Deo Singh as Upadhyaksh, Sushila Devi as Mantri, Deo Nath Singh as Up-Mantri and Babban Singh as Sansthapak amongst others. The

records of Registrar's office show that originals had been filed informing him of elections held from time to time of the Committee of Management of the Inter College. The numbers of members of the Committee of Management of the Inter College invariably is 15.

79. There are two membership registers found in the Records. One membership Register on the first page says that it has 114 pages and it has been signed by (i) Hira Singh, (ii) Vikramaditya Goswami, (iii) Uday Bhan Singh, (iv) Raj Bahadur Vishvakarma, (v) Hashim Begand, (vi) Dinesh Pratap Singh. The cash register shows the names of 27 persons as having deposited Rs.1001 each. The total that was received was Rs.27,027 which was utilised in buying building material and furniture for the School.

80. The college record that was sealed earlier in 2017 by this court has also been perused by me. In this record there is another Membership Register. The first page of the Register marked as Membership Fee and Cashbook Register 1965 onwards, has the signatures of (i) Sati Prasad Singh, (ii) Raghupati Singh, (iii) Jantri Singh, (iv) Taluqdar Singh and (v) Hira Singh on the first page and also A certification that it has 76 pages. It starts from 26 August 1966 and mentions one Ramlal Srivastava as depositing Rs.1001, which was transferred on the same day to the College account. The second name mentioned is that of Babban Singh son of Guru Baksh Singh who deposited fees of 1001/- on 31.01.1968. All these members deposited Rs.1001/-, which was shown to have been transferred to the bank account of the College by Sati Prasad Singh and Hira Singh Prabandhak.There were 23 members Who deposited Rs.1001/- on various dates in between August 1966 to June 1972. On the next page the names of Shivnath Singh and Rajdeep Singh have also been mentioned to have deposited Rs.1001 in June 1972. In between there are several names of persons who deposited Rs.101/- only for becoming ordinary members of the society. After serial number 35 there is a line drawn and the signatures of Sati Prasad Singh, Guru Baksh Singh and Hira Singh can be found. From serial number 36 onwards the list mentioned different names in a different handwriting using a different pen, showing the name of Lalan Singh, Bhanu Pratap Singh, Pawan Kumar Singh, Tej Pratap Singh and others up to serial no. 47,all having deposited Rs.1001/- in between April 1980 up to May 1991, it seems that such deposits were received by Babban Singh. From serial number 48 onwards up to serial number 59 names of several persons have been mentioned as having deposited Rs. 101 only with Babban Singh. There is a noting on the said register dated 22.6.2010 signed by Pawan Kumar Singh, Babban Singh and Tej Pratap Singh, that till the said date only 28 members survived. This noting does not say whether some members had been removed. It only says that the others had died. From page number 7 another list ,in a different Handwriting and pen, shows the deposit of Rs.1001/- from serial number 60 to serial number 81. The said list has been signed by Pawan Kumar Singh and Tej Pratap Singh and it mentions that on 14.06.2011 there were 48 members of the Society, the others had died. It does not mention anyone as having been removed. Names of three other persons have been shown on the next page at serial number 82,83, and 84 who had deposited rupees hundred as ordinary members. There is a noting dated 21.04.2015 saying that on the said date there were 44 members of the Society.

81. In the records that were sealed by this Court in 2017, there is a Proceedings Register of the General Body of the Society also, having on the first page the signatures of Babban Singh as Sansthapak, Satyendra Dev Singh as Deputy Secretary, Sushila Devi as Secretary, and Guru Baksh Singh as Manager and a certification that there were 62 pages in the said register. On the second page itself there is a mention of the proceeding that took place on 11.10.1980 on the basis of Circulated Agenda with regard to amendment in the by laws. The entire proceedings are handwritten in ballpoint pen and the bear the signature of Guru Baksh Singh. From page 2 to 6, the amended bye-laws have been noted. On page 7 is the proceeding of a meeting held on 29.11.1981 which is in a different handwriting and with a different pen. There are proceedings of meetings since 1983 to 2005. A few of such meetings show that they had been held for the purpose of election of Committee of Management but in most of the meetings the Agenda is routine.

82. There is one file in the Records produced by Sri J.P. Maurya, Additional Chief Standing Counsel, containing certified copies of papers which have been obtained from the office of the Deputy Registrar. It has certified photocopies in it. A copy of the plaint filed by Heera Singh, Devi Prasad Mishra, both former Members of the Legislative Council , along with Vishwanath Verma and Hashim Beg can also been found in this file. The plaint was filed on 23.10.1986 before the Prescribed Authority arraying Babban Singh, Gurbaksh Singh, Sushila Devi, Lallan Singh and several others , i.e. a total of 29 persons as defendants. The Committee of Management of the Society had been shown as defendant number 30, in the said plaint. A perusal of the said plaint shows that Hira Singh had approached the Prescribed Authority against the constitution of a duplicate Society by the same name of Khemraj Smarak Rashtriya Vidya Peeth Sangh, and in paragraph 4 & 5 of the said plaint Hira Singh said that the original Society was registered on 1.11.1965 containing 15 members only whose list is enclosed as Annexure A. Such 15 persons were life members who could not have been removed on any ground except that of moral turpitude. On 23.11.1965 the said Society was registered but the defendants number 1 to 25 constituted a duplicate Society on 11.10.1980 and allegedly passed a resolution for amending the bylaws of the original Society. The Life members were never informed of any meeting that was allegedly held on 11.10.1980 The defendant nos. 1 to 5 conspired amongst themselves and inducted close family friends and relatives in the Society, who have been shown as defendant nos. 6 to 25. The defendant no. 26 in the said list of defendants includes the name of Jairam Varma a former minister and MLA. There is a mention in the plaint of inspection done of the File in the office of the Deputy Registrar on 06.11.1985 and filing of a complaint on 03.12.1985 and that the proceedings were decided ex parte on 24.07.1986 by the Deputy Registrar. In paragraph 14 of the said plaint there is a mention of no elections being held after 1965 onwards, and all proceedings held thereafter by the defendants number 1 to 25 being fraudulent, including fraudulent elections held on 1979, 1981, 1983, and 1985. It has also been mentioned that Records are in the custody of Baban Singh and the defendant number 1 to 5 have

manipulated such records and forged the signatures of other life members. No Agenda was circulated for holding of any General Body meeting for inducting new members by Babban Singh and others. The Society has 7 acres of land which had been dedicated to the Inter-College.

83. The Society Records submitted by the petitioners have some Receipt Books. In one of the Receipt Books, there are 44 counter foils only having serial no. 1 to 48. This court has carefully examined these counter foils signed by Raghupati Singh. There are only 44 of these counterfoils, but the serial numbers of Receipts issued show numbers 1 to 48. At least four of such counterfoils are missing or have been removed intentionally.

84. This Court having perused the original records also finds that there was no actual removal of the life members. The Resolution filed at page 164 of the writ petition dated 30.11.1970 is only a proposal. Babban Singh had suggested to request the life members again to deposit the subscription and to wait for a few days. Similarly, at page 166, the meeting dated 30.11.1973 mentioned Babban Singh as Sansthapak and his father in law, Guru Baksh Singh as Adhyaksh. The meeting at page 168 shows the date of 30.11.1975 which is also worded as proposal. Similarly at page 170 and 172, in the meetings dated 30.11.1977 and 30.11.1979, no actual termination of membership was ever done. It was only a proposal to terminate a few out of the original 27 members, that is, only 10 members. At page 162 there is a copy of proceedings of 1969 where proposal no.2 contains the Agenda item regarding induction of four persons as members who had deposited the fee. The Resolutions relied upon by the petitioners do not terminate the membership of the life members. None of them were actually removed, but they were deliberately kept out of the meetings by not circulating the date of the meeting or the Agenda to them.

85. Proceedings that have been submitted as photocopies before the Deputy Registrar by Pawan Kumar Singh have a uniform date of 30th November, and elections being held on the same at after every two years upto year 1983. The original bye-laws contained a provision for only five office bearers i.e. Adhyaksh, Upadhyaksh, Prabandhak, Mantri and Up-Mantri, whereas these meetings allegedly held in 1973, 1975, 1977 show election of seven members as office bearers including Koshadhyaksh and Sansthapak. These two posts of Koshadhyaksh and Sansthapak were not mentioned in the original Bye-laws and the Bye-laws came to be amended allegedly only in 1980.

86. No member could be elected as office bearers for more than two consecutive terms of two years without unanimous consent of all the other members but in the alleged election proceedings that were filed as photocopies before the Deputy Registrar by Pawan Kumar Singh repeatedly the very same members have been shown to be elected as office bearers of the Society.

87. If such amended Bye-laws were actually so amended as alleged then the Committee of Management should have been elected every two years and the office bearers should have been elected every five years. The Committee of Management however was not elected after every two years. After the election meeting held on 31.11.1979, election has been shown to be held on 01.04.1983 and thereafter every

five years on 04.04.1988, 03.04.1993, 01.04.1998 and so on but the same persons have been shown to be elected, and the number of members in the General Body have been shown to be either 24 or 25. The question that would arise in such a case before the Deputy Registrar would be, as to when these persons became members because out of original 15 members also the Founder/Life members, nine were said to have been removed on 10.09.1972? Incidentally, 10.09.1972 proceedings have been referred to in the letter sent by Satyendra Deo Singh but the same are not on record, and no copy of such proceedings of 10.09.1972 has been filed even in the record that is before this Court.

88. In the original Bye-laws there was no mention of the post of Treasurer, however, in the elections that were allegedly held by the petitioners, Treasurer was also said to be elected for the Society even before the post was introduced.

89. Even if the argument of the learned counsel for the petitioners that the initial term of the Committee of Management was two years and it could have held elections any time as there was no amendment in the Act before 1975 adding Section 25 (1) and 25 (2) in the Act is taken on its face value and that the petitioners have regularly held elections initially after every two years, and then after the amendment in the Bye-laws after every five years; the Deputy Registrar has also observed that the proceedings of elections do not conform to the original by-laws.

90. This Court has carefully perused the Original by-laws, there was no provision in the by-laws regarding who was to conduct the elections. There was also no provision regarding the person who would be competent to induct new members. There was only a mention that those who associated themselves with the Association before its registration would be treated as life members. A provision had been made for induction of new members after the registration of the Society by depositing membership fee of Rs.1001/- but to whom such fee was to be given is not mentioned. The logical conclusion would be that only the General Body had the power to induct new members. There were five posts initially available Adhyaksha, Upadhyaksha Mantri, Up-Mantri and Prabandhak. No other posts were mentioned in the original by-laws. Since 15 members originally signed the Memorandum of Association they may be treated as members of the Committee of Management, whereas 27 members constituted the General Body of the Society as there is proof available in the records of subsequent deposit of fees by a few.

91. In *Shailendra Singh 2017 (3) UPLBEC 2035*, the Division Bench of this Court referred to the observations made in *Committee of Management, Kisan Shiksha Sudhar* (supra) which took the view that the Assistant Registrar is not a post office, he has to apply his mind and only a bona fide dispute can be referred to the Prescribed Authority under Section 25 (1) and not a frivolous dispute. It also referred to Division Bench judgement in *Committee of Management, Rashtriya Junior High School, Bhabhaniyaon Jaunpur versus Assistant Registrar, where the Court had observed:-"it is standard law, that if any dispute as to two rival Committees of Management was shown to be in existence to the Registrar or the Assistant Registrar,*

reference by him of the dispute to the Prescribed Authority follows as a matter of course. But a bonafide dispute does not come into existence merely because one member, even if he is a founder member, chooses simply to say so or assert that he has a rival committee and therefore, a bonafide dispute as to management exists sufficient prima facie material must be produced before the Registrar before he can validly exercise his jurisdiction of referring the dispute. He must, simply put, be satisfied that there is something to refer and he is not really sending litigation before the Prescribed Authority, without there being even a shadow of real cause for litigation." The Division Bench in the case of *Committee of Management Vs. Adarsh Krishak Junior High School,* took the view that the Assistant Registrar while exercising power in respect of filing of list of office bearers under Section 4A of the Act or granting renewal of a society, does not act as a mere post office and he is not bound to refer any and every dispute to the Prescribed Authority under Section 25 (1) of the Act and only a bonafide and genuine dispute would be the subject matter of reference and not otherwise.

92. The Division Bench in *Shailendra Singh* (supra) also considered the observations made by Division Bench of this Court in *Gram Shiksha Sudhar Samiti versus Registrar* **2010 (7) ADJ 643** and *Committee of Management Anjuman Khairul Amin Allahganj and another* **2014 (1) ADJ 44** to the contrary, and also the observations made by a Division Bench of this court in the case of *Malati Devi versus State of U.P. and others* **2016 (4) ESC 2146** where it was observed that the question whether Malti Devi had resigned from the post of Manager of the Society/Institution and that in her place respondent Munna Rajbhar, had been elected as Manager for the remaining period needed to be examined under Sub Section (1) of Section 25 of the Societies Registration Act, and observed that in each case the facts and circumstances have to be carefully examined. The Court observed in paragraph 20 in Shailendra Singh (supra) as follows:- We, at this juncture, approve the view taken in the case of *Babu Ram Shiksha Prasar Samiti, District Etah and another Versus Deputy Registrar* ***2007 (9) ADJ 262*** where in this court held as follows:-

"13. On the basis of statutory provision, which covers the field and the viewpoint of this Court the inevitable conclusion is, that whenever issue is raised before the Registrar/Assistant Registrar/Deputy Registrar, that an incumbent is valid member or not within the scope and ambit of Section 15 of the Societies Registration Act, 1860, the said question can be very well looked into and decided by the Registrar/Assistant Registrar/Deputy Registrar as the case maybe, in view of the wide amplitude of Authority vested under Sections 22, 23, 24 of the Societies Registration Act 1860. Registration and renewal of registration of Society is the exclusive domain of the Registrar/Assistant Registrar/Deputy Registrar as the case maybe under Section 3 and 3A (a) of the Societies Registration Act 1860. The authority to accept, annual list of managing body, is also the exclusive domain of the Registrar/Assistant Registrar/Deputy Registrar as the case maybe. While proceeding to exercise authority vested under Sections 3A or 4 of the Societies Registration Act 1860, in case an election dispute or a dispute in respect of continuance of office bearers is raised, then Registrar/Assistant Registrar/Deputy

Registrar may in his/her discretion, refer the dispute to the Prescribed Authority if he/she is satisfied that a bonafide, genuine dispute has arisen, in respect of election or continuance of office bearers, and in case dispute totally lacks bonafide and is not a genuine dispute, then reference is not at all required, and there is no impediment in the exercise of authority vested under Sections 3A and 4 of the Societies Registration Act 1860. This action of the Registrar/Assistant Registrar/Deputy Registrar, can always be tested on the parameters of judicial review. Apart from this, the group of persons on the list being accepted under this Section are not remedy less, as they can always prove the validity of the said list, after mustering support of one fourth members of the Society, before the Prescribed Authority. Prescribed Authority gets jurisdiction to decide the dispute in respect of election, or continuance of office bearers, either on a reference or on being moved by one fourth members of the General Body. In entertaining a dispute, on behalf of one fourth members of the General Body of the Society, the Prescribed Authority must satisfy himself that dispute has been raised by one fourth members of the General Body of the Society, who are members in terms of Section 15 of the Societies Registration Act 1860, and once satisfaction is recorded on this score, then dispute can be adjudicated in a summary manner, and in the event of negative finding being there, the Prescribed Authority will have no jurisdiction. The parties are thereafter free to approach the civil court."

(emphasis supplied)

93. The Division Bench in *Shailendra Singh (supra)* observed that the authority has been conferred upon the Deputy Registrar to accept the list of members and office bearers of the Managing Committee under Section 4 of the Act, and anyone aggrieved against the acceptance of the said list of members and office bearers can approach the appropriate forum. In the State of U.P. a Proviso has been inserted under Sub Section (1) of Section 4 of the U.P. Act which requires that if the managing body is elected after the last submission of the list, the counter signature of the old members shall be obtained on the list and if the old office bearers do not countersign the list, the Deputy Registrar may issue a notice to such persons inviting objections from them and decide all the objections received within the specified period. In view of the said Proviso, if any objection is filed by Ex members and they raise the dispute of the election, it cannot be said that the Deputy Registrar cannot decide such dispute and he is bound to refer the dispute to the Prescribed Authority. The Deputy Registrar in every case cannot be forced to refer the dispute to the Prescribed Authority and based upon evidence adduced Deputy Registrar has to take a call as to whose list of office bearers and members is required to be taken on record. In the State of UP, dispute or doubt pertaining to election and continuance of office bearers has to be decided by the Prescribed Authority on receiving reference from the Deputy Registrar or, alternatively on reference being made by one fourth of the members of the Society. Section 25 (1) provides for settlement of dispute in summary manner and it does not all together oust the authority of the Deputy Registrar to accept the list of members. If such interpretation is accepted, then the power conferred on the Deputy Registrar by the proviso to Sub Section (1) of Section 4 will become redundant and otiose and if reference is made mandatory in every case,

the second part that provides for reference by one fourth members shall also become a meaningless provision. The said interpretation would also be against the true intent of the legislature, which has empowered the Deputy Registrar to decide the objection raised before him and accept a list of office bearers and members of the Managing Committee and the said orders will always be subject to the provisions of Sub Section (1) of Section 25 of the Act or alternatively the civil court. The Division Bench in Shailendra Singh (supra) in paragraph 23 further observed thus -

"Under Societies Registration Act, as applicable in the State of U.P., Registrar has been given wide power, such as, under Section 3A of the Act, for renewal of certificate of registration; under Section 4 to Register the annual list of Managing Body; under Sections 4A (UP amendment) intimation to the Registrar regarding change et cetera in the Rules; under Section 12 A a power to approve change in the name of the Society; under Section 12 B in respect of change of name and objects of Society; and under Section 12D, power to cancel registration in certain circumstances. Under Section 22 the Registrar is empowered to call for information, and under Section 23 he can direct the Society to furnish its account or copy of the statement of receipts and expenditure for any particular year, duly audited by the Chartered Accountant. Section 24 also empowers the Registrar in directing the investigation of affairs of the Society and under Section 25 he has power to refer the dispute of the election or for continuance of office bearers to the Prescribed Authority".

The Division Bench further observed in para 24 :-

"the powers conferred under the aforesaid Sections clearly demonstrate that the Registrar is the principal Executive Officer to exercise his power in respect of affairs of the Society. Thus, his power under Section 4 cannot be divested only on the ground that under Section 25 he has the authority to refer the dispute pertaining to election and continuance of office bearers and, accordingly, even if some frivolous dispute is raised in respect of elections or continuance of office bearers, the same should be mandatorily referred. If there is a dispute of two parallel groups of the Society, the Registrar can always examine whether the persons of rival group, who have raised the dispute, are members of the Society or not. He can record his prima facie satisfaction in this regard as to who has the authority to convene the meeting and hold elections; persons who have participated or valid members of the Society; elections have been held as per by-laws of the Society, and if he is satisfied that the dispute is genuine and it is a dispute inter-se between the members of the Society, then he can refer the dispute to the Prescribed Authority."

(emphasis supplied)

94. A Division Bench in *T.P. Singh Vs. Registrar/Assistant Registrar, Firms Societies and Chits,* **2019 (132) ALR 480,** has considered the powers of the Registrar under Section 4B of the Act. The facts of the case were that the writ petitioner T.P. Singh had been removed from the membership of the Kayastha Paathshaala Society by a Resolution passed by the Governing Council. The petitioner challenged such a Resolution before the Assistant Registrar who observed that the dispute raised before him was not within the purview of Section 4B of the Societies Registration Act. The question that was

being considered by the Division Bench has been formulated in paragraph 17 of the report as follows : 17.- "First question up for consideration before this court is, whether the objections raised by the petitioner before the Assistant Registrar are within the ambit of the enquiry under Section 4B of the act 1860 or not?" The Court observed the various amendments carried out in the Act of 1860 by the U.P. Legislature. In Section 4 Sub Section (1) and (2) were inserted with effect from 10.10.1975. Further amendment it was made with effect from 30.4.1984 in Sub Section (1), and a Proviso was inserted. Section 4 as it stands amended from time to time, presently reads as under:

*"**4-Annual list of managing body to be filed -** (1) once in every year, on or before the 14th day succeeding the day on which according to the rules of the Society, the Annual General Meeting of the Society is held, or, if the rules do not provide for an Annual General Meeting, in the month of January, a list shall be filed with the Registrar of the names, addresses and occupations of the governors, council, directors, committee, or other governing body then entrusted with the management of the affairs of the society .*

Provided that if the managing body is elected after the last submission of the list, the counter signature of the old members, shall, as far as possible, be obtained on the list. If the old office bearers do not countersign the list, the Registrar may, in his discretion, issue a public notice or notice to such persons as it thinks fit, inviting objections within a specified period and shall decide all objections received within the said period.

(2) Together with the list mentioned in Sub Section (1) there shall be sent to the Registrar a copy of the Memorandum of Association including any alteration, extension or abridgement of purposes made under Section 12, and of the Rules of the Society corrected up to date and certified by not less than three of the members of the said Governing Body to be the correct copy and also a copy of the balance sheet for the preceding year of account."

95. A new Section 4A was inserted by U.P. Act No.52 of 1975 with effect from 10.10.1975 which reads as under:

"4A. Changes etc in the Rules to be intimated to the Registrar - a copy of every change made in the Rules of the Society and intimation of every change of address of the Society, certified by not less than three of the members of the Governing Body, shall be sent to the Registrar within 30 days of the change."

96. A further Section 4B was inserted by U.P. Act No. 23 of 2013 with effect from 09.10.2013 and reads as under:

"4B(1) At the time of registration/renewal of a Society, list of members of the General Body of that Society shall be filed with the Registrar mentioning the name, father''s name, address and occupation of the members. The Registrar shall examine the correctness of the list of members of the General Body of such Society on the basis of the Register of members of the General Body and the minutes book thereof, cashbook, receipt book of membership fee, and bank passbook of the Society.

(2) If there is any change in the list of members of the General Body of the Society referred to in Sub Section 1, on account of induction, removal, resignation or death of any member, a modified list of members of the General Body, shall be filed with the Registrar, within one month from the date of change.

(3) The list of members of the General Body to be filed with the Registrar under this Section shall be signed by two office bearers and two executive members of the Society."

97. The Division Bench in *T.P. Singh* (supra) observed in paragraph 23 to 26 of the judgment as follows: -

"The reason for insertion of Section 4B mentioned in the Statement of Objects and reasons of the U.P. Act No. 23 of 2013 is that there is no provision for filing of list of General Body of the Society and a large number of disputes in Societies are raised due to non-existence of correct list of General Body with the Registrar . In several cases an illegal person fraudulently produces before the Registrar incorrect list of General Body of the Society and claims to be the Member and office bearer of such Society.

24. In order to avoid such situation it was decided to amend the Act 1860 in its application to the State of U.P. and that is how Section 4B came to be inserted in the Act, 1860. A List of Members of General Body of Society has to be filed at the time of registration or renewal of the Society. The List must mention names, father''s name, address, and occupation of members. Registrar is under a statutory duty to examine correctness of list of members of General Body of such Society on the basis of register of Members of General Body and the minutes book, cashbook, receipt book of membership fee and bank passbook of the Society. Apparently, it shows that members included in the list, whether included correctly, has to be examined by the Registrar. If a member is not included in list, whether such non-inclusion can also be examined by the Registrar is not very clear from Section 4B (1) of the Act 1860, but this is made clear by sub Section (2) which says that if there is any change of list of members of the General Body of the Society referred to in subSection (1) on account of induction, removal, resignation or death of any member, a modified list of members of the General Body shall be filed with the Registrar within one month from the date of change. (emphasis supplied)

"25. A plain reading of the above provision shows that at the time of registration or renewal, a list of members of General Body of Society has to be filed before Assistant Registrar. Thereafter whenever there is any change in the said list, same has to be informed to the Registrar by submitting a modified list of members of the General Body. When such a modified list is submitted to Registrar , in our view, examination is allowed to be made by the Registrar in respect of correctness of list of members of the General Body in Sub-Section (1) and would also include removal of members for the reason, when the modified list is communicated to the Registrar, whether modification is on account of induction or removal in any manner, both aspects and correctness thereof can be and must be examined by the Registrar.

(emphasis supplied)

"26. The incidental question which immediately crops up is the extent of

the authority of the Registrar of such examination. Whether it is an in-depth examination which may be termed as adjudication of dispute or it is a summary enquiry subject to adjudication of dispute by a court of law."

98. The Division Bench in T.P. Singh (supra) thereafter considered several precedents that were cited before it both of Division and Single Benches of this Court. It referred to judgement rendered in *Committee of Management A. S. Degree College Association versus State of U.P*. **2016 (4) ADJ 207**, and quoted with approval suggestion made by the Single Judge that the requirement that General Body list should be filed at the time of registration/renewal of the Society does not mean that if such a list is not in existence as the registration/renewal had taken place before insertion of Section 4B of the Act 1860, Deputy Registrar will have no power to decide a membership dispute subsequently. The adjudication of these questions by the Deputy Registrar would undoubtedly minimize the chances of a dispute in future and will thus effectuate the legislative intent. The Division Bench quoted with approval *Anjuman Farogh E Islam versus State of U.P*. **2014 (5) ADJ 673**, where a Single Judge of this court was dealing with a challenge to the determination of electoral roll by the Deputy Registrar's order dated 23.12.2009. It was also claimed that pursuant to the electoral roll finalised by the Deputy Registrar election programme was notified on 29.12.2009 and election was held on 30.12.2009 though conduct of said election was clearly challenged by the petitioner in the said writ petition. The Court found that the Prescribed Authority had examined the matter and found by an order dated 27.09.2007 that there were only 11 valid members on the date when the last election was held in 2004. The Deputy Registrar by adding 13 members had failed to examine the fact, whether they were enrolled in terms of the by-laws of the Society or not. The court observed that the Deputy Registrar has been empowered to examine the correctness of the list of members of the General Body on the basis of register of Members of General Body, Minutes Books, Cash Books, Receipt Book of membership fee and bank passbook etc of the Society. The intention of the legislature was to minimise the disputes of Society as in most societies these disputes are with regard to validity of enrollment of members and election held on the basis of disputed membership. If the Deputy Registrar examines the validity of the enrolment of members on the basis of the aforesaid documents, it would ensure that a rank outsider would not be able to control the affairs of the Society on the basis of fake documents.

99. In the case of *Sri Jain Dharam Pravarardhini Sabha, Lucknow versus State of U.P*. 2**016 (34) LCD 503** a Division Bench was examining a dispute where the renewal of the Society was made for the last time in 1996 and was valid till 2000. After 13 years an application for renewal was filed in November 2013 and renewal was granted. An application for recall of order was filed which was rejected by the Deputy Registrar. This was challenged in writ petition and an interim order was passed directing Deputy Registrar to decide upon rival lists of members of the General Body and finalize the list of members. The Deputy Registrar thereafter finalized the list of members of the General Body in 2015. This order was

set aside in a writ petition because of violation of principles of natural justice and the matter was remanded. The Division Bench while hearing the intra-court Appeal observed that Section 4 B had already come in October 2013 and the order of renewal was passed in December 2013 by the Deputy Registrar. The Court observed that Section 4B was applicable and passed an order accordingly directing the Deputy Registrar to examine the correctness of list of members in the light of the parameters given in Section 4B.

100. In *Adarsh Sanskrit Vidyalaya vs Committee of Management Ambedkar Nagar* **2016 (9) ADJ 679** Division Bench was considering a complaint regarding false and fabricated documents being inserted in the office record of the Deputy Registrar. The Deputy Registrar had rejected such a complaint and treated the list as valid for holding fresh election. The order passed by the Deputy Registrar was challenged in writ petition. The writ petition was allowed and the Single Judge observed that the Deputy Registrar erred in not examining the correctness of membership of over 25 members of the General Body. Whereas this was the direction given by the writ court earlier.

101. In *Syed Akhtar Hussain Rizvi vs. State of U.P*. (Special Appeal No. 261 and 263 of 2015); decided on 07.01.2016 by Division Bench at Lucknow, the dispute related to the Board of Trustees of Shia College and School and other connected institutions. By an order passed in 2011 by the Governing Body of the Society the membership of three members was ceased. Such a Resolution was challenged before the Deputy Registrar who quashed such Resolution. The Deputy Registrar's order was challenged in writ petition but no interim order was passed. The General Body thereafter resolved to withdraw the writ petition and restored the membership of the three members in whose favour the Deputy Registrar had passed the order. The list of members of the General Body was later filed before the Deputy Registrar in June 2014. Objections were raised but they were rejected and the Deputy Registrar by an order passed in October 2014 accepted the list after including the name of one disputed member. A writ petition was filed challenging the order passed by the Deputy Registrar where no interim order was granted. In the meantime the General Body meeting took place in November 2014 and a list of members of Society was filed by the before the Deputy Registrar. The Deputy Registrar rejected objections and directed registration of the list in January 2015. The order was then challenged in a petition where Deputy Registrar's orders passed in October 2014 and January 2015 were set aside. The Writ Court dealing with the challenge set aside the orders passed by the Deputy Registrar and directed that membership as determined on 15.11.2009 be taken as basic membership and after excluding deceased members and members whose terms had expired, fresh elections be held and in the meantime a high-level committee comprising of five members be constituted to take charge of the affairs of the College. This order was challenged in intra court Appeal. The Division Bench observed that under Section 4B of the Act the Deputy Registrar is obliged to examine the correctness of list of General Body of the Society on the basis of Register of members, Minutes book, Cashbook, Receipt book of membership fee and Bank Passbook. The court held that subsequent elections and induction of members were two different issues and the Deputy Registrar was competent to consider the

question of membership and any person aggrieved by his decision has remedy before the civil court. The Division Bench observed that the intention of the legislature in enacting Section 4B (1) and (2) was "*that there should not be any loss of communication in regard to validity of members between the Registrar of the Society and so in its wisdom, the legislature in sub Section (2) laid down that a continuous exercise should be undertaken by the Society, informing the change in membership within a period of one month."*

102. The Division Bench observed that if a list of General Body members is submitted at the time of registration/renewal only and thereafter subsequent change in membership is not communicated till the next renewal, it will defeat the purpose that bogus membership dispute should not be allowed to obstruct simple functioning of the Society. "Therefore, if any change in membership takes place within the period when the next renewal is due, it has to be informed to the Registrar and he is empowered to look into the correctness of such change. *If there is no constant updation of information, the Registrar will be clueless and will be lacking information, if in the meantime, various members in the General Body are inducted by the Society, are not inducted in accordance with the provisions contained in the bylaws. The Registrar can place a check on illegal induction in this manner. Now the check, which is required to be placed, is to be placed in a continuous manner and if it is in piecemeal, it shall be of no avail and the intention of the legislature will be defeated.* The introduction of Section 4 B was with the intention to remove mischief that was observed by the legislature resulting in frequent and frivolous litigation. If such mischief is required to be checked under Sub Section (2) of Section 4B, "it requires that a Society must inform the Registrar regarding the change in membership after registration or Renewal takes place up to the period of the next renewal." The Bench also observed that in making enquiry under Section 4B of the Act, the Deputy Registrar is not a post office but supposed to act administratively by applying his mind on the facts and documents placed before him. The Division Bench referred to judgement of the Supreme Court in *A.P. Abubakar Musaliar Versus District Registrar* **2004 11 SCC 247** and observed that when more than one returns are filed before the Deputy Registrar, he may not hold an elaborate enquiry but he is bound to satisfy himself prima facie as to which return is to be accepted. Deputy Registrar's inquiry is summary in nature and not final and the aggrieved party can always take up the matter before a competent court.

103. The Division Bench judgement made it clear that under Section 4B of the Act, the Deputy Registrar is not supposed to make adjudication of dispute of correctness of membership like a court, but whenever the list is submitted or there is any change in the list of members, and objection is raised or otherwise, Deputy Registrar has to prima facie satisfy himself that change has been made in accordance with the provisions of the bylaws and is prima facie genuine.

104. In *Allahabad High School Society versus State of UP* **2011 (4) ADJ 341**, a Coordinate Bench considered the correctness of the decision taken by the Assistant Registrar and the Resolution passed by the governing body of the

Society regarding the validity of the amendment made in the by-laws. It was observed that the office of the Deputy Registrar is not a post office but can examine whether the alleged Resolution making amendment in the bylaws is forged, fictitious or otherwise patently illegal. The court also said that the amendments in by-laws except for change in the name do not require to be intimated to the Deputy Registrar, but all changes in the Rules are mandatorily required to be intimated to the Deputy Registrar, who has to maintain record and hence when it is brought to its notice that there is any manipulation, etc, he can examine the said issue. Similar view was taken by the Division Bench in appeal against the said judgement, reported in **2011 (4) ADJ 887**. The judgment in Appeal was challenged before the Supreme Court and the Supreme Court dismissed such challenge. The judgement is reported in **2011 (6) SCC 118.**

105. After referring to judgment of Single Judges and the Division Benches on the issue, the Division Bench in T.P. Singh (supra) observed in paragraph 53 and 54 -

"*53. The discussion made by us and facts stated above show that Society in question, in the present case, held a meeting with Agenda to consider letters of the petitioner and thereupon read those letters as constituting a misconduct, justifying termination of membership and resolved to terminate membership of the petitioner. This resulted in change in the list of members of the Society and hence was communicated to the Assistant Registrar. The petitioner filed objection raising various issues including issue of membership of some other persons as well as some office bearers of the Society. It may be noticed that a person, filing objection before Assistant Registrar, will raise a whole gamut of issues before the Assistant Registrar which may be a combination of issues, some within jurisdiction of the Assistant Registrar and some beyond, but then the Assistant Registrar can always decide on substantive issues which are within the scope of scrutiny and within his jurisdiction and can respond to those aspects. It is to be seen by the Assistant Registrar /Registrar who is the statutory authority supposed to look into the matter, in exercise of statutory powers conferred under Section 4B of the Act 1860. It is true that the inquiry of Registrar /Assistant Registrar may not go into a detailed adjudication of a disputed question of fact like a civil court and the remedy obviously would be available to the party concerned to take recourse to civil court, but the mandate contained in the statute regarding scrutiny, to the extent it is provided, has to be observed and discharged. Registrar /Assistant Registrar is obliged to examine the question of correctness or alteration or change or modification in the list of members when an objection is raised. Cancellation/termination/removal of membership is a mode of alteration of list of General Body of the Society. Section 4B of the Act of 1860 talks of correctness of list of members, which can be examined by the Registrar /Assistant Registrar. Documents, which are supposed to be furnished to the Registrar, Assistant Registrar are also specifically mentioned and from those documents whatever fact situation maybe, he is to find out whether the Society, in bona fide manner has followed its own procedure laid down in the bye-laws. For example, if abruptly a Resolution is passed without there being any Agenda on a particular issue and by-laws require circulation of Agenda to the*

members before meeting is held, it is apparent that action taken by the Society is not in accordance with the bylaws, and thus its decision would not be correct and can be interfered with by the Registrar /Assistant Registrar. Similarly, from documents relating to fee, if it is found that requisite fee has not been paid by a person inducted as a member and to deposit a fee is one of the conditions to become a member of Society, the Registrar /Assistant Registrar can interfere and declare induction of such member to be illegal and declare the Resolution to this effect, bad in law. Similarly, if Society claims that fee has been deposited but from Bank Passbook, this claim is not found correct, Registrar /Assistant Registrar can again interfere. These are few illustrations only. This interference includes declaration of Resolution as bad or illegal, and mere fact that request has been made that Resolution should be cancelled or be declared illegal by itself, would not deprive Registrar from entering into the scrutiny to the extent it is mandated by Section 4B of the Act, 1860, otherwise the very objective and purpose of insertion of Section 4B of the Act , 1860 would stand defeated.

"54. The legislature intended to curtail litigation on account of frivolous induction or removal of members and alteration in the list of members of the Society, being aware of the fact that remedy available in common law is time-consuming and if disputes remain pending for a long time, interest of the Society in many cases suffer seriously. To give effect to the intention of legislature completely, Registrar / Assistant Registrar is authorized to examine the correctness of any inclusion , alteration, change et cetera in the membership of the Society particularly when an objection is raised. It must examine relevant records and find out the facts evident from record as to whether decision has been taken in accordance with the procedure prescribed in the bylaw, is bonafide and genuine."

(emphasis supplied)

106. This Court has considered the argument of counsel appearing for both parties and finds that besides the complaint of Dinesh Pratap Singh there were two other complaints of 11 life members which were pending before the Deputy Registrar at the time of decision in the Special Appeals. The Deputy Registrar in his order impugned has referred to the Membership Register which was placed before him in its original by Narendra Pratap Singh on 11.11.2016. The petitioners, on the other hand, had not produced any documents in original but had only produced photo copies. The list submitted earlier in original by Satyendra Singh were found to be lists of the Committee of Management elected for the Inter College. The list of members inducted in 1965 and found surviving thereafter till 1986, also does not have the names of the petitioners. The order dated 29.11.1980 had been passed on the basis of fraudulent papers. This can be determined from the fact that the expulsion of members had been done wrongly in between 1972 to 1980. Moreover, the Committee of Management had already become time-barred before the amendment was done in the by-laws in 1980. A tentative list of 21 members was notified by the Deputy Registrar of which only eight were found alive.

107. It is evident from the letter dated 30.09.2016 filed at page 252 of the writ petition that the Deputy Registrar had

framed four issues. The parties were informed. None of the parties raised any objection praying for framing of additional issues for example that of locus of the complainant. The reply of the petitioner only stated that the Committee of Management be recognised straightaway as the Division Bench had set aside the order passed by the Single Judge and also earlier orders passed by the Deputy Registrar, locus of other life members, who had also filed complaints was never raised before the Deputy Registrar and was also not considered by the Division Bench. It is true that while filing the writ petition before the learned Single Judge the locus of Dinesh Pratap Singh had been challenged however in Special Appeal the argument was not pressed.

108. If a Statutory Authority takes one of the two possible views and both views are possible, such finding can only be assailed by the petitioners with a positive pleading. No positive pleading is there in the writ petition with regard to alleged perverse findings of fact by the Deputy Registrar.

109. Even from the contents of the writ petition no serious challenge to the findings of fact recorded in the impugned order can be made out. From paragraph 3 to 25, petitioners have mentioned the previous rounds of litigation. In paragraph 26, they have mentioned submitting of a copy of judgement and order dated 31.08.2016 in the office of the Deputy Registrar and Annexure 24 is a letter dated 14.12.2016, the reply of the petitioners, which is incomplete. In paragraph 23 of the writ petition mention has been made of various replies submitted by the petitioner but no copies of any of the replies have been annexed except the reply dated 14.12.2016. In the reply dated 14.12.2016 they have only requested the Deputy Registrar to recognise them without submitting any documents in support of the case. From paragraph 28 to 31 again the petitioners have mentioned the observations made by the Division Bench. In paragraph 36, it has been mentioned that the opposite party no.4 filed his objections on 16.01.2016 to the tentative list and in paragraph 38, it has been mentioned that all the 15 original members are already dead and now only five are alive. In paragraph 39, it has been mentioned that no dissolution proceedings were undertaken by issuing notice under Section 13 of the Deputy Registrar. The petitioners have not disclosed who were these five members who were alive either in the writ petition nor have they mentioned their names before the Deputy Registrar. They repeatedly stated that periodical elections were being held of the Society but did not disclose the details with regard to the members constituting the General Body nor have they disclosed the names of office bearers. In the entire writ petition there is no foundation to assert that findings of fact recorded in the order impugned are erroneous. No ground has been taken to challenge the findings of fact recorded by the Deputy Registrar. The only ground taken for challenging the order is that the Division Bench had left it open to the Deputy Registrar to consider the locus of the complainant which was not done and therefore the order impugned is violative of the order passed by the Division Bench, hence, it should be set aside by this Court.

110. This Court having gone through the order dated 28.12.2016 feels that even if the contention of Pawan Kumar Singh was accepted that the Deputy Registrar could not look into elections held prior to the introduction of Section 25 (2) in the

Act, it would still be open for the Deputy Registrar to look into all the elections held allegedly after the 1975 amendment to the Statute. It was found that no elections were held in 1979, or thereafter, as there was no timely communication of such elections to the office of the Deputy Registrar. There was also failure to produce papers relating to the elections proceedings in their original.

111. The order impugned in substance covers all the issues framed by the Division Bench except the issue of locus which was not necessary to be decided as the complaint initially filed by Dinesh Pratap Singh had abated as he was no more. On the other hand, there were two more complaints pending filed by 11 life members. When issues were framed, the petitioners could certainly have complained regarding non-framing of issue with regard to locus of the other complainants. The locus of respondent nos. 4 to 8 was never challenged before the Registrar.

112 . The proceedings before the Deputy Registrar are summary proceedings and are not conclusive findings of fact. Any person aggrieved must go to the civil court where the Presiding Officer has the training to sift grain from chaff. When the petitioners have not raised any questions before the Deputy Registrar, they cannot be now allowed to raise the same in the writ petition. The petitioners have submitted six replies before the Deputy Registrar. Only one reply dated 14.12.2016 has been brought on record. The reply filed as annexure no.4 to the writ petition is also incomplete. If original records are filed in the office of the Deputy Registrar then the receipt is given of such filing and they are returned only when such receipt is shown. There is no receipt filed along with the writ petition to show that original records were filed but were ignored by the Deputy Registrar.

113. Also, Babban Singh has been shown to have been elected as Sansthapak in 1977 whereas the amendment to bring in the post of Sansthapak was incorporated only in 1980. The Deputy Registrar had not undertaken any adjudication when he directed registration of the amended bye-laws, nor did he act as a quasi-judicial authority, whose orders cannot be reviewed unless the Statute provides for the same. The Deputy Registrar had acted in an Administrative Capacity in determining the question of amendment to the Bye-Laws and changes in membership of the Society and as per the law settled by the Supreme Court in ***R.R. Verma versus Union of India,*** **1980 (3) SCC 402**, an Administrative Authority can certainly review its orders.

114. This Court does not sit in appeal and its role is limited to a Secondary Review. The Registrar had returned a finding of the documents being forged which constitutes a fraud. Babban Singh was the Sansthapak as well as serving as Principal of the School till his death. He had inducted all his family members in the General Body of the Society, and this Court has also gone through the judgements rendered by the Division Bench of ***Shiksha Prasar Samiti versus Deputy Registrar,*** **2002 (2) UPLBEC 1866,** and to the judgement rendered in ***Ashok Kumar Singh Vs. State of U.P.,*** **2012 AWC 2930,** regarding power to review/ recall an order passed on misrepresentation. No dispute regarding elections or continuance of office bearers was before the Deputy Registrar.

Therefore, the parties could not have been relegated to avail the remedy provided under Section 25 (1) of the Act. In fact, the Deputy Registrar in the order impugned was not concerned only with elections. The dispute was with regard to the amendment allegedly made in the by-laws and also with regard to membership. The Deputy Registrar found that the amendments were carried out in the absence of notice to Original Life Members. The General Body Members who were inducted by the petitioners were only on the basis of an amendment which amendment in the by-laws it self could not have been made in the absence of life members counter signing the Resolution dated 11.10.1980, the provision of Section 4B came on the statute book in October, 2013. The question of membership can now be seen by the Deputy Registrar after the induction of Section 4B as has been held by the Division Bench of this Court in the case of ***T P Singh v Deputy Registrar,*** **2019 (132) ALR 480.**

115. In ***Allahabad High School Society Vs. State of U.P.*** **2011 (3) ESC 2034**, the Supreme Court has observed in paragraph 20 that all things incidental to decide membership could be looked into.

116. The petitioners have failed to make out any case to show interference in the orders impugned dated 28.12.2016, the order dated 09.02.2017. The writ petition is ***dismissed.***

117. The respondents nos.4 to 8 have been elected in 2017. The office bearers' tenure is two years which got over and elections were held again in 2019. The elections were due in March 2021, which may or may not have been held, this court cannot say as there are no pleadings on record. The subsequent elections of 2017 and 2019 or 2021 have not been challenged.

118. Since the Society has admittedly only five surviving members, this Court deems it appropriate to direct the Deputy Registrar, Firms, Chits and Societies, Faizabad Region, Ayodhya to consult the District Magistrate Ayodhya and the Commissioner, Ayodhya Division, and the five surviving members within four weeks from the date a copy of this order is produced before him and induct at least 30 life members from amongst eminent educationists and Social workers of the Ayodhya Division. The Divisional Commissioner, Ayodhya, and the District Magistrate Ayodhya, shall be Patron Members of the Society and the Deputy Registrar shall ensure elections of Committee of Management of the Society as and when it falls due. If the respondent nos.4 to 8 have inducted life members or ordinary members in the General Body of the Society, in the meantime the Deputy Registrar shall call for the proceedings and verify the membership in accordance with Section 4B of the Act and proceed accordingly.

(2022)01ILR A768
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.09.2021

BEFORE

THE HON'BLE AJAY BHANOT, J.

Writ C No. 16344 of 2021

Manmohan Mishra ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:

Sri Jagnath Singh, Sri Mahendra Pratap Singh

Counsel for the Respondents:
C.S.C., Sri Brahmanand Singh

A. Recovery law – UP Public Moneys (Recovery of Dues) Act, 1972 – UP Agricultural Credit Act, 1973 – Agricultural loan granted – Impugned recovery proceeding was initiated under the Act of 1972 – Validity challenged – Application of the Act of 1972 considered – Held, UP Agricultural Credit Act, 1973 is an enactment created for a special purpose and a specific class of citizens namely agriculturists, who have taken agricultural loans – It's provisions confer special benefits and provide for additional protection to agriculturists who default in payment of loans – Recovery proceeding initiated under the Act of 1972 was held beyond jurisdiction. (Para 29 and 33)

B. Interpretation of Statute – General law and Special law – Overriding effect – *Generalia specialibus non derogant* – Held, canon of statutory interpretation that special law shall prevail over the general law flowing from the maxim 'Generalia specialibus non derogant', have settled the proposition with good and consistent authorities. (Para 31)

Writ petition allowed. (E-1)

List of Cases cited :-

1. Suresh Nanda Vs C.B.I.; 2008 (3) SCC 674

2. Rajan Sandhi P. Vs U.O.I. & anr.; 2010 (10) SCC 338

3. Commercial Tax Officer, Rajasthan Vs M/s. Binani Cements Ltd. & anr.; 2014 (8) SCC 319

4. Sharat Babu Digumarti Vs Govt. of NCT of Delhi; 2017 (1) SCC (Cri) 628

5. Raheja Universal Ltd. Vs N.R.C. Ltd. & ors.; 2012 (4) SCC 148

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

1. Heard Sri Jagannath Singh, learned counsel for the petitioner, learned Standing Counsel for the respondents No.1 to 4 and Sri Brahmanand Singh, learned counsel for the respondent No.5/Bank.

2. The petitioner has assailed the recovery certificate dated 29.06.2019 issued by the respondent No.5-Bank under the Uttar Pradesh Public Moneys (Recovery of Dues) Act, 1972 and attachment notice dated 14.01.2020 issued by the respondent No.3 and consequential proceedings taken under the Uttar Pradesh Public Moneys (Recovery of Dues) Act, 1972.

3. The sole contention of Sri Jagannath Singh, learned counsel for the petitioner is that the recovery proceedings taken out under the Uttar Pradesh Public Moneys (Recovery of Dues) Act, 1972 are beyond jurisdiction. The applicant had taken an agricultural loan. The loan comes within the ambit of Uttar Pradesh Agricultural Credit Act, 1973 (hereinafter referred to as 'Agricultural Credit Act). The scheme of recovery under the Uttar Pradesh Agricultural Credit Act, 1973 is distinct from the mode of recovery prescribed under the Uttar Pradesh Public Moneys (Recovery of Dues) Act, 1972.

4. Sri Brahmanand Singh, learned counsel for the respondent No.5/Bank does not dispute the aforesaid fact.

5. Learned Standing Counsel submits that once the bank admits that the loan is not covered under the Uttar Pradesh Public Moneys (Recovery of Dues) Act, 1972, the

State cannot take a different stand in the matter.

6. Heard learned counsel for the parties.

7. On facts it could not be disputed that the disputed loan is an agricultural loan within the ambit of Uttar Pradesh Agricultural Credit Act, 1973.

8. The Uttar Pradesh Agricultural Credit Act, 1973 was enacted with a view to facilitate adequate flow of credit for agriculture production and development through banks and other institutional credit agencies and for matters connected therewith. A large part of citizenry of the State derive their livelihood from agriculture. The legislature was sensitive to their pecuniary conditions and economic hardships faced by them.

9. The manner of recovery of agricultural loan has been set out in comprehensive detail in the Uttar Pradesh Agricultural Credit Act, 1973 read with Uttar Pradesh Agricultural Credit Rules, 1975.

10. Many of the features in the Uttar Pradesh Agricultural Credit Act, 1973 are distinct from the provisions of the Uttar Pradesh Public Moneys (Recovery of Dues) Act, 1972. Some of the provisions in the Uttar Pradesh Agricultural Credit Act, 1973 (hereinafter referred to as 'the Agricultural Credit Act') read with Uttar Pradesh Agricultural Credit Rules, 1975 (hereinafter referred to as 'the Rules'), which ameliorate the conditions of the agriculturists and are not part of the Uttar Pradesh Public Moneys (Recovery of Dues) Act, 1972), are discussed below.

11. The Uttar Pradesh Agricultural Credit Act, 1973 defines "agriculture" and "agriculturist" and reads as under:

"Section 2. Definitions.-In this act unless the context otherwise requires----

"(a) agriculture' and "agricultural purpose' includes making land fit for cultivation, cultivation of land improvement of land (including development of sources of irrigation), raising and harvesting of crops, horticulture, forestry cattle breeding, animal husbandry, dairy farming, piggery, poultry farming, seed farming, pisciculture, apiculture, sericulture and such other activities as are generally carried on by persons engaged in any of the aforementioned activities and also includes-

(i) marketing of agricultural products, their storage and transport;

(b)"agriculturist" means a person who is engaged in agriculture."

12. The other relevant Sections 2(c), 2(e) and 2(g) of the definition clauses of the Act of 1973 are extracted below:

"Section 2(c) 'bank' means-

(iv) a corresponding new Bank constituted under the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 (Act V of 1970);

Section 2(e) "financial assistance" means assistance [granted, whether before or after the commencement of this Act] by way of loan, advance, guarantee or otherwise (i) either to an

agriculturist for agricultural purposes or (ii) to a Co-operative Society for enabling it to grant loans and advances to its members for agricultural purposes;

Section (g) "prescribed" means prescribed by rules made under this Act."

13. Rights of agriculturists to alienate the land or interest in land in favour of banks is provided in Chapter II of the Act of 1973. Sections 3 and 4 of the Act of 1973 being germane are reproduced hereunder:

"**Section 3.** The State Government may by notification in the Gazette, vest, subject to such restrictions as may be specified in the notification, all bhumidhars, [* **] asamis and Government lessees, with rights of alienation in land held under their tenure or any interest in such land including the right to create a charge or mortgage or such land or interest in favour of banks generally or any specified class of banks for the purpose of obtaining financial assistance from such banks, and upon issue of such notification, such bhumidhars, [***] asamis and Government lessees shall, notwithstanding anything contained in any law for the time being in force or in any contract, grant or other instrument to the contrary, or any custom or tradition, have a right of alienation in accordance with he terms of the notification.

Section 4. Charge on crop and other movable property in favour of a bank.-(1) It shall be lawful for an agriculturist to create a charge on the moveable property owned by him or on the crops raised by him standing or otherwise or other produce from land cultivated by him, to the extent of his interests therein, in favour of a bank to secure financial assistance from that bank, notwithstanding that he may not be owner of the land [on and from which such crop or produce is raised.

(2) Notwithstanding anything to the contrary in [* **]4 the Uttar Pradesh Co-operative Societies Act,1965 or any other law for the time being in force, no charge in respect of any debt or other cut-standing demand due to a co-operative society from an agriculturist shall have priority over a charge on the crop raised by him, standing or otherwise, or any other movable property in respect of any financial assistance given to him by a bank provided the financial assistance made by the bank is prior in point of time to the debt or demand of the co-operative society. "

14. The manner creation of charge on land in favour of a bank by declaration of an agriculturist is provided in Section 6 of the Act of 1973, is of critical importance to the controversy speaks thus:

"**Section 6. Creation of charge on land in favour of a bank by declaration.**-An agriculturist desirous of securing financial assistance from any bank by creating a charge on land or any other immovable property which he owns or in which he has an interest may make a declaration on a duly stamped paper in the form set out in the Schedule or as near thereto as circumstances permit, declaring that thereby he creates in favour of the bank a charge on such land or his Interest therein or other immovable property, as the case may be.]

(2) A declaration made under sub-section (1) may be varied from time to time by the agriculturist with the consent of the bank in chose favour the declaration has been made."

15. Section 6-A of the Act of 1973 deals with transfer charge or mortgage to land allotted during consolidation operation:

"Section 6-A. Transfer of charge or mortgage to land allotted during consolidation operation.-Where any land held by an agriculturist is subject to a charge or mortgage created in favour of a bank by an agriculturist and the rights title and interest of the agriculturist in the said land have ceased as a result of the enforcement of the final consolidation scheme under Chapter IV of the U. P. Consolidation of Holdings Act, 1953, such charge or mortgage shall be transferred, and attached to the corresponding land allotted to the agriculturist and to the compensation, if any, payable under the said scheme."

16. Section 7 of the Act of 1973 removes disability in creation of charges and mortgages and reads so:

"Section 7. Removal of disability in creation of charges and mortgages.-Notwithstanding anything contained in the Uttar Pradesh Co-operative Societies Act, 1965 and Uttar Pradesh Co-operative Lana Development Bank Act, 1964] or any other law for the time being in force and notwithstanding that any land or interest therein stands already charged or mortgaged to a co-operative society, it shall be lawful for an agriculturist to create a charge or mortgage on such land or interest therein in favour of a bank as security for any financial assistance given to the agriculturists by that bank."

17. Specific provisions for registration of charges and mortgage in favour of banks are also provided in Section 9 and the registration of discharge certificates is contemplated in Section 9(b) of the Act of 1973:

"Section 9. Registration of charges and mortgage in favour of banks.-(1) Notwithstanding anything contained in the Registration Act, 1908, a charge in respect of which a declaration has been made under sub-section (1) of section 6 or in respect of which a variation has been made under sub-section (2) of that section, or a mortgage of any land or interest therein or other immovable property executed by an agriculturist in favour of a bank in, respect of financial assistance given by that bank shall be deemed to have been duly registered in accordance with the provisions of that Act with effect from the date of execution of such charge, variation or mortgage, as the case may be, provided the bank has sent to the Sub-Registrar within the local limits of whose jurisdiction the whole or any part of the property charged or mortgaged is situate within a period of one month from the date of such execution by registered post acknowledgement due, a copy of the document creating of such charge, variation or mortgage duly certified to be a true copy by an employee of the bank authorized to sign on its, behalf and the Sub-Registrar has filed it in Book No. 1 prescribed under section 51 of the Registration Act, 1908.

(2) The Sub-Registrar shall, as soon as may be, on receipt of the copy of the document referred to in sub-section (1), and after ascertaining that said document is

duly stamped, file the copy in Book No.1 prescribed under section 51 of the Registration Act, 1908.

(3) Where the Sub-Registrar is of the opinion that the said document is not duly stamped or suffers from any defect arising out of an accidental slip or omission, he shall send back the copy of the document to the bank requiring it to get the deficiency in the stamp duty made good on the original or to get the defect removed within thirty days or within such extended time as he sub-Registrar may allow in that behalf.

(3-A) The bank shall get the deficiency made good or the defect removed, notwithstanding anything contained in the Indian Stamp Act, 1899.]1

(4) After the deficiency in stamp has been made good [or as the case may be the defect has been removed]1 the Bank shall send the copy of the document again to the sub-Registrar in the manner laid down in sub-section (1) and thereupon the sub-Registrar shall file the copy in Book No. 1 in accordance with the provisions of sub-section (2).

(5) Notwithstanding anything contained in the Registration Act, 1908, it shall not be necessary for the agriculturist or any office of the bank to appear in person or by agent in any registration office in any proceeding connected with the registration of the document or to sign as provided in section 58, of the said Act.

Section 9-B. Registration of discharge certificates.-Where any declaration or variation in respect of a charge, or mortgage of any land or interes therein or other immovable property has been registered in accordance with section 9 and the amount of financial assistance secured hereby has been paid to the bank or the debt has been otherwise discharge, the bank shall issue a certificate to that effect and the provisions of the said section shall issue a certificate to that effect and the provisions of the said section shall mutatis mutandis apply to the registration of such certificate."

18. The manner of distraint and sale of produce and movables is provided in Section 10-B of the Act of 1973.

"Section 10-B. Distraint and sale of produce and movables.-(1) Where any sum in respect of any financial assistance granted to an agriculturist remains unpaid on the date on which it falls due, the bank granting the financial assistance may apply to the Tahsildar having jurisdiction for the recovery of the sum due, together with expenses of recovery, by distraint and sale of the movable property or the crop or other produce charged in favour of the bank.

(2) The provisions of the Limitation Act, 1963, shall apply in relation to an application under sub-section (1), as if such application were a suit in a civil court for sale of the movable property for enforcing recovery of the sum referred to in that sub-section.

(3) On receipt of an application under sub-section (1) the Tahsildar or any other official authorized by him may, notwithstanding anything contained in any other law for the time being force, take

action in the manner prescribed for purposes of distraining and selling the property referred to in that sub-section.

(4) Any sum, so recovered shall be transferred to the bank after deducting the expenses of recovery and satisfying the Government dues or other prior charge, if any."

19. Another important feature affords an enhanced protection to agriculturists is the manner of recovery of dues of a bank through a prescribed authority and is provided in Section 11 of the Act of 1973 which is extracted hereunder:

"Section 11.Recovery of dues of a bank through a Prescribed Authority.- (1) Notwithstanding anything contained in any law for the time being in force, an officer specified by the State Government by notification in the Gazette (hereinafter referred to as the prescribed authority) may, on the application of a bank by order, direct that any amount due to the bank on account of financial assistance given to an agriculturist be paid by the sale of the land and or any interest therein or other immovable property which is charged or mortgaged for the payment of such amount :

Provided that no order of sale shall be made under this sub-section unless the agriculturist has been served with, a notice by the prescribed authority calling upon him to pay the amount due.

(1-A) The provisions of the Limitation Act, 1963 shall apply in relation to an application under sub-section (1), as if such applications were a suit in civil court for sale of the land or interest therein or other immovable property for enforcing recovery of the sum referred to in that sub-section.

(2) An order passed by the prescribed authority shall, subject to the result of appeal under section 12, be final and be binding on the parties.

(3) Every order passed by the prescribed authority in terms of sub-section (1) or by the appellate authority under section 12 shall be deemed to be a decree of a civil court and shall be executed in the same manner as a decree of such court by the civil court having jurisdiction.

(4) [* * * *]

Section 11-A. Recovery in the case of personal security.-(1) Where any amount of financial assistance is .granted by a bank to an agriculturist and the agriculturist fails to pay the amount together with interest on the due date, then without prejudice to the provisions of sections 10-B and 11, the local principal officer of the bank by whatever name called may forward to the Collector a certificate in the manner prescribed specifying the amount due from the agriculturist.

(2) The certificate referred to in sub-section (1) may be forwarded to the Collector within three years from the date when the amount specified in the Certificate fell due."

20. Section 12 of the Act of 1973 contemplates an appeal against any order passed by the Prescribed Authority. Under this provisions agriculturists can appeal orders in recovery proceedings.

"Section 12.Appeal-(1) Any party aggrieved by an order of the prescribed authority under section 11 may, within a period of thirty days from the date of the order prefer an appeal to such appellate authority as may be specified by the State Government by notification in the Gazette.

(2) The appellate authority may, after giving an opportunity of hearing to the parties, pass such order as it think fit."

21. The recovery of dues from legal representatives of an agriculturist who dies before liquidating any financial dues against him is provided in Section 12-B of the Act of 1973 as under:

"Section 12-B. Recovery of dues from legal representatives.- (1) Where an agriculturist dies before the dues in respect of any financial assistance granted to him have been fully satisfied, the bank or the Tahsildar referred to in section 10-B or the prescribed authority referred to in section 11 or the Collector referred to in section 11-A may proceed against the legal representatives of the agriculturist for the recovery of the dues.

(2) Where, the proceedings are taken for the recovery against such legal representatives, they shall be liable only to the extent of the property of the deceased which has come to their hands and has not been duly disposed of and for the purpose of ascertaining such liability, the Tahsildar or the prescribed authority or the Collector, as the case may be, may suo motu or on application of the bank compel such legal representatives to produce such account as he or it thinks fit."

22. The manner of recovery of dues from sureties is stated in Section 12-C of the Act of 1973 and is extracted below:

"Section 12-C. Recovery of dues from sureties.-The provisions of this Act relating to the recovery of dues from an agriculturist and his legal representatives shall mutatis mutandis apply to the recovery of such dues from a surety who enters into a contract of guarantee to perform any promise or discharge the liability of an agriculturist in case of his default and to the legal representatives of such surety."

23. Exemption from legislations relating to money-lending and agriculturists debt relief is given to an agriculturist in regard to financial assistance by a bank under Section 21 of the Act of 1973:

"Section 21. Exemption from legislations relating to money-lending and agriculturists debt relief.-Nothing in any law for the time being in force dealing with money-lending or agriculturist's debt relief shall apply to financial assistance given to an agriculturist by a bank."

24. The Rules framed under the Uttar Pradesh Agricultural Credit Act, 1973 are called the Uttar Pradesh Agricultural Credit Rules, 1975. Chapter III of the Rules contains detailed provisions for distraint and sale of movables. Rule 22 of the Rules of 1975 contemplates as under:

"Rule 22. Release of the property before sale : Sections 10-B and 25. - Where, prior to the date fixed for sales, the agriculturist or his heirs or legal representatives or any person acting on his

behalf or any person claiming an interest in the property distrained pays the full amount due, including interest, and other expenses incurred in the distraint and sale of the property charged the Tahsildar shall not proceed with the sale and shall release the property forthwith."

25. Chapter IV of the Rules of 1975 pertains to sale of land or interest therein.

"Rule 23. Application for sale of land or interest therein : Sections 11 and 25. - (1) Where any charge or mortgage has been created on any land or interest or on any other immovable property in favour of a bank in respect of any financial assistance granted to an agriculturist and the whole or any part of amount due in respect thereof remains unpaid, the bank may apply to the Prescribed Authority for the sale of such land, of interest therein or other immovable property.

(2) Every application by a Bank under sub-rule (1) shall be in Form D. The application shall be accompanied by sufficient number of copies thereof along with copies of notices in Form E for service on the agriculturist or his heirs or legal representatives, as the case may be.(3) A fee at the rate specified in Rule 12(3) shall be payable on every application referred to in sub-rule (1). The amount of fee shall be deposited in Government Treasury of the State Bank of India under the Head mentioned in Rule 12(3) and the Treasury Challan shall be attached to the application as evidence of payment of the prescribed fee.(4) An attested copy of the document creating the charge of mortgage shall be filed along with application referred to in sub-rule (1). But the Prescribed Authority may summon the original as and when it is considered necessary.

Rule 24. Notice to the agriculturist : Sections 11 and 25. - (1) On receipt of the application referred to in Rule 23, the Prescribed Authority shall cause to be noted thereon, the date of its presentation, and if it is satisfied that the application is in order, a notice in Form E shall be served on the agriculturist, his heir or legal representatives, as the case may be, calling upon him to pay the amount specified in the notice within a period of twenty-one days or to show cause why a direction for the sale the property charged or mortgaged be not issued.(2) The notice referred to in sub-rule (1) shall be served in the manner laid down in Rule 14.

Rule 25. Order for sale of the property : Sections 11 and 25. - (1) If the amount specified in the notice referred to in Rule 24 or any part thereof remains unpaid after the expiry of the time allowed therefor, or if no cause is shown; or where the cause shown is considered by the Prescribed Authority to be in sufficient, the Prescribed Authority shall by order direct that the amount due to the bank be paid by sale of the property charged or mortgaged.(2) Every order under sub-rule (1) shall be in writing and shall contain the following particulars -

(a) the reasons on which the decision is based ;

(b) a direction as to costs and interest, if any ;

(c) the number of cases, and the names and description of the parties ;

(d) the date when the order was signed and pronounced.

(3) A copy of the order under sub-rule (1) shall be sent to the Civil Court having jurisdiction and, subject to the result of appeal, if any, shall be executed as a decree of such court."

26. Chapter V of the Rules of 1975 also has an important bearing on the controversy since it pertains to recovery of dues as arrears of land revenue. The relevant provisions are reproduced as under:

"Rule 26. [* * *]

Rule 27. Certificate of recovery : Sections 11-A and 25. - Every certificate referred to in sub-section (1) of Section 11-A shall be prepared in Form F and shall be sent to the Collector of the district in which the agriculturist or his heirs or legal representatives ordinarily reside or carry on the activities referred to in Section 2(a) or own properties.

Rule 28. Recovery as arrears of land revenue : Sections 11-A and 25. - On receipt of the certificate in accordance with Rule 27, the Collector shall cause the same to be entered in a register maintained for the purpose and shall proceed to recover the amount specified in the certificate as arrears of land revenue.

Rule 29. Utilisation of the amount recovered : Sections 11-A and 25. - The amount recovered under Rule 21 or Rule 28 shall be utilized in the following manner:

(a) Firstly, for meeting the expenses of recovery which shall be charged at the rate of ten per cent (or at such other rate as the State Government in the Revenue Department may from time to time fix in this behalf) on the amount of the claim ;

(b) Secondly, for payment of the Government dues or other prior charges, if any ;

(c) Thirdly, for payment of the dues of the bank.;

(d) The balance, if any, shall be paid to the person from whom the recovery was made.

Rule 30. Remittance to Bank : Sections 11-A and 25. - The account referred to in clause (c) of Rule 29 shall be remitted to the Bank as far as possible within one month from the date of recovery -

(i) by money order, if it docs not exceed rupees twenty-five; and

(ii) by bank-draft or by postal order, if it exceeds rupees twenty-five."

27. The procedure before the learned appellate authority is laid out in Chapter VI of the Rules of 1975, which includes filing an appeal, hearing of the appeal, order of the learned appellate authority and also adjournment of hearing, speak thus:

"Rule 31. Appeal : Sections 12 and 25. - (1) Every appeal under Section 12 shall be presented in the form of a memorandum setting forth concisely the

grounds of objection to the order appealed against. A certificate copy or a typed attested copy of such order shall invariably be attached to the memorandum.

(2) The memorandum of appeal shall be accompanied by sufficient number of copies thereof along with copies of notices in Form G for service on the respondents."(3) The provisions of Rule 23 (3) and Rule 24 shall mutatis mutandis apply to an appeal under Section 12 as they apply to an application under Section 11(1).

Rule 32. Hearing of appeal.: Sections 12 and 25. - (1) Where the appellate authority is of the opinion that the memorandum of appeal suffers from any defect it shall make a note to that effect and shall call upon the appellant to remove the same.(2) If the defects pointed out by the appellate authority arc removed within the period specified therefor or within such extended period as the appellate authority may from time to time grant, the latter may admit the appeal for hearing.(3) If the appellant fails to remove the defects within the period specified in sub-rule (2), or if the appeal is beyond the limitation specified in Section 12(1), the appellate authority shall, subject to the provisions of Section 24, reject the appeal.(4) Where the appeal is admitted, the appellate authority shall fix a date for hearing and the notice of the date of hearing shall be served on the respondent in Form G. An intimation of the date shall also be sent to the appellant.

Rule 33. Order of the appellate authority : Sections 12 and 25. - (1) On the date fixed for the hearing of an appeal, the appellate authority shall go through the record and hear the parties to the dispute or their authorised agents and shall pass such order on the appeal as the appellate authority may deem fit.(2) The provisions of sub-rules (2) and (3) of Rule 25 shall mutatis mutandis apply to every order made under this rule.

Rule 34. Adjournment of hearing : Sections 12 and 25. - The appellate authority may, in its discretion, adjourn to any other date the hearing of any appeal at any stage."

28. Chapter VII of the Rules of 1975 contains other miscellaneous provisions including issuance of summons, memorandum of oral evidence, ex parte orders, certified copy, return of documents, processes how to be issued and disposal of property by bank which read as under:

"Rule 35. Issue of summons : Sections 10-B, 11, 12 and 25. - (1) The Tahsildar, the Prescribed Authority or the appellate authority, as the case may be, may issue summons for the attendance of a witness, provided the party concerned deposits in advance such amount towards expenses as officer or authority concerned considers necessary for securing such attendance.

(2) The summons shall require the person summoned, to appear before the said officer or authority at a staled time and place, and the summons so issued shall specify whether his attendance is required for the purpose of giving evidence or to produce any documents or for both. Any particular document the production of which is required for the purpose, shall be described in the summons with reasonable accuracy.(3) Any person may be required to produce a document, without being summoned to give evidence and such person shall produce the required document personally or may send it by registered

post.(4) The summons may be served in the manner specified in Rule 14 or by any other mode specified in the Code of Civil Procedure, 1908.

Rule 36. Memorandum of oral evidence : Section 25. - The Tahsildar, the Prescribed Authority or the Appellate Authority shall make a memorandum of any oral evidence admitted by him or it.

Rule 37. Ex parte orders : Section 25. - (1) In the case of absence of any party the case may be decided ex parte.(2) The Tahsildar, the Prescribed Authority or the Appellate Authority may on an application being made in that behalf, and for sufficient cause -

(a) set a side an ex parte order, or

(b) restore an application or appeal dismissed for default of appearance of the applicant, or the appellant as the case may be.

(3) An application under sub-rule (2) shall be made within thirty days from the date of the ex parte order or from the date of dismissal of application or appeal and in the case of an ex parte order, where the notice was not duly served on the applicant, within thirty days from the date of knowledge of such order.(4) Notwithstanding anything contained in sub-rule (3), no application referred to in sub-rule (2) shall be entertained -

(a) in the case of any movable property, if such property has already been sold, and

(b) in the case of any immovable property, if the sale has already been confirmed.

Rule 38. Certified copy : Section 25. - (1) Any person affected by an order passed by the Tahsildar, the prescribed authority or the appellate authority shall be entitled to be furnished with a certified copy thereof and any other connected document on application duly made in that behalf.(2) Every application for certified copy shall be accompanied by the requisite copying charges, The scale of charges shall be the same as laid down for the criminal courts subordinate to the High Court.

Rule 39. Return of documents : Section 25. - (1) Every document or record tendered by a party or any other person may, on application, be returned to such party or person after the disposal of appeal and where no appeal is filed, after the expiry of the period for appeal. No fees shall be charged for return of said documents or records.(2) The original deed of charge, the variation or mortgage in possession of the bank shall be returned to the agriculturist or his legal representatives after the bank's dues arc discharged in full.

Rule 40. Processes how to be issued : Section 25. - Every order, notice, summons or intimation issued by any officer or authority under the Act or these Rules shall be in writing and shall bear the signature of such officer or authority or such authority as may be authorised in this behalf, and shall be authenticated by the seal of such officer or authority.

Rule 41. Disposal of property by bank : Sections 12-A and 25. - (1) Where a bank acquires any land or any interest therein or any other immovable property under Section 12-A, it shall dispose it of by a registered sale-deed in favour of an agriculturist within a period of one year from the date of such acquisition.(2) A bank desirous of transferring the property referred to in sub-rule (1) after the expiry of the period referred to in the said sub-rule, shall have to obtain prior approval of the State Government, in the Revenue Department.(3) Every application for permission to transfer a property under sub-rule (2) shall be sent to the Secretary to the Government of Uttar Pradesh in the Revenue Department, Council House, Lucknow, and if no reply is received within six months from the date of receipt of such application by the Government the application for permission shall be. deemed to have been granted."

29. From the scheme of the Uttar Pradesh Agricultural Credit Act, 1973 as discussed earlier, it is evident that the Uttar Pradesh Agricultural Credit Act, 1973 is an enactment created for a special purpose and a specific class of citizens namely agriculturists, who have taken agricultural loans. The provisions of Uttar Pradesh Agricultural Credit Act, 1973 confer special benefits and provide for additional protection to agriculturists who default in payment of loans. Many features of the Uttar Pradesh Agricultural Credit Act, 1973 show that it is a beneficial legislation created for agriculturists.

To the contrary, the Uttar Pradesh Public Moneys (Recovery of Dues) Act, 1972 is a prior legislation which is a general nature. It is settled rule of statutory construction that the special enactment shall prevail over the general statute. Further the Uttar Pradesh Public Moneys (Recovery of Dues) Act, 1972 does not recognize the distinction between agriculturists and other borrowers and creates no special provisions for the agricultural class and offers no protection to the agriculturists.

30. In case the proceedings are taken out against the agriculturists for the recovery of agricultural loan under the Uttar Pradesh Public Moneys (Recovery of Dues) Act, 1972, agriculturists will be prejudiced as the said Act, does not provide the same protection as is envisaged in the Uttar Pradesh Agricultural Credit Act, 1973.

31. Canon of statutory interpretation that special law shall prevail over the general law flowing from the maxim "Generalia specialibus non derogant", have settled the proposition with good and consistent authorities. **[References: G.P. Singh's Principles of Statutory Interpretation1, Suresh Nanda Vs. C.B.I.2, Rajan Sandhi P. Vs. Union of India and another3, Commercial Tax Officer, Rajasthan Vs. M/s. Binani Cements Ltd. and another4, Sharat Babu Digumarti Vs. Govt. of NCT of Delhi5, and Raheja Universal Limited Vs. N.R.C. Limited and others6.]**

32. In such view of the matter and in the facts of the instant case, the Uttar Pradesh Agricultural Credit Act, 1973 shall be applicable to the case of the petitioner and shall prevail over the Uttar Pradesh Public Moneys (Recovery of Dues) Act, 1972.

33. In the wake of preceding discussion, the recovery certificate dated

29.06.2019 issued by the respondent No.5-Bank is beyond jurisdiction.

34. The recovery certificate dated 29.06.2019 issued by the respondent No.5-Bank under the Uttar Pradesh Public Moneys (Recovery of Dues) Act, 1972 and the attachment notice dated 14.01.2020 issued by the respondent no.3 as well as consequential proceedings are liable to be set aside and are set aside.

35. It is open to the respondent No.5-bank to take out the fresh recovery proceedings Uttar Pradesh Agricultural Credit Act, 1973 read with Uttar Agricultural Credit Rules, 1975, to recover its outstanding dues from the petitioner.

36. The writ petition is allowed to the extent indicate above.

(2022)01ILR A781
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.10.2021

BEFORE

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

Writ C No. 17418 of 2021

Kenisha Singh Jeet ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Arvind Srivastava III, Sri Sanjeev Kumar

Counsel for the Respondents:
C.S.C., Sri Rohit Pandey, Sri Vindhya Vashini Prasad Rai, Sri V.P.Rai

A. Constitution of India – Article 226 – Writ – Scope of interference – Examination for M.A. Course – Online examination form uploaded and it's hard copy was claimed to be submitted to the College, to which the College denied – Prayer for holding the fresh examination sought – No document was produced to proof that hard copy was produced to the College – Effect – Held, no provision known to law, has been placed before this Court on the basis of which this Court, in exercise of power under Article 226 of the Constitution of India, can direct the respondent-University to conduct fresh or special examination of M.A. Final Year of the petitioner only, when as matter of fact that the same is already over – However, the High Court issued necessary direction permitting the petitioner to appear in the examination during next academic session considering his bright future. (Para 16, 17 and 19)

Writ petition disposed of. (E-1)

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

1. Heard Mr. Arvind Kumar Srivastava-III, learned counsel for the petitioner, Mr. Asheem Mukherjee, learned Standing Counsel for the State-respondents, Mr. Rohit Pandey, learned counsel for the respondent-University and Mr. V.P. Rai, learned counsel for the respondent-institution.

2. This writ petition has been filed by the petitioner for a writ of mandamus commanding the respondent nos. 5 and 6 to rectify their mistake by verifying the examination form of the petitioner, upload the admit card of the petitioner on website and permit him to appear in the final (revised) Examination Schedule (P.G.) M.A. (Final Year) Main Exam-2021, as per the updated schedule dated 7th July, 2021.

He further prays for a direction upon the respondent nos. 5 and 6 to conduct fresh examination of the petitioner in respect of final (revised) Examination Schedule (P.G.) M.A. (Final Year) Main Exam-2021, as per the updated schedule dated 7th July, 2021.

3. Counter and rejoinder affidavits have been exchanged between the parties and they agree that this petition may be finally decided without calling for any further affidavit.

4. In the present petition, it is the case of the petitioner that the petitioner is a student of 2nd year of M.A. English of respondent-institution, namely, Hindu College, Moradabad, U.P. which is affiliated to respondent-University, namely, Mahatama Jyotiba Phule Rohilkhand University, Bareilly. The petitioner got enrolled in the M.A. course in the respondent-college in the year 2019 and was duly promoted in the main examination, which was held in the year 2020 of M.A. First Year. Thereafter, the petitioner submitted the admission form for the academic session 2020-2021, wherein the petitioner was allotted form no. 2100206287 and she also submitted the examination fee of Rs. 1,000/- as well as the other charges online on 8th March, 2021.

5. It is further case of the petitioner that it is the procedure adopted by the respondent-University that the entire fees and the relevant forms are to be deposited online through the portal of the respondent-University, thereafter the papers of the candidates concerned are to be forwarded by the respondent-college to the University along with the hard copies of admission forms and respective details. After the deposit of the fees, the payment status of the online fees of the petitioner was shown to be successful, hence, the petitioner drew an impression that the obligation on the part of the petitioner, which was to be exercised, had been diligently discharged and the onus now has been shifted on the college concerned i.e. respondent no.6 to forward the relevant form as well as other details to the respondent-University. After the examination schedules were notified for the academic session 2020-2021 on 8th July, 2021, the petitioner visited the portal of the respondent-University to find out her admit card but she was surprised to see that the verification status of the petitioner was shown as Unverified i.e. "May not be received at college (submit a copy of the examination form in your college). Since the first paper of the M.A.(2)-English-I-Nineteenth Century English Poetry (11017) was scheduled for 24th July, 2021, the petitioner tried to download her admit card on 20th July, 2021 but on the portal of the respondent-University, the status of the petitioner was shown as unverified due to which the admit card of the petitioner could not be downloaded on 20th July, 2021. Immediately, thereafter the petitioner approached the college concerned on the very same day i.e. 20th July, 2021 and the petitioner narrated the entire facts, as stated above, to the administration of the respondent-college and gave the details upon which the administration of the respondent-college assured her that they will get it rectified. Since the administration of the respondent-College fairly accepted their fault and admitted that they had not uploaded the petitioner's form properly into the verified system of the respondent-University.

6. It is further case of the petitioner that since the respondent-college had the

obligation to upload the form of the student concerned in the verified system of the respondent-University and once the petitioner had uploaded the admission form and deposited the requisite fees online on 8th March, 2021, then it was the responsibility of the respondent-college to forward the same to the respondent-University. However, the administration of the respondent-college failed to do its promise and did not get the mistake rectified by uploading the petitioner's form on the portal of the respondent-University and hence the petitioner could not be issued the admit card for the examination dated 24th July, 2021 and now, the second paper scheduled to be held on 27th July, 2021.

7. It is also the case of the petitioner that in case the petitioner is not provisionally allowed to appear in the examination of M.A. final year, the entire hard work of the petitioner will go in vain and she will be made to suffer for no fault of her own. Now one paper has already been held on 24th July, 2021 in which the petitioner was not permitted to appear in absence of issuance of admit card on the fault of the respondent-college. Petitioner prays that if the petitioner is permitted to appear in her examinations, which are going to be held on 27th July, 2021, in that case, the petitioner will have an option to appear in back paper examination for the subject examination, which was held on 24th July, 2021.

8. The present writ petition has been presented before the Court on 26th July, 2021 and the petitioner has not been granted any interim order and she has not been permitted to appear in the examinations provisionally, which were scheduled to be held on 26th July, 2021 onwards. At present, the examinations are over.

9. Today, learned counsel for the petitioner submits that the petitioner has duly discharged her obligation and submitted the online form and thereafter, submitted the hard copy of the same before respondent-college and from the subsequent checking of the status of her form from the website of the respondent-University, it was revealed that the fee paid by the petitioner was successfully received by the respondent-University and at that point of time, no intimation or warning whatsoever was communicated to the petitioner either by the University or the respondent-college.

10. Learned counsel for the petitioner further submits that since the petitioner had duly submitted the online admission form within time i.e. on 8th March, 2021 and thereafter, on the very same day, the hard copy was submitted before respondent-college, it was obligatory on the part of the respondent-college to forward it to the University concerned and now the fact of the matter is that without any fault on the part of her own, the petitioner has been denied the opportunity to appear in the final year examination, which were scheduled from 20th July, 2021 to 4th August, 2021, meaning thereby that it is a loss of whole academic year to the petitioner.

11. On the cumulative strength of the aforesaid, learned counsel for the petitioner, therefore, submits that since there is no fault on the part of the petitioner, seeing the precious time and bright career of the petitioner, this Court may direct respondent-University to conduct special or fresh examination for

the petitioner, so that the petitioner may save her precious time for the academic session 2020-2021, otherwise the petitioner would be forced to appear in the examination, which will be held for the academic session 2021-2022 and in that circumstances the petitioner shall suffer huge mental agony and academic loss without any fault on her part.

12. In reply, Mr. Rohit Pandey, learned counsel for the respondent-University submits that as per the procedure, the candidate has to submit his online examination form and deposit the examination fee for appearing in the examination. After submitting online application form, the candidate is required to download its hard copy and submit the same to the college and the college, inturn is required to forward the examination form of the candidate along with other details to the University. In the present case, the petitioner has submitted her online application form but her document was not forwarded by her respondent-college. Upon making enquiry from the respondent-college, it was informed by the Principal of the respondent-college that the petitioner has not submitted her online examination form to the respondent-college within the prescribed time i.e. before 3rd July, 2021, therefore, her examination form along with other details was not forwarded to the respondent-University. He submits that in that regard, a communication dated 26th July, 2021 was also sent by the Principal of the respondent-college to the respondent-University. Learned counsel for the respondent-University, therefore, submits that since the petitioner was required to submit her online application form to the respondent-college, which she did not make within time, due to which the respondent-college did not forward the same to the respondent-University, she cannot be allowed to appear in the examination at such belated stage, inasmuch as the examination is already over. He also submits that for only one student, there is no provision or procedure known to law as applicable to the respondent-University to conduct special or fresh examination, therefore, this Court under Article 226 of the Constitution of India, cannot direct the respondent-University to conduct fresh or special examination of the petitioner only, which is impossible.

13. Learned counsel for the respondent-College submits that the submissions made by the learned counsel for the petitioner cannot be accepted, as they do not bear the truth. He further submits that it is the procedure that the college duly informs the students about the steps of admission and examination form every year. The student has to fill up the examination form on the portal of the University and collect the printout or hard copy of the same to be submitted to the college and the college thereafter forwards the same to the University for further proceedings. The college issues notices/directions regarding the admission and examination forms and displays the same on the notice board from time to time to let the students be informed about the necessary proceedings or steps to follow. In the academic session 2020-2021 also, the college followed the same procedure. The notice regarding the examination form was served to the students on 25th February, 2021 asking them to fill up the examination forms on the portal of the University and submit the hard copy of the same to the college. Moreover, a reminder was also issued to the students to submit the hard copy of their examination forms in time.

Meanwhile, the students were also informed by the faculty members to fill up their examination form in time to avoid any inconvenience. As a result thereof, 109 students submitted the hard copy of the examination forms to the college by last date. The details of which have duly been recorded in the register concerned. But very surprisingly, the petitioner failed to submit the hard copy of the examination form so that it could be forwarded to the University. Therefore, the plea of the petitioner that she drew an impression that the obligation on her part, which was to be exercised, had been diligently discharged and now the onus shifted to the college i.e. respondent-college to forward the relevant form and other details to the respondent-University, has no force, hence the same is liable to be rejected. On the cumulative strength of the aforesaid, learned counsel for the respondent-college submits that the present writ petition does not warrant any interference as she is not entitled to any relief and the same is liable to be dismissed.

14. I have considered the submissions made by the learned counsel for the parties and have examined the records of the present writ petition.

15. Two issues arise for consideration before this Court:

1. Whether the petitioner has submitted the hard copy of the examination form along with other details before the respondent-college within the time specified or not?; and

2. Can this Court, in exercise of powers under Article 226 of the Constitution of India, direct the respondent-University to conduct fresh or special examination of M.A. Final year of the petitioner only?.

16. Qua the first issue, when this Court required the learned counsel for the petitioner to show any record on the basis of which it can be established that the petitioner, after uploading the examination form along with other details from the portal of the University, has submitted the same before the respondent-college within the time specified, in reply learned counsel for the petitioner has failed to produce or show the same. No such documentary proof has been produced before this Court on behalf of the petitioner from which it is established that the petitioner has submitted the hard copy of the admission form along with other details to the respondent-college within time.

17. Qua the second issue, no provision known to law, has been placed before this Court on the basis of which this Court, in exercise of power under Article 226 of the Constitution of India, can direct the respondent-University to conduct fresh or special examination of M.A. Final Year of the petitioner only, when as matter of fact that the same is already over

18. In view of the aforesaid, this Court is not inclined to interfere in the present writ petition.

19. However, considering the peculiar facts and circumstances of the case specifically the bright future of a student like the petitioner, this petition is disposed of by providing that in case the petitioner submits her examination form along with examination fee and other details as required, on the portal of the respondent-University for M.A. final year (Session

2021-2022) within the time specified on the said portal and after downloading the hard copies of the same, she submits the same before administration of the respondent-college, the respondent-college shall forward the same to the respondent-University, in case there is no legal impediment. On receipt of the same, the University, after completing necessary formalities shall issue online admit card of the petitioner on its portal, so that the petitioner may download the same and appear in M.A. final year examination for the academic session 2021-2022.

(2022)01ILR A786
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.11.2021

BEFORE

THE HON'BLE ROHIT RANJAN AGARWAL, J.

Writ C No. 21935 of 2021

Smt. Kusumlata ...Petitioner
Versus
State of U.P. & Ors. ....Respondents

Counsel for the Petitioner:
Sri Rakesh Dubey

Counsel for the Respondents:
C.S.C.

A. Fair price shop – Control Order, 2016 – GO dated 05.08.2019 – Clause IV, Sub-clause (10) – Compassionate allotment was claimed by the married daughter – Word 'married daughter' is excluded from the word 'family' – Validity challenged – Parity with the compassionate appointment under Dying-in-Harness-Rules claimed – Reason to exclude the married daughter explained – Held, purpose for excluding the married daughter from the canopy of family under the Control Order of 2016 is that a fair price shop runs upon a license granted by the St. agencies in favour of a dealer pursuant to which an agreement is executed – Once the daughter is married outside the village and resides in a different matrimonial village the dealership cannot be granted to her under the compassionate allotment on the death of her father/mother as it is not possible for her to run the shop and distribute the essential commodities to the card holders residing at her paternal village – High Court distinguished the compassionate appointment under the Dying-in-Harness Rules. (Para 25, 27 and 28)

B. Constitution of India – Article 21 and 47 – Fundamental Right – Right to food – Supply of food-grains – Protection – Held, the Government as well as the Apex Court have recognized that right to food is part of Article 21 of the Constitution – The dealership of fair price shop is given by the St. for ensuring the supply of foodgrains by the Government of India as well as the St. Government to the citizens fulfilling the object of Article 47 of the Constitution of India – In case, dealership is given to an outsider who is unable to run the fair price shop due to his/her unavailability the very purpose for enacting the Act of 2013 and Control Order of 2016 would be rendered otiose. (Para 26 and 33)

Writ petition dismissed. (E-1)

List of Cases cited :-

1. Writ C No. 60881 of 2015; Smt. Vimla Srivastava Vs St. of U.P. & anr. decided on 04.12.2015

2. Writ-A No. 10928 of 2020; Manjul Srivastava Vs St. of U.P. & ors. decided on 15.12.2020

3. K.S.Puttaswamy (Retired) & anr.(AADHAAR) Vs U.O.I. & anr.(2019) 1 SCC 1

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

1. The question before this Court for consideration is whether married daughters can be considered/eligible for compassionate allotment of dealership of a fair price shop on the death of their father/mother to whom the license to run fair price shop was originally granted by the State.

2. The challenge made in this writ petition is for declaring the word "unmarried" as unconstitutional from the definition of family prescribed under Sub-clause (10) of Clause IV of the Government Order dated 05.08.2019 bearing No. 6/2019/1358/29.06.2019-162 सी0/2001.

3. Facts, in brief, as narrated is that one Nekram, father of the petitioner, was granted license by the district authorities to run the fair price shop at Village Newadi Khurd, Nyay Panchayat Aheripur, Block Maheva, Pargana Bharthana, District Etawah in the year 2005. Unfortunately, he passed away on 15.02.2021 leaving behind his wife Suman Devi, three minor sons and four daughters. Smt. Suman Devi, the widow, applied for the grant of license under compassionate allotment in view of the Government Order dated 05.08.2019. She was informed that as she was not having the requisite qualification, she was not entitled for the appointment as dealer of fair price shop under the government order as Sub-rule 3 of Rule IV provides for eligibility.

4. Facing with financial problem she made an application that dealership may be allotted to her daughter, present petitioner, on 26.05.2021, as she is dully qualified as per the government order. The said application is pending consideration before the authorities.

5. Sri Rakesh Dubey, learned counsel for the petitioner, submitted that the definition of word "family' under the Government Order dated 05.08.2019 excludes married daughter and only the unmarried daughter, legally separated daughter and widowed daughter is included for the grant of compassionate allotment in case of death of original licensee, which violates Article 14 of the Constitution of India.

6. He submitted that a married daughter cannot be excluded from the definition of family as well as under the category of daughters, and State cannot make any such distinction between the daughter of a person under various category such as unmarried, married, legally separated and widow daughter. He has relied upon the decision of Division Bench of this Court in case of **Smt. Vimla Srivastava Vs. State of U.P. & Another [Writ-C No. 60881 of 2015]** decided on 04.12.2015 wherein this Court held that exclusion of married daughters from the ambit of expression "family" in Rule 2 (c) of the Uttar Pradesh Recruitment of Dependents of Government Servants Dying-in-Harness Rules, 1974 (hereinafter referred as "Dying-in-Harness Rules') is illegal and unconstitutional being violative of Article 14 and 15 of the Constitution. Thus, the word "unmarried" in Rule 2 (c) (III) of the Dying-in-Harness Rules was struck down. Reliance has also been placed upon a decision of coordinate Bench of this Court in case of **Manjul Srivastava Vs. State of U.P. & Others [Writ-A No.**

10928 of 2020] decided on 15.12.2020 wherein this Court held as under;

"21. The severance of the offending part has made the remainder of Section 2(c) (iii) intra vires, purging it of the vice of discrimination on the ground of sex alone. What has remained back is a workable provision and is to be understood in the manner that a daughter, irrespective of her marital status, is to be regarded as a member of the deceased government servant's family, in the same manner as a son, whether married or unmarried. This Court, therefore, holds that in the definition of the deceased's family, the word "daughter' has to be read unqualified by the marital status of the daughter and it requires no further amendment to the Rules by the Government to make the right of a daughter of the deceased government servant effective under the Rules. The impugned order, therefore, passed on the basis of a reading of Rule 2(c) (iii) of the Rules with the word "daughter' qualified by the word "unmarried' since struck down by this Court in Smt. Vimla Srivastava (and followed in Neha Srivastava), is manifestly illegal. It is so as it proceeds on the basis of a statutory provision, that has been declared unconstitutional and void by this Court."

7. It was also submitted that in Section 2 (II) of Code of Civil Procedure 1908 the word "legal representative" means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or suied. According to him the married daughter being the legal representative is entitled for the compassionate allotment and the government order cannot exclude and make discrimination between the married and an unmarried daughter.

8. Learned Standing Counsel, vehemently opposing the writ petition, submitted that the provision on which reliance has been sought by the petitioner is the Dying-in-Harness Rules, which is applicable for the government servants. The judgment of Division Bench in case of **Smt. Vimla Srivastava** (Supra) was in reference to the service matter wherein the Court had struck down Rule 2 (c) (iii) on the ground that it was violative of Article 14 and 15, but in the present scenario the father of petitioner was granted license to run fair price shop in the village in pursuance to the Control Order which was prevalent at that time in the State.

9. At present the State has enforced the Uttar Pradesh Essential Commodities (Regulation of Sale and Distribution Control) Order, 2016 (hereinafter referred to as 'the Control Order, 2016') which has been issued exercising the power under Section 3 of the Essential Commodities Act, 1955 (hereinafter called as "Act of 1955") as well as the National Food Security Act, 2013 (hereinafter referred as "Act of 2013").

10. According to learned Standing Counsel the dealer is appointed by the State Government after an agreement is executed between the district authorities and the licensee to run the fair price shop. The existence of dealership depends upon the continuance of the license, which is not a matter of right but its existence upon the agreement executed between the parties.

Once the agreement comes to an end no one can claim as a matter of right to continue to proceed with the license.

11. He further urged that petitioner has been married and is residing at Village and Post Rajpur, Tehsil Chakarnagar, District Etawah, and thus not being the resident of the same village where the fair price shop exists, the license for dealership cannot be granted. He further contended that purpose for not including the married daughters is for the reason that after marriage the daughter leaves the village or the district, where the fair price shop is situated, and the object of setting up of fair price shop is for supply of essential commodities and foodgrains to the card holders attached to the shop living in the village or area, which cannot be run by a person not residing in the same vicinity.

12. He further contended that license for running the fair price shop is only granted to the person residing in the village where fair price shop is to be allotted. Clause IV (5) of the Government Order dated 05.08.2019 specifically provides that the fair price shop is to be allotted only to a local resident. As the petitioner herself has disclosed that she is not the resident of the village in which fair price shop exist and the allotment has to be made, her claim cannot be considered in the light of the statutory provisions.

13. Having heard rival submissions and perusal of record. Before proceeding to decide the issue raised in the writ petition a brief background in respect of the establishment and running of fair price shop is necessary for better appreciation. The Essential Commodities Act was enacted with the object for control of production, supply and distribution of essential commodities.

14. Section 3 of Act of 1955 provided power to the State Government to issue order for controlling and regulating the production, supply and distribution of the essential commodities. It was in exercise of this power under Section 3 of Act of 1955 that U.P. Scheduled Commodities (Regulation of Distribution) Order, 1989 was issued.

15. Thereafter came the U.P. Scheduled Commodities Distribution Order 1990 and Clause 24 of the Order provided for "rescission' of earlier Uttar Pradesh Foodgrains and Other Essential Articles Distribution Order, 1977 and Uttar Pradesh Scheduled Commodities (Regulation of Distribution) Order, 1989.

16. The U.P. Scheduled Commodities Distribution Order 1990 occupied the field for regulating and controlling the distribution of essential commodities in the State till it was superseded by Uttar Pradesh Scheduled Commodities Distribution Order, 2004 (hereinafter called as "Order of 2004").

17. The Government of India in the year 2013 implemented the National Food Security Act keeping in mind Article 47 of the Constitution of India, which mandates the States with duty to raise the level of nutrition and standard of living and to improve public health. For the first time the Government recognized the right to food of an individual. The Government implemented Targeted Public Distribution System under which foodgrains is provided

to the "eligible household" at subsidised rates. Following the Act of 2013 National Food Security Rules 2015 were implemented and, thereafter, the State Government also framed the U.P. State Food Security Rules, 2015 exercising the power under Section 40 of the Act of 2013.

18. The Central Government thereafter enacted "The Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 (hereinafter called as "Act of 2016") for providing good governance, efficient, transparent, and targeted delivery of subsidies, benefits and services, the expenditure for which is incurred from the Consolidated Fund of India, to individuals residing in India through assigning of unique identity numbers to such individuals and for matters connected therewith or incidental thereto. The validity of said Act was challenged before Supreme Court of India in case of **K.S.Puttaswamy (Retired) and Another (AADHAAR) vs. Union of India and Another (2019)** 1 SCC 1, and Apex Court upheld the validity of Act of 2016.

19. After the enactment of Act of 2013, and Act of 2016, the State Government having already framed the Rules of 2015, came out with the Control Order 2016 superseding the earlier Government Order of 20.12.2004 as well as all the Government Orders issued prior to coming of this Order.

20. The Control Order of 2016 in Clause 2 (b) defines the word "Agent", 2 (n) "Fair Price Shop", 2 (o) "Fair Price Shop Owner" and 2 (p) defines the "Family", which are extracted here as under;

"2. Definitions.- In this order, unless the contaxt otherwise requires,-

....

(b) "Agent" means a person or a co-operative society or a corporation of the State Government authorized to run a Fair Price Shop under the provision of this Order;

....

(n) "Fair Price Shop" means a shop set up as directed by the State Government under this order for distribution of foodgrains, sugar, kerosene oil etc. under various orders of Central and State Government;

(o) "Fair Price Shop Owner" means a person and includes a co-operative society authorized to run a fair price shop appointed under provisions of this order;

(p) "Family" means group of following persons,-

- Head of the Family,

- Husband/wife, including legally adopted children,

- Adult children, who are fully dependent on the head of the family,

- Unmarried, legally separated and widow daughters, and

- Fully dependent mother/Father of the head of the family."

21. Pursuant to the Control Order of 2016 the State Government issued a Government Order dated 05.08.2019 in regard to the allotment of license of vacant fair price shop and the reservation applicable therein. Sub-clause (10) of Clause IV provides that the definition of family as occurring in the Control Order of 2016 will also apply in case of the allotment of license of vacant shop which is as under;

"ग्राम प्रधान के परिवार के सदस्यों के पक्ष में उचित दर की दुकान के आवंटन का प्रस्ताव नहीं किया जायेगा। परिवार की परिभाषा, जैसा कि उ0 प्र आवश्यक वास्तु (वितरण के विनियमन का नियंत्रण) आदेश २०१६ में दी गई है, निम्नानुसार होगी :-

- परिवार का मुखिया,

- पति/पत्नी विधिक रूप से अपनाये गये दत्तक संतान सहित।

- संतान जो परिवार के मुखिया पर पूर्ण रूप से आश्रित हो।

- अविवाहित, विधिक रूप से पृथक और विधवा बेटी, और

- परिवार के मुखिया पर पूर्ण रूप से आश्रित माता/पिता"

22. The definition of family occurring in the Control Order of 2016 is not *para materia* to the definition of family occurring in Rule 2 (c) of the Dying-in-Harness Rules, which is extracted here as under;

"2(c) "family" shall include the following relations of the deceased Government servant:

(i) Wife or husband;

(ii) Sons/adopted sons;

(iii) Unmarried daughters, unmarried adopted daughters, widowed daughters and widowed daughters-in-law;

(iv) Unmarried brothers, unmarried sisters and widowed mother dependent on the deceased Government servant, if the deceased Government servant was unmarried;

(v) aforementioned relations of such missing Government servant who has been declared as "dead" by the competent Court;

Provided that if a person belonging to any of the above mentioned relations of the deceased Government servant is not available or is found to be physically and mentally unfit and thus ineligible for employment in Government service, then only in such situation the word "family" shall also include the grandsons and the unmarried granddaughters of the deceased Government servant dependent on him."

23. Under the definition of family in Dying-in-Harness Rules sons/adopted sons have been included in the definition of family whether they are dependent or not upon the head of the family. While the Control Order of 2016 takes care of the fact that the family includes head of the family alongwith all the children whether minor or major, who are totally dependent upon the head of the family, which includes both sons and daughters.

24. There is no distinction under the Control Order of 2016 between the sons and daughters and all those persons who are dependent upon the head of the family are considered under the umbrella of family. Interestingly, the dependent parents i.e. father/mother of the head of the family are also included in the definition which is not there under the Dying-in-Harness Rules.

25. The purpose for excluding the married daughter from the canopy of family under the Control Order of 2016 is that a fair price shop runs upon a license granted by the State agencies in favour of a dealer pursuant to which an agreement is executed. The dealer is an agent of the State who is to help in distribution of foodgrains and other essential commodities to the card holders belonging to "eligible household" and "Antyodaya household".

26. The dealership of fair price shop is given by the State for ensuring the supply of foodgrains by the Government of India as well as the State Government to the citizens fulfilling the object of Article 47 of the Constitution of India. The dealership of fair price shop is not a vested right and petitioner cannot claim it to be a fundamental right to carry on such a business, but the very existence of dealership dependents upon the execution of an agreement with the State authorities.

27. Once the daughter is married outside the village and resides in a different matrimonial village the dealership cannot be granted to her under the compassionate allotment on the death of her father/mother as it is not possible for her to run the shop and distribute the essential commodities to the card holders residing at her paternal village.

28. The parity claimed for recruiting the dependents of government servants under Dying-in-Harness Rules is distinguishable in the present set of case, as the Division Bench of this Court found that the Legislature had made distinction between the sons and daughters, while the married son was made eligible under the Dying-in-Harness Rules for compassionate appointment but the married daughter was excluded from the zone of consideration.

29. Under the Control Order of 2016 no such distinction exists between the sons and daughters and all the children who are dependent upon the head of the family including the father and mother of the head of the family are embraced with the definition of the word "family".

30. In **Smt. Vimla Srivastava (Supra)** the Division Bench had beautifully noticed the distinction which has been made in our society between the son and daughter. Relevant paragraphs are extracted here as under;

"The issue before the Court is whether marriage is a social circumstance which is relevant in defining the ambit of the expression "family" and whether the fact that a daughter is married can constitutionally be a permissible ground to deny her the benefit of compassionate appointment. The matter can be looked at from a variety of perspectives. Implicit in the definition which has been adopted by the state in Rule 2 (c) is an assumption that while a son continues to be a member of the family and that upon marriage, he does not cease to be a part of the family of his father, a daughter upon marriage ceases to be a part of the family of her father. It is discriminatory and constitutionally impermissible for the State to make that

assumption and to use marriage as a rationale for practicing an act of hostile discrimination by denying benefits to a daughter when equivalent benefits are granted to a son in terms of compassionate appointment. Marriage does not determine the continuance of the relationship of a child, whether a son or a daughter, with the parents. A son continues to be a son both before and after marriage. A daughter continues to be a daughter. This relationship is not effaced either in fact or in law upon marriage. Marriage does not bring about a severance of the relationship between a father and mother and their son or between parents and their daughter. These relationships are not governed or defined by marital status. The State has based its defence in its reply and the foundation of the exclusion on a paternalistic notion of the role and status of a woman. These patriarchal notions must answer the test of the guarantee of equality under Article 14 and must be held answerable to the recognition of gender identity under Article 15."

31. The Division Bench after noticing the decisions of various High Courts in respect of discrimination between different sex had struck down the word "unmarried" in Rule 2 (c) (iii) of Dying-in-Harness Rules being unconstitutional and violative of Article 14 and 15 of the Constitution. Relying on the said judgment coordinate Bench of this Court in **Manjul Srivastava (Supra)** had also taken similar view.

32. But the present dispute is in regard to allotment of a dealership of fair price shop on the death of father of petitioner, who is married and residing at a different village. The authorities had not refused to grant dealership to the eligible dependents of the deceased Nekram. The argument raised by learned counsel as to legal representative as provided in Section 2 (II) of the Code of Civil Procedure which includes the petitioner does not have any relevance in present scenario as the existence of dealership arises out of an agreement between the parties. Once the agreement has come to an end on the death of Nekram the license can only be granted on fulfilling the conditions laid down in the Government Order dated 05.08.2019. Sub-clause 5 of Clause IV categorically provides that applicant has to be local resident.

33. The concept of allotting dealership to a local resident is firstly that he is acquainted with the most of the card holders as they are living in same village and secondly his availability in attending and running the fair price shop. The Government as well as the Apex Court have recognized that right to food is part of Article 21 of the Constitution. In case, dealership is given to an outsider who is unable to run the fair price shop due to his/her unavailability the very purpose for enacting the Act of 2013 and Control Order of 2016 would be rendered otiose.

34. That Sub-clause 5 of Clause IV of the government order of 2019 specifically provides that applicant should be a local resident. Petitioner is admittedly a resident of a different village, and not of the village where the fair price shop is to be allotted. The validity of the said condition of the government order has not been challenged in the writ petition, and only challenge has been made to declare the word "unmarried" as unconstitutional from the definition of family prescribed under Sub-clause 10 of Clause IV.

35. Once the government order specifically provides the applicant to be the resident of the same village where the shop has to be allotted, no such allotment can be made to an outsider. The argument of petitioner's counsel that married daughter should also be included in the definition of the word "family", in the present scenario cannot be accepted as the license is granted only on the fulfillment of the conditions prescribed under the government order of 2019. Petitioner being not able to fulfill the essential conditions cannot be granted such license.

36. More so, the Control Order of 2016 does not make any distinction between the sons and daughters of a license holder, as in case of Rule 2 (c) of the Dying-in-Harness Rules. The definition of family occurring in the Control Order of 2016 as well as the government order of 2019 embraces the word "dependant child", which also includes the dependant father and mother. Argument that married daughter had been excluded creates gender bias cannot be accepted, as the very purpose is the distribution of food grains to the card holders attached to the ration shop situated in village. Once the daughter of a licensee is married outside the village, she cannot continue to run the fair price shop and distribute ration. The sole purpose of enacting the Act of 2013 and the Control Order of 2016 is that the food reaches the last person of the society and a licensee being only an agent of the State through which the target is achieved by both the Central Government and the State Government.

37. Having considered the facts and circumstances of the case, this Court finds that no ground is made for declaring the word "unmarried" as unconstitutional from the definition of family provided under Sub-clause 10 of Clause IV of the Government Order dated 05.08.2019.

38. Writ petition fails and is hereby dismissed.

(2022)01ILR A794
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.12.2021

BEFORE

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

Writ C No. 22819 of 2021

Ram Gopal Chaturvedi & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Ramesh Kumar Shukla, Sri Prakhar Shukla

Counsel for the Respondents:
C.S.C., Sri Bharat Pratap Singh, Sri Dhananjay Awasthi

A. NCET Regulation, 2014 – Diploma in Elementary Education (D.El.Ed.) Course – Admission – Eligibility criteria – Impugned advertisement mentioned criteria different from the criteria required under Regulation of 2014 – Validity challenged – Policy matter – Scope of interference – Noting the submission of the St.'s counsel that it is a policy matter and the policy decisions of the St. are not to be disturbed/interfered with unless they are found to be grossly arbitrary or irrational, the High Court directed the petitioner to file representation before the authority and further directed the authority to decide it preferably within three months. (Para 22 and 24)

Writ petition disposed of. (E-1)

List of Cases cited :-

1. Bijay Kumar & ors.. Vs St. of U.P. & ors..; 2015 (2) ALJ 71

2. Writ A No. 5981 of 2019; Suraj Kumar Tripathi Vs St. of U.P. & 3 Ors..

3. Government of Maharashtra & ors. Vs Deokar's Distillery; (2003) 5 SCC 669

4. Edukanti Kistamma (dead) through Lrs. & ors. Vs S.Venkatareddy (dead) through Lrs. & ors.; (2010) 1 SCC 756

5. Vasavi Engineering College Parents Association Vs St. of Telangana & Ors.; (2019) 7 SCC 172

6. Fertilizer Corporation Kamgar Union (Regd.), Sindri Vs U.O.I.; (1981) 1 SCC 568

ors.; (2007) 4 SCC 737

8. Yogesh Kumar & ors. Vs Government Of NTC Delhi; (2003) 3 SCC 548

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

1. Heard Sri Prakhar Shukla, Advocate holding brief of Sri Ramesh Kumar Shukla, learned counsel for the petitioners, Sri Shailendra Singh, learned Standing Counsel for the State-respondent and Sri Bharat Pratap Singh, learned counsel for the respondent no.3-NCTE.

2. This writ petition has been filed interalia for the following relief:-

"(i) issue a writ, order or direction in the nature of certiorari directing to the respondent no.3 to quash/cancel the admission process which is started from 20.07.2021 in compliance of Govt. Orders vide G.O. No.9/2021/402/68-4-2021-9(3) dated 16.06.2021 and G.No.426/68-4-2019-2067/2013 Basic Siksha Anubhag-4 (Annexure No.1)."

3. The petitioners are aggrieved by the new eligibility criteria for admission in Diploma in Elementary Education (D.El.Ed) formerly known as B.T.C examination as is directed by the Govt. Orders vide G.O. No.9/2021/402/68-42021-9(3) dated 16.06.2021 and G.No. 426/68-4-2019-2067/2013, Basic Siksha Anubhag-4.

4. The brief facts of the case is that the petitioners have passed senior secondary examination (10+2), hence they were eligible for appearing in D.El.Ed examination as per the rules of National Council for Teacher Education. The applications were invited by U.P. Examination Regulatory Authority, Prayagraj through order No.9/2021/402/68-4-2021-4-9(3)/2021 Basic Siksha Anubhag-4, Date 16.06.2021 from all eligible candidates against the vacancies in government/private colleges in State of U.P. The eligibility criteria as mentioned in the advertisement is that the candidates should have passed High School or equivalent, Intermediate (+2) or equivalent and graduation from any recognized University. The eligibility criteria as per the advertisement is as under:-

"शैक्षिक योग्यता-D.EL.Ed प्रशिक्षण में चयन हेतु ऐसे अभयार्थी ऑनलाइन आवेदन करने के पात्र होंगे, जिन्होन आवेदन पत्र भरने के पूर्व माध्यमिक शिक्षा परिषद, उत्तर प्रदेश प्रयागराज/सीबीएसई/आईसीएसई से मान्यता प्राप्त संस्थानो से हाई स्कूल व उसके समकछ तथा इंटरमीडिएट व उसके समकछ घोषित परीक्षा और विधि द्वारा स्थापित और UGC से मान्यता प्राप्त विश्वविद्यालय/ महाविद्यालय से स्नातक परीक्षा न्यूनतम 50 प्रतिशत अंको के साथ उत्तीर्ण की हो। अनुसुचित जाति /

अनुसूचित जनजाति / अन्य पिछड़ा वर्ग / विकलांग / स्वतंत्र सग्राम सेनानी आश्रित / भूतपूर्व सैनिक (स्वयं) के अभ्यर्थियों को न्यूनतम अंको में 05 प्रतिशत की छूट दी जाएगी।"

5. Learned counsel for the petitioners submits that the petitioners are aggrieved by the new eligibility criteria for D.El.Ed course as mentioned in the advertisement, which is against the regulations prescribed by the National Council for Teachers Education (hereinafter referred to as 'NCTE') as well as against the criteria as is being followed in other States. The requirements of pursuing the aforesaid course as laid down by the NCTE regulation of 2014 is that the candidates should have at least 50% in Higher Secondary (+2) examination or its equivalent examination.

6. Learned counsel for the petitioners has also pointed out that the letter dated 09.08.2021 of Director Rajya Shaikshik Anusandhan Evam Prashikshan Parishad Uttar Pradesh, Lucknow to the Sachiv Pariksha Niyamak Pradhikari, Prayagaj, U.P., wherein it has been specifically stated that for the purpose of D.El.Ed examination, the minimum qualification is recommended to be fixed as "Intermediate" and has directed him to proceed accordingly.

7. Since deliberations were going on with respect to the eligibility criteria for the aforesaid course and sufficient application forms were not received in comparison to the number of vacant seats, therefore, the last date of submission of the form of D.El.Ed. Course was extended up to 15.09.2021. Regarding the vacant seats, a press release note has also been issued showing that the vacant seats have not been fulfilled till date.

8. Reference may also be made to the norms and standards for diploma in elementary teacher education Programme leading to Diploma in Elementary Education (D.El.ED) as contained in Appendix-2 of NCTE Regulations 2014 which provides eligibility for admission to the training course. Relevant Clause '3.2' reads as under:-

*"**3.2 Eligibility** (a) Candidates with at least 50% marks in the higher secondary (10+2) or its equivalent examination are eligible for admission.*

(b) The reservation and relaxation in marks for SC/ST/OBC/PWD and other categories shall be as per the rules of the Central Government/State Government, whichever is applicable."

9. Learned counsel for the petitioners further submits that the standards for Elementary Education Programme fixed by the NCTE, 2014 would prevail over the said regulations as is laid down in the judgment of this Court in the case of ***Bijay Kumar and Ors. vs. State of U.P. and Ors. reported in 2015 (2) ALJ 71 and Suraj Kumar Tripathi vs. State of U.P. and 3 Ors. passed in Writ-A No. 5981 of 2019.***

10. Mr. Bharat Pratap Singh, learned counsel for the respondent no.3-NCTE does not dispute the aforesaid facts.

11. On the other hand, Mr. Shailendra Singh, learned Standing Counsel for the State-respondents submits that the admission in the D.El.Ed course has to be done in accordance with eligibility criteria mentioned in the Government Order dated 25.06.2019, which provides that the candidates should have passed High School (Class-X) or equivalent, Intermediate (Class-XII) or

equivalent and graduation from any recognized University, securing 50% marks in all the courses. As the aforesaid Government Order and advertisement mentioning the condition of possessing the new eligibility criteria has not been challenged, therefore, the relief prayed by the petitioners to admit them in D.El.Ed course cannot be granted. In support of his contention, learned Standing Counsel has relied upon the judgments of the Apex Court in the case on ***Government of Maharashtra and others vs. Deokar's Distillery*** reported in ***(2003) 5 SCC 669 and Edukanti Kistamma (dead) through Lrs. and others vs. S.Venkatareddy (dead) through Lrs. and others reported in (2010) 1 SCC 756,*** wherein the Apex Court has held that without challenging the Government Order/basic order, consequential relief cannot be granted to the petitioners.

12. Learned Standing Counsel further submits that after obtaining diploma in elementary education (D.El.Ed), the petitioners will claim appointment on the post of teacher in primary education, qualification of which is mentioned in U.P Basic Education Teachers Service Rules, 1981 (hereinafter referred as "Rule 1981").

13. Learned Standing Counsel further submits that in a controversy with respect to issuance of appointment letters for the post of Assistant Teacher in primary school, objections were raised with respect to validity of the Diploma in Education as obtained by the candidates, was prior to completion of graduation. The objection has raised as per Rule 2(q) 1 of the 1981, which reads as follows:-

"Training means training course recognized by the Government from time to time to teach children from class I to VIII for which graduates are eligible for admission."

The aforesaid-mentioned Rule contemplates only graduates appearing in the training course and obtaining a Diploma on completion thereof, shall be eligible for appointment on the post of Assistant Teacher.

14. However, the Court while dealing with the controversy permitted those candidates, who have completed their graduation course prior to completion of Diploma in Elementary Education (D.El.Ed.) to be eligible for issuance of appointment letters but did not deal with eligibility criteria as required for admission in D.El.Ed. / training course and it was left open for the respondents to deal with the issue.

15. Keeping in mind the qualification as required for the post of Assistant Teacher, who should possess training as recognized by the government from time to time, for which graduates were eligible, the Government order mentioning the new eligibility criteria has been issued.

16. Learned Standing Counsel further submits that the policy decision has been taken by the State Government changing the eligibility criteria for admission in D.El.Ed. course, which cannot be judicially reviewed by this Court. In support of his contention, he has relied upon the judgment of the Apex Court in the case of ***Vasavi Engineering College Parents Association ..... Vs State of Telangana & Ors.*** reported in ***(2019) 7 SCC 172***, wherein it has been held that the Court can neither act an appellate authority nor can usurp

jurisdiction of decision maker and make the decision itself. Until and unless the same is arbitrary or in violation of any provision of law or is infringing the fundamental rights of any person.

17. In ***Fertilizer Corporation Kamgar Union (Regd.), Sindri vs Union of India, reported in (1981) 1 SCC 568,*** it was also observed:-

"35. ....We certainly agree that judicial interference with the administration cannot be meticulous in our Montesquien system of separation of powers. ***The court cannot usurp or abdicate, and the parameters of judicial review must be clearly defined and never exceeded***. If the directorate of a government company has acted fairly, even if it has faltered in its wisdom, the court cannot, as a super auditor, take the Board of Directors to task. This function is limited to testing whether the administrative action has been fair and free from the taint of unreasonableness and has substantially complied with the norms of procedure set for it by rules of public administration."

18. Reference may also be made to the judgment of the Apex Court in the case of ***Directorate of Film Festivals & Ors. Vs. Gaurav Ashwin Jain & Ors., reported in (2007) 4 SCC 737,*** where the Apex Court held as follows:-

"16. The scope of judicial review of governmental policy is now well defined. Courts do not and cannot act as Appellate Authorities examining the correctness, suitability and appropriateness of a policy nor are courts Advisors to the executive on matters of policy which the executive is entitled to formulate."

19. Learned Standing Counsel further submits that in the present case as eligibility of training course as mentioned in Rule 1981 is graduation, hence the Government Order dated 16.06.2021 has been issued.

20. Learned Standing Counsel submits that admission to any course should be made strictly in accordance with terms of the advertisement and the recruitment rules. In support of his contention, he has relied upon the judgment of Apex Court in the case of ***Yogesh Kumar And Others vs Government Of NTC Delhi*** reported in ***(2003) 3 SCC 548***.

21. Learned Standing Counsel further submits that standards for diploma in elementary teacher education Programme fixed by the NCTE Regulations, 2014 would prevail over the regulations only, in case they are adopted by the State Government. In the present case, there is nothing on record to show as to whether the NCTE regulation, 2014 has been adopted by the State Government or not?

22. With respect to submission made by learned counsel for the petitioners that other States are following the NCTE regulations, 2014, according to which, the eligibility criteria for D.El.Ed. course is that the candidates should have at least 50% marks in higher Secondary (+2) examination or its equivalent examination, learned Standing Counsel states that it is a policy matter and the policy decisions of the State are not to be disturbed/interfered with unless they are found to be grossly arbitrary or irrational.

23. Counsel for the parties agree that the writ petition may be disposed of finally at this stage without calling for further affidavits specifically in view of the order proposed to be passed today.

24. Considering the facts and circumstances of the case and submissions made by the parties, this writ petition is disposed of with a direction to the petitioners to make a detailed representation before the respondent no.2 for redressal of their grievances. If any such representation is made, the respondent no.2-Sachiv, Pariksha Niyamak Pradhikari, U.P., Elanganj Prayagraj, shall make all endeavours to consider and decide the same, in accordance with law, preferably within a period of three months from the date of receipt of the said representation.

25. Accordingly, this writ petition is disposed of.

(2022)01ILR A799
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.12.2021

BEFORE

THE HON'BLE RAJESH BINDAL, C.J.
THE HON'BLE PIYUSH AGRAWAL, J.

Writ C No. 23806 of 2021

Shyoraj Singh & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Gautam Kumar

Counsel for the Respondents:
Sri Ramanand Pandey, Addl.C.S.C.

A. Acquisition law – Land Acquisition Act, 1894 – Section 48 – Application – Compensation received after acquisition, however an application u/s 48 to withdraw from acquisition was filed – Maintainability – Held, the case of the petitioners will not fall within the scope of Section 48 of the 1894 Act, for the reason that it is the definite case of the St. and is even evident from the material on record that the possession of the land was taken immediately after acquisition and the St. had transferred the same to the Corporation, which had even developed an industrial eSt. thereon. (Para 19)

B. Acquisition law – Vesting of land in St. – It's effect – Possession retained by the private person even after acquisition – Changing in the status of private owner to the trespasser – Held, after acquisition of land and passing of award, the land vests in the St. free from all encumbrances. The vesting of land with the St. is with possession – Any person retaining the possession thereafter has to be treated trespasser – When large chunk of land is acquired, the St. is not supposed to put some person or police force to retain the possession and start cultivating on the land till it is utilized. The Government is also not supposed to start residing or physically occupying the same once process of the acquisition is complete – Indore Development Authority's case is followed. (Para 20)

C. Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 – S. 101 – Return of the land claimed – Acquisition took place in 1987-88 – Applicability of the Act of 2013 – Held, it is not the case of the petitioners that acquisition of the land is under the provisions of the 2013 Act – Rather the acquisition process was completed way back in the year 1987-88 under the provisions of the 1894 Act. Hence, the provisions of Section 101 of the 2013 Act will have no application in the case in hand. (Para 23)

Writ petition dismissed. (E-1)

List of Cases cited:-

1. Om Prakash & anr.Vs St. of U.P. & ors.; (1998) 6 SCC 1

2. Indore Development Authority Vs Manoharlal & ors.; AIR 2020 SC 1496

(Delivered by Hon'ble Rajesh Bindal, C.J.)

1. The present petition has been filed by the petitioners impugning the notice dated August 10, 2021 issued by U.P. State Industrial Development Corporation (hereinafter referred to as "the Corporation") directing the petitioners to remove the unauthorized construction raised on the land which was already allotted to an industrial unit, otherwise action was to be taken against the petitioners in accordance with law. Further prayer has been made seeking a direction to the respondent no. 1 to decide the application filed by petitioners under Section 48 of the Land Acquisition Act, 1894 (hereinafter referred to as "1894 Act").

2. Learned counsel for the petitioners submitted that the land was sought to be acquired for the use by Corporation. Emergency provision of Section 17 of the 1894 Act were invoked. Notification under Section 6 was issued on April 15, 1986. Thereafter award was passed by Land Acquisition Officer (hereinafter referred to as "LAO"). The possession of the land was never taken by the State. The petitioners have raised construction thereon where cow-shed and a school is running with about 400 students studying therein. The project for which the land was acquired has already been completed and the land in question is lying surplus.

3. He further referred to Section 17 of U.P. Urban Planning and Development Act, 1973 (hereinafter referred to as "1973 Act") to state that in case acquired land is not utilized for a period of five years, the landowner can seek to return the same back to him. In the case in hand, for the last about three decades land in question has not been utilized, hence, petitioners have a right to get their land back. They are ready to deposit the compensation back.

4. Though not pleaded in the writ petition, the learned counsel for the petitioners also sought to invoke the provisions of Section 101 of Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (hereinafter referred to as "2013 Act") to submit that even in terms of the aforesaid provision, land in question deserves to be returned back to the petitioners as the land was not utilized within five years of acquisition. They will suffer irreparable loss. As regards allotment of the land to any other person, as has been mentioned in the show cause notice, the argument raised is that neither any lease-deed has been executed by the Corporation in favour of the allottee nor any construction has been raised by him, hence, otherwise also that allotment has to be cancelled.

5. He further submitted that provisions of Section 17 of the 1894 Act were wrongly invoked for the reason that acquisition in question was merely for development of an industrial estate. In support of the argument, reliance is placed upon the judgment of Hon'ble Supreme Court in **Om Prakash and another Vs. State of U.P. and others (1998) 6 SCC 1.**

6. On the other hand, learned counsel for the State submitted that the petitioners do not have any right to claim that the land,

which already stood acquired and for which the compensation has admittedly been received by the petitioners, be returned back to them. The acquisition proceedings having been completed, the petitioners do not have any right to invoke Section 48 of 1894 Act. The possession of the land was taken immediately after acquisition and handed over to the Corporation, which had even carved out plots and sold to number of allottees. Merely because on some portion of the land the petitioners have made certain construction after encroaching upon the same, will not entitle them to claim its release from acquisition.

7. The provisions of Section 17 of the 1973 Act will not come to the rescue the petitioners for the reason that the land in question was utilized immediately after acquisition as it was transferred to the Corporation. The development activities started immediately and the industrial estate was developed.

8. The provisions of Section 101 of the 2013 Act are also not applicable to the case in hand as the acquisition in question is not under the aforesaid Act. It is further submitted that it is too late to allow the petitioners to challenge the acquisition which already stood completed way back in the year 1987-88 that too after receiving compensation alleging that provisions of Section 17 of 1894 Act were wrongly invoked. The application under Section 48 of 1894 Act was filed by the petitioners only after notice was issued by the Corporation to the petitioners for removal of encroachment made on the part of the land. The petitioners otherwise also cannot invoke the provisions of Section 48 of 1894 Act as the possession of the land in question was taken immediately after acquisition and the same was transferred to the Corporation, which in turn had even allotted the plots carved out thereon. Any construction raised by the petitioners was unauthorized.

9. In response, learned counsel for the petitioners submitted that even as per the notice issued to the petitioners, the allotment of plot was made by Corporation in the year 2007. It was much beyond five years period as provided in Section 17 of the 1973 Act and Section 101 of the 2013 Act. Hence, the land was not utilized before that.

10. We have heard learned counsel for parties and perused the relevant record.

11. Section 48 of the Land Acquisition Act, 1894, on which reliance was placed by the learned counsel for the petitioners, is extracted below:

"48. Completion of acquisition not compulsory, but compensation to be awarded when not completed.- (1) Except in the case provided for in section 36, the Government shall be at liberty to withdraw from the acquisition of any land of which possession has not been taken.

(2) Whenever the Government withdraws from any such acquisition, the Collector shall determine the amount of compensation due for the damage suffered by the owner in consequence of the notice or of any proceedings thereunder, and shall pay such amount to the person interested, together with all costs reasonably incurred by him in the prosecution of the proceedings under this Act relating to the said land.

(3) The provisions of Part III of this Act shall apply, so far as may be, to the

determination of the compensation payable under this section."

12. Section 17 of the U.P. Urban Planning and Development Act, 1973 is reproduced as under:

"17. Compulsory acquisition of land.- (1) If in the opinion of the State Government any land is required for the purpose of development or for any other purpose, under this Act, the State Government may acquire such land under the Provisions of the Land Acquisition Act,1894:

Provided that, any person from whom any land is so acquired may after the expiration of a period of five years from the date of such acquisition apply to the State Government for restoration of that land to him on the ground that the land has not been utilized within the period for the purpose for which it was acquired, and if the State Government is satisfied to that effect, it shall order restoration of the land to him on re-payment of the charges which were incurred in connection with the acquisition together with interest at the rate of twelve per cent per annum and such development charges if any as may have been incurred after acquisition.

(2) Where any land has been acquired by the State Government, that Government may, after it has taken possession of the land, transfer the land to the Authority or any local authority for the purpose, for which the land has been acquired on payment by Authority or the local Authority of the compensation awarded under that Act and of the charges incurred by the Government in connection with the acquisition."

13. Section 101 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 reads as under:

"101. Return of unutilised land.- When any land acquired under this Act remains unutilised for a period of five years from the date of taking over the possession, the same shall be returned to the original owner or owners or their legal heirs, as the case may be, or to the Land Bank of the appropriate Government by reversion in the manner as may be prescribed by the appropriate Government."

14. The basic facts, which are not in dispute in the present petition, are that notification under Section 4 of 1894 Act, was issued on April 11, 1986. After invoking the provisions of Section 17 of 1894 Act dispensing with the filing of the objections under Section 5-A thereof, notification under Section 6 of the 1894 Act was issued on April 15, 1986. The award was pronounced by the LAO immediately thereafter.

15. It remained undisputed that the petitioners' land was acquired and they had also received the compensation in terms of their entitlement. The stand taken by the respondents is that immediately after acquisition process of the land was completed, the possession thereof was taken from the landowners and it was handed over to the Corporation for development as an industrial estate. In fact, the industrial estate stands developed and the plots have been allotted to various persons where industrial units have also been setup. Even in the case of the petitioners, in the show-cause notice issued to them for removal of unauthorized

construction, it has been stated that a plot carved out thereon has been allotted.

16. As far as the argument raised by learned counsel for the petitioners for invoking Section 17 of the 1973 Act is concerned, the same is to be noticed and rejected. A perusal of Section 17 of the 1973 Act shows that in case the acquired land is not utilized for a period of five years from the date of its acquisition, the land owner can apply to the State for restoration thereof. If the State Government is satisfied that the land had not been utilized for a period of five years for the purpose it was acquired, it can order restoration thereof to the landowners on re-payment of the amount incurred for acquisition along with interest thereon including the development charges, if any.

17. In the case in hand, the definite stand of the State on the record is that immediately after acquisition of the land, which was for development of an industrial estate by the Corporation, the possession thereof was taken and handed over to the Corporation which had even carved out the plots thereon and industrial estate stood developed. Number of industrial units are operating. A perusal of notice dated August 10, 2021, issued to the petitioners for removal of the unauthorized construction also establishes this fact. It is mentioned therein that the plot on which the petitioners had raised unauthorized construction is part of plot allotted to Smt. Amarjeet Kaur way back on September 28, 2007, hence the claim that petitioners are entitled to invoke Section 17 of the 1973 Act for restoration of the land to them on the ground that the same has not been utilized is totally misconceived and hence, deserves to be rejected.

18. As far as challenge to the acquisition of land at this stage on the ground that invocation of Section 17 of the 1894 Act was illegal, the argument is to be noticed and rejected for the reason that process of acquisition was completed way back in the year 1987-88. The petitioners have even received the compensation and did not raise any objection immediately thereafter. They cannot be permitted to challenge the acquisition three decades after the process of acquisition was completed.

19. Section 48 of the 1894 Act provides that the Government is at liberty to withdraw from acquisition any land of which possession has not been taken. In the case in hand, the petitioners filed application under Section 48 of the 1894 Act after they were issued notice by the Corporation for removal of unauthorized construction on the acquired land for which even they had received the compensation. The case of the petitioners will not fall within the scope of Section 48 of the 1894 Act, for the reason that it is the definite case of the State and is even evident from the material on record that the possession of the land was taken immediately after acquisition and the State had transferred the same to the Corporation, which had even developed an industrial estate thereon. The part of the land, which is in possession of the petitioners, is forming part of a plot which stood allotted to Amarjeet Kaur, way back in 2007. Hence, no direction can be issued to the State even for consideration of the application filed by the petitioners invoking Section 48 of the 1894 Act.

20. The issue as to what is meant by "possession of the land by the State after its acquisition" has also been considered by

Constitution Bench of Hon'ble Supreme Court in **Indore Development Authority Vs. Manoharlal and others AIR 2020 SC 1496**. It is opined therein that after the acquisition of land and passing of award, the land vests in the State free from all encumbrances. The vesting of land with the State is with possession. Any person retaining the possession thereafter has to be treated trespasser. When large chunk of land is acquired, the State is not supposed to put some person or police force to retain the possession and start cultivating on the land till it is utilized. The Government is also not supposed to start residing or physically occupying the same once process of the acquisition is complete. If after the process of acquisition is complete and land vest in the State free from all encumbrances with possession, any person retaining the land or any re-entry made by any person is nothing else but trespass on the State land. Relevant paragraphs 244, 245 and 256 are extracted below:

"244. Section 16 of the Act of 1894 provided that possession of land may be taken by the State Government after passing of an award and thereupon land vest free from all encumbrances in the State Government. Similar are the provisions made in the case of urgency in Section 17(1). The word "possession" has been used in the Act of 1894, whereas in Section 24(2) of Act of 2013, the expression "physical possession" is used. It is submitted that drawing of panchnama for taking over the possession is not enough when the actual physical possession remained with the landowner and Section 24(2) requires actual physical possession to be taken, not the possession in any other form. When the State has acquired the land and award has been passed, land vests in the State Government free from all encumbrances. The act of vesting of the land in the State is with possession, any person retaining the possession, thereafter, has to be treated as trespasser and has no right to possess the land which vests in the State free from all encumbrances.

245. The question which arises whether there is any difference between taking possession under the Act of 1894 and the expression "physical possession" used in Section 24(2). As a matter of fact, what was contemplated under the Act of 1894, by taking the possession meant only physical possession of the land. Taking over the possession under the Act of 2013 always amounted to taking over physical possession of the land. When the State Government acquires land and drawns up a memorandum of taking possession, that amounts to taking the physical possession of the land. On the large chunk of property or otherwise which is acquired, the Government is not supposed to put some other person or the police force in possession to retain it and start cultivating it till the land is used by it for the purpose for which it has been acquired. The Government is not supposed to start residing or to physically occupy it once possession has been taken by drawing the inquest proceedings for obtaining possession thereof. Thereafter, if any further retaining of land or any re-entry is made on the land or someone starts cultivation on the open land or starts residing in the outhouse, etc., is deemed to be the trespasser on land which in possession of the State. The possession of trespasser always inures for the benefit of the real owner that is the State Government in the case.

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256. Thus, it is apparent that vesting is with possession and the statute has provided under Sections 16 and 17 of

the Act of 1894 that once possession is taken, absolute vesting occurred. It is an indefeasible right and vesting is with possession thereafter. The vesting specified under Section 16, takes place after various steps, such as, notification under Section 4, declaration under Section 6, notice under Section 9, award under Section 11 and then possession. The statutory provision of vesting of property absolutely free from all encumbrances has to be accorded full effect. Not only the possession vests in the State but all other encumbrances are also removed forthwith. The title of the landholder ceases and the state becomes the absolute owner and in possession of the property. Thereafter there is no control of the landowner over the property. He cannot have any animus to take the property and to control it. Even if he has retained the possession or otherwise trespassed upon it after possession has been taken by the State, he is a trespasser and such possession of trespasser enures for his benefit and on behalf of the owner." *(emphasis supplied)*

21. Keeping in view the above enunciation of law by Hon'ble the Supreme Court in **Indore Development Authority's case (supra)**, in the case in hand on the undisputed facts on record it can safely be opined that in the present case the acquisition proceedings stood completed. The award was announced, the compensation was received by petitioners, hence the land vested in the State with possession, free from all encumbrance. In case, the petitioners have raised any construction, they are the trespassers and are to be dealt with as such. Once the possession of the land already stood vested in the State, no question arises for invocation of Section 48 of 1894 Act.

22. Though it is not pleaded in the petition, however, at the time of argument, learned counsel for the petitioners sought to rely upon the provision of Section 101 of the 2013 Act for return of the land to the petitioners, which according to them had not been utilized after acquisition. As the argument is legal, we deem it appropriate to deal with the same.

23. A bare perusal of Section 101 of the 2013 Act shows that the same can be invoked or the power thereunder can be exercised by the State if the acquisition had been carried out under the provisions of the 2013 Act. In the case in hand, it is not the case of the petitioners that acquisition of the land is under the provisions of the 2013 Act. Rather the acquisition process was completed way back in the year 1987-88 under the provisions of the 1894 Act. Hence, the provisions of Section 101 of the 2013 Act will have no application in the case in hand. The issue was dealt with by a Constitution Bench of Hon'ble Supreme Court in **Indore Development Authority's case (supra**). Para 361 thereof, which deals with the situation, is extracted below:

"361. Section 24 deals with lapse of acquisition. Section 101 deals with the return of unutilized land. Section 101 cannot be said to be applicable to an acquisition made under the Act of 1894. The provision of lapse has to be considered on its own strength and not by virtue of Section 101 though the spirit is to give back the land to the original owner or owners or the legal heirs or to the Land Bank. Return of lands is with respect to all lands acquired under the Act of 2013 as the expression used in the opening part is "When any land, acquired under this Act remains unutilized". Lapse, on the other

hand, occurs when the State does not take steps in terms of Section 24(2). The provisions of Section 101 cannot be applied to the acquisitions made under the Act of 1894. Thus, no such sustenance can be drawn from the provisions contained in Section 101 of the Act of 2013. Five years' logic has been carried into effect for the purpose of lapse and not for the purpose of returning the land remaining unutilized under Section 24(2)."

24. In view of the aforesaid view expressed by the Constitution Bench of Hon'ble Supreme Court in **Indore Development Authority's case (supra)**, even the argument raised for release of the land by invoking Section 101 of 2013 Act also deserves to be rejected as acquisition in question is not under the 2013 Act.

25. For the reasons mentioned above, we do not find any merit in the present petition. The same is, accordingly, dismissed.

(2022)01ILR A806
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.12.2021

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE VIKRAM D CHAUHAN, J.

Writ C No. 26844 of 2021

Vinay Kumar Sharma ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Kunwar Tejandra Bahadur, Sri Arvind Kumar Tripathi

Counsel for the Respondents:
C.S.C.

A. National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999 – Section 14 – Appointment of guardian for mentally retarded person – Application filed before the District Magistrate was neither in prescribed format nor it provide the provision, under which it was filed – Effect – Held, it is trite of law that non-mentioning of a provision of law in the application itself will not invalidate the proceedings – The aforesaid issues are technical issues and the wheels of substantive justice cannot be stopped only on the ground that the application of the petitioner before the District Magistrate is not in the prescribed form – Aforesaid defect is a defect which is curable. (Para 27 and 29)

B. Constitution of India – Article 21 – Fundamental right of mentally retarded person to have a guardian – Held, a person with disability, including mental retardation, cannot be permitted to be without a guardian – The law envasages protection and care to the aforesaid person with disability, including mental retardation and the same is in consequence with fundamental right under Article 21 of the Constitution of India – The person with disability, including mental retardation, is entitled under law to care and protection by the St. Authorities so as to bring them within the mainstream of life, care and protection. (Para 30)

Writ petition disposed of. (E-1)

List of Cases cited:-

1. High Court of Gujarat Vs Gujarat Kishan Mazdoor Panchayat, (2003) 4 SCC 712

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

1. The present writ petition has been filed by the petitioner for issuance of a direction to the District Magistrate, Bijnor

to consider the application of the petitioner to issue a certificate in his favour pertaining to guardianship of his mentally and physically disabled brother namely, Sandeep Kumar Sharma.

2. Heard learned counsel for the petitioner and learned Standing Counsel for the respondents.

3. The counsel for the petitioner contends that the father of the petitioner, Late Ramesh Prasad Sharma had three sons, namely, Sandeep Kumar Sharma, Vinay Kumar Sharma and Ankit Kumar Sharma. It is further submitted that Shri Sandeep Kumar Sharma (brother of the petitioner) is 90% physically as well as mentally disabled and is aged about 37 years. In this regard, the counsel for the petitioner has also drawn attention to the disability certificate (Annexure 1 to this writ petition) issued by the Chief Medical Officer, Bijnor indicating that Sri Sandeep Kumar Sharma (brother of the petitioner) is mentally retarded. It is further contended by the petitioner that during the lifetime of the parents of the petitioner, Sri Sandeep Kumar Sharma was being looked after by the parents and after the death of the parents, no person has been appointed as the guardian of Sri Sandeep Kumar Sharma. It is the submission of the counsel for the petitioner that both the parents of Sri Sandeep Kumar Sharma has already expired. It has been specifically pointed out that the father of Sri Sandeep Kumar Sharma died on 8th October, 2008 and mother died on 6th March, 2001.

4. It is urged by the counsel for the petitioner that Sri Sandeep Kumar Sharma is the eldest son and is not married on account of his mental and physical disability, whereas the petitioner and his younger brother Ankit Kumar Sharma are married. It is also submitted that Sri Sandeep Kumar Sharma on account of his above-mentioned disability is not in a position to maintain and take care of himself and after the death of his parents, no guardian has been appointed under law. It is contended that the petitioner has to face various difficulties and hindrance on account of non-appointment of the Guardian in respect of Sri Sandeep Kumar Sharma in various aspects of the life including his medical care and property.

5. It is further urged by the counsel for the petitioner that earlier the petitioner filed an application under section 7 of the Guardians and Wards Act, 1890 before the court of Principal Judge, Family Court, Bijnor on 7th March, 2019 and the aforesaid case was registered as O.M. Case No 9 of 2019 (Vinay Kumar Sharma Vs. Ankit Kumar Sharma). It is further submitted by the counsel for the petitioner that the aforesaid application under section 7 of the Guardians and Wards Act, 1890 was preferred for appointment of the petitioner as Guardian of Sri Sandeep Kumar Sharma and in the aforesaid case on 27th August, 2019, written statement has been filed by Ankit Kumar Sharma, whereby no objection has been made for the appointment of the petitioner as Guardian of Sri Sandeep Kumar Sharma. Learned counsel for the petitioner further submits that the Principal Judge, Family Court, Bijnor on 22nd September, 2020 has dismissed the above-mentioned case of the petitioner on the ground that the aforesaid court has no power to appoint Guardian in respect of retarded person, who is major. It is urged by the counsel for the petitioner that a person can be appointed as Guardian

under the Guardianship and Wards Act, 1890 in respect of minor and as such, the application of the petitioner under the aforesaid Act was held to be not maintainable. It is also submitted by the counsel for the petitioner that thereafter the petitioner has preferred an application dated 24th June, 2021 before the District Magistrate, Bijnor for issuance of a certificate of guardianship of Sri Sandeep Kumar Sharma in favour of the petitioner. It is further submitted that the petitioner has further on 12th July, 2021 again approached the District Magistrate, Bijnor for issuance of certificate in respect of guardianship of Shri Sandeep Kumar Sharma in favour of the petitioner. It is urged by the counsel for the petitioner that despite having approached the above-mentioned authority for issuance of the guardianship certificate in favour of the petitioner in respect of the person of Sri Sandeep Kumar Sharma, there exist complete inaction on the part of the District Magistrate, Bijnor to process the application of the petitioner and to issue the guardianship certificate in favour of the petitioner. Counsel for the petitioner further submits that in the aforesaid background, the petitioner has moved this Court by means of the present writ petition for issuance of the necessary direction to the District Magistrate, Bijnor.

6. Learned Standing Counsel has stated that although the Act No.44 of 1999 is applicable in the facts and circumstances of the case. However, the application preferred by the petitioner before the District Magistrate, Bijnor is not in accordance with the prescribed proforma as prescribed under the Rules of 2000 and as such, the application cannot be considered in the present form.

7. The application dated 24th June, 2021 and 12th July, 2021 preferred by the petitioner before the District Magistrate, Bijnor does not indicate the provision of law under which the aforesaid application has been preferred for issuance of certificate of guardianship in respect of Sri Sandeep Kumar Sharma. On a pointed query being made to the counsel for the petitioner as to the provision of law under which the aforesaid application has been preferred by the petitioner for issuance of guardianship certificate in favour of the petitioner in respect of Shri Sandeep Kumar Sharma, the counsel for the petitioner submitted that the aforesaid application will be referable to National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999 (hereinafter referred to as "Act No. 44 of 1999"). It is the submission of the counsel for the petitioner that Sri Sandeep Kumar Sharma is mentally retarded and in this respect certificate has already been issued by the Chief Medical Officer, Bijnor.

8. Before considering the case of the petitioner as stated in the writ petition, it is imperative that the scheme and statutory provision under the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999, is considered.

9. The National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999 has been enacted by the Parliament with the object to provide for the constitution of a body at the National level for the Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities and

for matters connected therewith or incidental thereto.

10. Under Section 2 of the above-mentioned Act No. 44 of 1999 various definitions has been provided in the context of the above-mentioned Act. The definition of various words under the aforesaid Act which are relevant for the purpose of present case are noticed herein below.

11. Under Section 2 of the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999 provides the definition of "Autism", "cerebral palsy", "mental retardation", "multiple disabilities", "persons with disability" and the same is quoted here and below:-

"(a) "autism" means a condition of uneven skill development primarily affecting the communication and social abilities of a person, marked by repetitive and ritualistic behaviour"

Further, under section 2 (c) of the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999 provides the definition of "cerebral palsy" and the same is quoted here and below :

(c) "cerebral palsy" means a group of non-progressive conditions of a person characterised by abnormal motor control and posture resulting from brain insult or injuries occurring in the pre-natal, perinatal or infant period of development

(g) "mental retardation" means a condition of arrested or incomplete development of mind of a person which is specially characterised by sub-normality of intelligence

(h) "multiple disabilities" means a combination of two or more disabilities as defined in clause (i) of section 2 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (1 of 1996).

(j) "persons with disability" means a person suffering from any of the conditions relating to autism, cerebral palsy, mental retardation or a combination of any two or more of such conditions and includes a person suffering from severe multiple disability."

12. Section 34 of the Act No. 44 of 1999 further provides for constitution of National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities, which shall be a body corporate by the aforesaid name and having perpetual succession and the common seal.

13. The aforesaid trust is established for the purposes of carrying out the objects of the act. The general superintendence, direction and management of the affairs and business of the above-mentioned trust is vested in the board constituted under Section 3 of the Act No. 44 of 1999.

14. The National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities is constituted with the objects as defined under Section 10 of the Act No. 44 of 1999. The provisions of Section 10 of the Act No. 44 of 1999 is quoted herein below:-

"10. Objects of Trust.--The objects of the Trust shall be--

(a) to enable and empower persons with disability to live as independently and as fully as possible within and as close to the community to which they belong;

(b) to strengthen facilities to provide support to persons with disability to live within their own families;

(c) to extend support to registered organisations to provide need based services during the period of crisis in the family of persons with disability;

(d) to deal with problems of persons with disability who do not have family support;

(e) to promote measures for the care and protection of persons with disability in the event of death of their parent or guardian;

(f) to evolve procedure for the appointment of guardians and trustees for persons with disability requiring such protection;

(g) to facilitate the realisation of equal opportunities, protection of rights and full participation of persons with disability; and (h) to do any other act which is incidental to the aforesaid objects."

The Act No 44 of 1999 under section 13 provides for constitution of local level committee for such areas as may be specified from time to time. It is also directed under section 13 (4) of the Act No 44 of 1999 that the aforesaid local committee shall meet at least once in three months or at such interval as may be necessary. The local level committee shall consist of -

(a) an officer of the civil service of the Union or of the State, not below the rank of a District Magistrate or a District Commissioner of a district;

(b) a representative of a registered organisation; and

(c) a person with disability as defined in clause (t) of section 2 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (1 of1996)."

15. Section 14(1) of the Act No. 44 of 1999 further provides that a parent of a person with disability or his relative may make an application to the local level committee for appointment of any person of his choice to act as a guardian of the person with disability. Section 14 (4) of the Act No. 44 of 1999 further provides that the local level committee shall receive, process and decide the application received under Section 14 (1) and (2) of the aforesaid Act in such manner as may be determined by the Regulations.

16. The Central Government in exercise of power under Section 34 of the Act No. 44 of 1999 has framed the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Rules, 2000. The aforesaid Rules have been notified for the purpose of carrying out the purposes of the Act.

17. Rule 16 of the above-mentioned Rules of 2000 provides that the application by a parent, relative or registered

organisation for appointment of guardian of a person with disability shall be made to the local level committee in Form A as has been appended along with the Rule. A bare perusal of the aforesaid Form (as prescribed under Rule 16) would further demonstrate that necessary particulars are to be disclosed in the aforesaid Form and disability certificate is also required to be enclosed along with the application. The aforesaid application was also required to be signed by two witnesses.

18. The Board with the previous approval of the Central Government has also framed Regulations under Section 35 of the Act No. 44 of 1999. The aforesaid Regulations are called the Board of the Trust Regulations, 2001. Regulation 13 of the above-mentioned Regulations of 2001 provide the guidelines for receiving, processing and confirmation of the application for appointment of a guardian. The Regulation 13 is quoted herein below :-

"Guidelines for receiving, processing and confirmation of application for appointment of a guardian - (1) The Local Level Committee shall receive applications for appointment of guardian in Form A under the rules.(Amended vide GSR 123(E) dated 16th February 2004).

(2) On receipt of the application for appointment of guardian, the Local Level Committee shall scrutinize the application and call for any supporting document or information that may be necessary for deciding the issue of guardianship.

(3) In case of application received from parents for guardian other than themselves, the Local Level Committee may decide to get parent's counselling in any 54 manner, it may decide to determine the genuineness of having a guardian other than parents.

(4) If parents or relatives are not available for the person with disability who is in need of guardian, because of being a vagrant or destitute or found abandoned, member or members of the Committee may ask for applications from a registered organization to initiate the process of guardianship for the person.

(5) The person with disability must be assessed by the Local Level Committee, to determine the genuineness of the need of guardianship and it shall be open to the Local Level Committee to seek the assistance of technical personnel or their services to determine the need.

(6) The Local Level Committee shall satisfy itself about the capabilities and the suitability of the person on whom guardianship is being conferred.

(7) The application for guardianship for personal care and maintenance shall be accepted to cover the following areas, namely -

a. Food, clothing and shelter needs;

b. Health care needs;

c. Religious needs;

d. Education, training and employment needs;

e. Leisure and nutrition needs;

f. Protection from exploitation and abuse;

g. Protection of constitutional and human rights; and

h. Medical and surgical needs.

(8) The confirmation of appointment of the guardian on application made by

(1) a registered organization; or

(2) the parent or relative of a person with disability shall be made in Form B under the rules."

19. The petitioner, who is the brother of Shri Sandeep Kumar Sharma has sought certificate of guardianship in favour of petitioner on the basis that Sri Sandeep Kumar Sharma is mentally retarded and further physically handicapped. The case of the petitioner is that the parents of Sri Sandeep Kumar Sharma are no more and that he is unmarried. It is the case of the petitioner that he is brother of Sri Sandeep Kumar Sharma and the other brother namely, Ankit Kumar Sharma-respondent no. 3 has no objection for issuance of guardianship certificate in favour of the petitioner and the petitioner being appointed as guardian of Sri Sandeep Kumar Sharma.

20. A perusal of the applications dated 24th June, 2021 and 12th July, 2021 would demonstrate that such applications have been preferred by the petitioner for appointment of the petitioner as guardian of Sri Sandeep Kumar Sharma and for issuance of necessary certificate of guardianship. The above-mentioned applications dated 24th June, 2021 and 12th July, 2021 has been preferred before the District Magistrate, Bijnor. It is also the submission of the counsel for the petitioner that the aforesaid application of the petitioner is pending consideration before the District Magistrate, Bijnor for a substantial period of time without any order being passed on the aforesaid application.

21. The application dated 24th June, 2021 and 12th July, 2021 preferred by the petitioner for issuance of certificate of guardianship in respect of Sri Sandeep Kumar Sharma do not disclose the provision of law under which the aforesaid application has been preferred before the District Magistrate, Bijnor. However on a pointed query made to the counsel for the petitioner as to the provision under which the aforesaid applications dated 24th June, 2021 and 12th July, 2021 has been preferred by the petitioner, the counsel for the petitioner has stated that the aforesaid applications have been preferred under Section 14 of the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999, for appointment of guardian. It is the case of the petitioner that Sri Sandeep Kumar Sharma is suffering from mental retardation and the parents of Sri Sandeep Kumar Sharma has already expired and as such a guardian is required to be appointed in respect of Sri Sandeep Kumar Sharma, who is not in a position to maintain himself and look after the property owned by him.

22. It is further to be seen that on earlier occasion, the petitioner had approached the Principal Judge, Family Court, Bijnor by preferring an application under Section 7 of the Guardians and Wards Act, 1890 for appointment of the petitioner as guardian of Sri Sandeep

Kumar Sharma. The aforesaid application was finally decided vide order dated 22nd September, 2020 whereby the Family Court, Bijnor refused to grant certificate of guardianship to the petitioner on account of the fact that under the Act of 1890, the guardianship can only be considered in respect of a minor and since Sri Sandeep Kumar Sharma is aged about 35 years and is major and as such the application under the Act of 1890 is not maintainable.

23. It is further to be seen that the power with respect to appointment of a guardian pertaining to a person who is suffering from mental retardation is to be governed by the Act No.44 of 1999. Under Section 14 of the aforesaid Act, the power to appoint guardian in respect of a person suffering from disability is provided. The aforesaid provision provides that the parent of the person with disability or his relative can make an application to a Local Level Committee for appointment of guardian of the person with disability. The Local Level Committee is constituted under Section 13 of the Act No.44 of 1999. The members of the Local Level Committee include an Officer not below the rank of District Magistrate of the district, a representative of a registered organization and a person with disability as defined in Clause F of Section 2 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995.

24. The power envisaged under Section 14 of the Act No.44 of 1999 with regard to appointment of guardian is to be exercised in accordance with the procedure prescribed under the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 2000. Under Rule 16 of the Rules of 2000, it is provided that the application for appointment of guardian for a person with disability shall be made to the Local Level Committee in Form-A. The Form-A is appended to the aforesaid Rules of 2000 for which a prescribed format has been provided which also provides certain documents to be submitted along with the application and the application is to be signed by two witnesses.

25. It is further to be seen that under Regulation No.13 of the 2001 Regulations, detailed guidelines has been prescribed for receiving the processing of formation of application for appointment of guardian. It is also provided under the aforesaid Regulations, the areas in respect of which the guardianship for personal care and maintenance to the person with disability is to cover.

26. The petitioner has filed along with the writ petition a certificate of Chief Medical Officer, Bijnor with regard to mental retardation of Sri Sandeep Kumar Sharma and on the aforesaid basis, the powers under the Act No.44 of 1999 is being sought to be enforced for appointment of guardian in respect of person with disability.

27. A bare perusal of the applications dated 24th June, 2021 and 12th July, 2021 preferred by the petitioner before the District Magistrate, Bijnor for appointment of guardian in respect of Sri Sandeep Kumar Sharma would demonstrate that although the aforesaid application do not provide the provision under which the aforesaid application has been preferred by the petitioner. However, it is trite of law that non-mentioning of a provision of law in the application itself will not invalidate

the proceedings if the power for exercise of the jurisdiction under the Act is otherwise available to the District Magistrate. The Apex Court in the case of ***High Court of Gujarat vs. Gujarat Kishan Mazdoor Panchayat, (2003) 4 SCC 712,*** has held that non-mentioning or wrong mentioning of a provision of law would not invalidate an order if a source therefore can be found out either under general law or a statute law. In view of the aforesaid, the technicalities that the application does not disclose the provisions under which it is filed, will be of no consequence.

28. It is also to be seen that the application under the Rules and Regulations are required to be filed in a prescribed format along with the documents and the witnesses. However, in the present case, the application filed by the petitioner before the District Magistrate, Bijnor seems to be not in proper form as the application is not supported by certificate of disability nor the same is signed by two witnesses.

29. It is also to be seen that the application is not in the prescribed form. However, the aforesaid issues are technical issues and the wheels of substantive justice cannot be stopped only on the ground that the application of the petitioner before the District Magistrate is not in the prescribed form. The Rules and Regulations framed under the Act No.44 of 1999 are for the purpose of carrying out the objects of the Act and one of the objects under the Act is to appoint guardian in respect of a person with disability and as such, the petitioner though has invoked the jurisdiction of District Magistrate, Bijnor by filing an application under Section 14 of the Act No.44 of 1999. However, the aforesaid application is not in the prescribed form and the aforesaid defect is a defect which is curable.

30. It is to be noted that under the Act No. 44 of 1999 there is no provision which restricts the right of the petitioner to cure the defect in respect of the form in which the application under Section 14 of the Act is to be filed for appointment of guardian. The Act No. 44 of 1999 is a beneficial legislation for the benefit of the person with disabilities including mental retardation and for the benefit of the aforesaid person various provisions have been made under the Act and the Rules framed thereunder. Once the Act No. 44 of 1999 is said to be beneficial legislation, the application filed by the petitioner although not in prescribed form, as prescribed under the Rules, however, the same will not denude the authority from proceeding under the Act No. 44 of 1999 and this Court can always direct the petitioner to cure the defect and prefer an application in accordance with form prescribed under the Rules. It is to be noted that a person with disability, including mental retardation, cannot be permitted to be without a guardian. The law envasages protection and care to the aforesaid person with disability, including mental retardation and the same is in consequence with fundamental right under Article 21 of the Constitution of India. The person with disability, including mental retardation, is entitled under law to care and protection by the State Authorities so as to bring them within the mainstream of life, care and protection. The defect of the application not being in proper form is a curable defect and the same can be cured by the petitioner at any stage. It is also to be noted that as of date, the District Magistrate has not passed any order on the application for appointment of guardian and the application is pending

consideration. The liberty therefore stands reserved in favour of the petitioner to file an application in prescribed form for appointment of the guardian in respect of Shri Sandeep Kumar Sharma before the respondent authorities. It is also to be noted that the respondent authorities on receipt of the application is required to process the application expeditiously, keeping in view of the fact that a person with disability including mental retardation cannot be permitted under law to remain for a long period without a guardian as the same may be detrimental to the right and interest of the person with disability.

31. In view of the aforesaid, it is hereby directed that the petitioner shall move an application in the prescribed format for appointment of guardian of Sri Sandeep Kumar Sharma along with all the relevant documents before the District Magistrate, Bijnor and on the receipt of the aforesaid application, the District Magistrate, Bijnor shall place the same before the Local Level Committee constituted under the Act No.44 of 1999 for consideration of the application of the petitioner for issuance of certificate of guardianship of Sri Sandeep Kumar Sharma in favour of the petitioner. The Local Level Committee shall accord consideration on the aforesaid application of the petitioner and after giving opportunity of hearing to all the concerned and affected parties, decide the same in accordance with law, within a period of three months from the date of filing of the application by the petitioner under the order of this Court.

32. It is reminded to the District Magistrate, Bijnor that a person who is mentally retarded and who has lost his parents cannot be permitted to remain without a guardian for a long period of time and considering the object of the Act, it is imperative on the Local Level Committee to accord such consideration in accordance with law within the time prescribed.

33. It is, however, made clear that this Court has not considered the merits of the application for grant of guardianship in favour of the petitioner and the Local Level Committee/District Magistrate shall consider the application of the petitioner in accordance with law.

34. In view of the aforesaid, the writ petition stands disposed off.

(2022)01ILR A815
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.11.2021

BEFORE

THE HON'BLE AJAY BHANOT, J.

Writ C No. 36732 of 2013

M/s SDB Infrastructure Pvt. Ltd. New Delhi & Anr. ...Petitioners
Versus
Presiding Officer Industrial Tribunal & Anr. ...Respondents

Counsel for the Petitioners:
Chandra Bhan Gupta, Om Prakash

Counsel for the Respondents:
C.S.C., Mani Shanker Sahu, Sri Ramgee Prasad

A. Labour law – Adjudication – Authorized representative withdrew from the case – Ex-parte award was passed without intimation and notice to the employer – Validity challenged – Held, the learned

court below/Presiding Officer adopted a procedure not known to law while passing the impugned award dated 27.11.2012 which caused miscarriage of justice – High Court set aside the award holding it in violation of principles of natural justice. (Para 15, 16 and 17)

Writ petition allowed. (E-1)

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

1. The matter is taken up in the revised call.

2. Heard Sri Chandra Bhan Gupta, learned counsel for the petitioners, learned Standing Counsel for the respondent No.1-State and Sri Virendra Kumar Gaur, learned counsel holding brief of Sri Ramgee Prasad, learned counsel for the respondent No.2/1.

3. This is an application seeking condonation of delay in filing substitution application. The application accompanied by a composite affidavit. Cause shown for the delay in filing the substitution application as asserted in the composite affidavit is sufficient.

4. Delay in filing the substitution application is hereby condoned. The delay condonation application is allowed.

(Re: Civil Misc. Substitution Application No.18 of 2021)

1. The matter is taken up in the revised call.

2. Heard Sri Chandra Bhan Gupta, learned counsel for the petitioners, learned Standing Counsel for the respondent No.1-State and Sri Virendra Kumar Gaur, learned counsel holding brief of Sri Ramgee Prasad, learned counsel for the respondent No.2/1.

3. This is an application for substitution and is supported by a composite affidavit.

4. The substitution application has been occasioned by the death of the respondent No.2-Subedar Choudhary. The composite affidavit filed in support of application for substitution asserts that the respondent No.2-Subedar Choudhary died on 12.02.2021 during the pendency of the writ petition.

5. The application for substitution has been moved by the legal heirs/legal representatives of the respondent No.2-Subedar Choudhary (since deceased) to be substituted in his place, as described in the prayer clause of the substitution application.

6. The substitution application is allowed.

7. Let the legal heirs/legal representatives of respondent No.2-Subedar Choudhary (since deceased) as described in the prayer clause of the substitution application, be substituted in his place. Words "died during the pendency of the petition" shall be transcribed after the name of the respondent No.2-Subedar Choudhary (since deceased). Substitution be carried out by learned counsel for the applicant within a period of two weeks and shall be confirmed by the Office.

8. The name of the legal heirs/legal representatives of the respondent No.2-Subedar Choudhary (since deceased) shall be typed in Red Ink on separate page. Similarly, the words "died during the

pendency of the petition", after the name of the respondent No.2-Subedar Choudhary (since deceased), shall also be transcribed in Red Ink on a separate page. Both the papers, bearing the name of the legal heirs/legal representatives of respondent No.2-Subedar Choudhary (since deceased), and the words "Died during the pendency of the writ petition", shall be affixed to the cause title. Office to confirm the substitution in the above said manner.

(Order on Writ Petition)

9. The matter is taken up in the revised call.

10. Heard Sri Chandra Bhan Gupta, learned counsel for the petitioners, learned Standing Counsel for the respondent No.1-State and Sri Virendra Kumar Gaur, learned counsel holding brief of Sri Ramgee Prasad, learned counsel for the respondent No.2/1.

11. The petitioners have assailed the impugned award dated 27.11.2012 passed by the respondent No.1/Presiding Officer, Industrial Tribunal-III, U.P. Kanpur.

12. Sri Chandra Bhan Gupta, learned counsel for the petitioners further contends that the authorized representative who was prosecuting the case on behalf of the petitioners withdrew from the proceedings with leave of the Court on 29.08.2012, without intimation to the petitioners. The impugned award passed by the learned court below/Presiding Officer, Industrial Tribunal-III, U.P. Kanpur was ex parte and rendered in violation of principles of natural justice. The respondent No.2-workman had superannuated from service after attaining the 58 years of age. His services were not terminated. Terminal benefits were disturbed to the respondent-workman.

13. Sri Virendra Kumar Gaur, learned counsel holding brief of Sri Ramgee Prasad, learned counsel for the respondent No.2/1 contends that the petitioner-employer was not liable to be noticed after the authorized representative had withdrawn from the proceedings. He defends the aforesaid impugned award. Sri Virendra Kumar Gaur, learned counsel holding brief of Sri Ramgee Prasad, learned counsel for the respondent No.2/1 further contends that the respondent No.2 died during the pendency of the writ petition. The legal heirs of the respondent No.2/workman-Subedar Chaudhary (since deceased) are entitled to the benefits. He found entitlements under the impugned award dated 27.11.2012. It is contended by Sri Virendra Kumar Gaur, learned counsel holding brief of Sri Ramgee Prasad, learned counsel for the respondent No.2/1 that the services of the respondent No.2/workman-Subedar Chaudhary (since deceased) were terminated without adopting the procedure not known to law.

14. Heard learned counsel for the parties.

15. The authorized representative of the petitioners withdrew from the case with leave of the learned labour court. However, the authorized representative did not intimate the petitioner-employer about his desire to withdraw from the case. The learned court below did not ascertain whether the petitioners have been intimated about the decision of the authorized representative to withdraw from the case. Further, the order-sheet discloses that no

notices were issued to the petitioners after the authorized representative withdrew from the case. The petitioners were unaware that the authorized representative had withdrawn from the case. Since no notices were issued, they went unrepresented in the proceedings thereafter. After the authorized representative withdrew from the case, the learned court below proceeded ex parte to the petitioners and passed the impugned award dated 27.11.2012. The pleadings in the writ petition in this regard have also not been traversed in the counter affidavit. The impugned award dated 27.11.2012 is in violation of principles of natural justice.

16. This Court finds that the learned court below/Presiding Officer, Industrial Tribunal-III, U.P. Kanpur, adopted a procedure not known to law while passing the impugned award dated 27.11.2012 which caused miscarriage of justice.

17. The impugned award dated 27.11.2012 passed by the respondent No.1-Presiding Officer, Industrial Tribunal-III, U.P. Kanpur, published on 12.03.2013 is liable to be set aside and is set aside.

18. The Court initially minded was to remand the matter for fresh consideration. However, in view of long pendency and admitted facts prolonging the litigation will not be in the interests of justice.

19. At this stage, it would be instructive to extract Section 4 (1) of the Payment of Gratuity Act, 1972 which reads as under:

"Section 4. Payment of gratuity-(1) Gratuity shall be payable to an employee on the termination of his employment after he has rendered continuous service for not less than five years, -

(a) on his superannuation, or

(b) on his retirement or resignation, or

(c) on his death or disablement due to accident or disease.

Provided that the completion of continuous service of five years shall not be necessary where the termination of the employment of any employee is due to death or disablement."

20. A cumulative consideration of the above materials establishes the fact of superannuation of the workman in 2006, upon attaining the age of 58 years. The respondent No.2-workman in the witness box also stated that on 30.11.2011, he had attained 71 years of age. The respondent No.2-workman in his testimony before the learned court below stated that at the time of termination of his services, he was paid various dues like gratuity, bonus, cumulative leave and his wages due till that date. The benefits so disbursed to the respondent No.2-workman are in the nature of the terminal dues that was paid at the time of superannuation. The respondent No.2-workman has since expired. The establishment in which the respondent No.2-workman was engaged had closed down in the year 2007.

21. The amount deposited by the petitioner-employer shall be forthwith disbursed in favour of the petitioner-employer forthwith.

22. The writ petition is allowed.

(2022)01ILR A819
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.10.2021

BEFORE

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

Writ C No. 53877 of 2017

Jitendra Singh ...Petitioner
Versus
Union Of India & Anr. ...Respondents

Counsel for the Petitioner:
Sri Manoj Kumar, Sri Suresh Kumar Maurya

Counsel for the Respondents:
A.S.G.I., Sri Surenra Prasad Sharma

A. Examination for UGC/NET-2017 – Wrong answer of a question in answer-key claimed – Re-evaluation sought – Scope of interference by the Court considered – Held, when a decision is taken by the Committee of Expert having high academic qualifications and long experience in the specialised field, the Courts should not normally probe the matters unless there are compelling circumstances for doing so – The Court should not re-evaluate or scrutinize the answer-sheet of the candidate as it has no expertise in the matter – The academic matters are best left to the academics. (Para 27 and 29)

Writ petition dismissed. (E-1)

List of Cases cited :-

1. Maharashtra St. Board of Secondary and Higher Secondary Education & Anr. Vs Paritosh Bhupesh Kurmarsheth & Ors.; AIR 1984 SC 1543

2. Pramod Kumar Srivastava Vs Chairman, Bihar Public Service Commission, Patna & ors; J.T. 2004 SC 380

3. University of Mysore Vs C.D. Govinda Rao & anr.; AIR 1965 SC 491

4. St. of Bihar & anr. Vs Dr. Asis Kumar Mukherjee; AIR 1975 SC 192

5. M.S. Gupta etc. Vs A.K. Gupta & ors.; (1979) 2 SCC 339

6. Rajendra Prasad Mathur Vs Karnataka University & anr.; AIR 1986 SC 1448

7. Dr. Umakant Vs Dr. Bhikha Lal Jain & ors.; AIR 1991 SC 2272

8. The Chancellor & anr. Vs Dr. Bijay Nanda Kar & ors.; (1994) 1 SCC 169

9. St. of Orissa & ors. Vs Prajnaparamita Samanta & ors.; (1996) 7 SCC 106

10. Chairman, J & K St. Board of Education Vs Fayaz Ahmed; (2000) 3 SCC 59

11. The Dental Council of India Vs Subharti K.K.B. Charitable Trust & anr.; AIR 2001 SC 2151

12. Ran Vijay Singh & ors. Vs St. of U.P. & ors.; (2018) 2 SCC 357

13. Bihar Staff Selection Commission Vs Arun Kumar; (2020) 6 SCC 362.

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

1. Heard Mr. Suresh Kumar Maurya, learned counsel for the petitioner, Mr. Surendra Prasad Sharma, learned counsel for respondent no.2 and Mr. Asheem Mukherjee, learned Standing Counsel for the State-respondent.

2. This writ petition has been filed by the petitioner for following relief:

"(i) Issue a writ, order or direction in the nature of mandamus directing respondent no.2 to consider and decide the claim of the petitioner contained in representation dated 08.06.2017 (Annexure-5) for being re-evaluate the OMR sheet Paper-II and amended result will be declare.

(ii) Issue any other writ, order or direction, which this Hon'ble Court may deem fit and proper in the circumstances of the case.

(iii) Award the cost of the petition in favour of the petitioner."

3. In the present writ petition, counter and rejoinder affidavits have been exchanged between the parties. Both the parties agree that this petition be disposed of at this stage without calling for any further affidavit.

4. In the present writ petition, the case of the petitioner is that he was pursuing study in Kashi Hindu Vishwavidyalaya, Varanasi and preparing for UGC/NET-2017. In connection with the same, he applied for UGC/NET and also appeared in the examination conducted by respondent no.2. The petitioner was allotted Role Number-84024171 and at the time of examination, in Paper-II of Hindustani Music, against the question no.32, as to how many Tantriyas (strings) are there in Alapini Vini,, the petitioner has given answer as option no.3 i.e. three tantriyas (strings), copies of the relevant part of the question paper being Paper-II of Hindustani Music as well as OMR sheet have been enclosed as Annexure-1 to the writ petition.

5. It is the further case of the petitioner that after the examination was over, the answer-key was published on the concerned website, wherein against question no.32, a wrong answer as option no. 1 i.e. two Tantriyas (strings), has been published, whereas the correct option was option no.3 i.e. three Tantriya (strings), a copy of the answer-key published on the website has been enclosed as Annexure-2 to the writ petition. Thereafter, the calculation/answer sheet was also prepared by the Central Board of Secondary Education, UGC-NET, wherein against the question no. 32 of Paper-II, wrong answer was mentioned and the answer of the petitioner was taken to be incorrect.

6. Further, in support of answer given by the petitioner against question no.32, he submitted documentary evidence like books written by respective writers, copies of relevant parts of the books have been enclosed as Annexure-4 to the writ petition. Thereafter, the petitioner has made an application before respondent no.2, namely, Director (UGC-NET), Central Board of Secondary Education, Gautam Buddha Nagar on 8th June, 2017, wherein he has disclosed all the facts and circumstances of the case and also made a request to re-evaluate the answer given by the petitioner against question no.32 of Paper-II of the Hindustani Music and thereafter declare the result accordingly, so that the future of the petitioner may be protected, a copy of the same has been enclosed as Annexure-5 to the writ petition.

7. In the petition, it has lastly been stated by the petitioner that the selection of the petitioner for J.R.F. has been obstructed as he secured 0.56% less mark in merit, although the petitioner had given correct answer against question no.32 of Paper-II of Hindustani Music, which was wrongly evaluated by the respondent, hence, the

petitioner made a request to respondent no.2 by means of an application dated 13th July, 2017 for re-evaluating the OMR sheet of Paper-II qua question no.32 and declare the result, accordingly.

8. This writ petition was presented before the Court on 13th November, 2017 and no interim order has been granted in favour of the petitioner.

9. The learned counsel for the petitioner submits before this Court that in the entrance examination of UGC/NET-2017 conducted by respondent no.2, the petitioner applied and appeared in the examination. Against question no.32 of Paper-II of Hindustani Music, he has given answer as option no.3 i.e. three tantriyas (strings), which is the correct answer, whereas in the answer-key published on concerned website by respondent no.2, against question no.32 of Paper-II, the answer was given as option no.1 i.e. two tantriyas (strings), which is a wrong answer. In support of the said submission, learned counsel for the petitioner has referred to the relevant part of the books in the name and style of "*Bhartiya Sangeet Vaadh*" written by *Dr. Lal Mani Mishra*, *Bhartiya Sangeet ke Trantivaadh* written by *Vidyavilashi Pandit, Sangeet Ratanakar (Hindi Anuvad)* written by *Subhadara Chaudhary*, copies of which have been brought on record at page nos. 27 onwards. He, therefore, submits that the selection of petitioner for J.R.F. had been obstructed only due to less mark by 0.56% whereas the petitioner had given correct answer against question no.32 of Paper-II, thus this Court, while allowing the present writ petition, may direct respondent no.2 to re-evaluate the OMR sheet of Paper-II qua question no.32 and declare the result of the petitioner accordingly.

10. On the other than, Mr. S.P. Sharma, learned counsel for respondent no.2 and Mr. Asheem Mukherjee, learned Standing Counsel for the State-respondent submit that the relief as prayed on behalf of the petitioner cannot be granted by this Court while exercising its power under Article 226 of the Constitution of India.

11. Learned counsel for respondent no.2 states that the request of the petitioner for re-evaluation of OMR sheet qua question no.32 of Paper-II of Hindustani Music cannot be granted because with regard to correctness of option given in answer-key, the expert opinion has been obtained and in the opinion of the subject expert, the correct answer of question no. 32 is option no. (2) i.e. Two Tantriyas (strings). Since the answer key has been examined by the subject expert and it is not the case of the petitioner that there is mala fide attributed to the respondents, as such, no judicial review would lie and the writ petition is liable to be dismissed.

12. Learned counsel for respondent no.2 further submits that the relief prayed on behalf of the petitioner pertains to direction upon respondent no.2 to consider and decide the representation of the petitioner dated 8th June, 2017 for OMR sheet of Paper-II being re-evaluated and thereafter result being amended on the ground that in Paper-II of Hindustani Music of NET,2017, the answer attempted by him is correct, whereas the same is said to be incorrect. For ready reference, the representation of the petitioner dated 8th June, 2017 read as follows:

"सेवा में,
निर्देशक (UGC-NET)
केंन्द्रीय माध्यमिक शिक्षा बोर्ड
प्लाट नं० 149, ब्लाक H सेक्टर 63, गौतम बुद्ध नगर

नोएडा ऊ०प्र० 201305

विषयः राष्ट्रीय पात्रता परीक्षा (नेट) जनवरी 2017 के हिन्दुस्तानी संगीत विषय के पुनर्मूल्यांकन के सम्बन्ध में।

महोदय,

मैं प्रार्थी जीतेन्द्र सिहं पुत्र श्री भोलाशंकर सिंह नेट परीक्षा जनवरी 2017 में पिछडी जाती का अभ्यर्थी हूँ। घोषित परीक्षा परिणाम में मेरा .57% से जे०आर०एफ० अवरूद्ध हुआ है, आपके जारी उत्तर पत्रक के द्ववितीय प्रश्न पत्रक के द्ववितीय प्रश्न पत्र में मेरा प्रश्न संख्या 32 सही है जबकी आपने इस प्रश्न को गलत घोषित किया है। इस एक प्रश्न के सही होने से मेरा जे०आर०एफ० प्रश्स्त हो जाएगा। इसकी सत्यता के सन्दर्भ मे मेरे पास अनेक प्रमाणिक पुस्तकों के प्रमाण है। आपके विशेष रूप से सूचित करते है कि यह मेरे जे०आर०एफ० के योग्यता का अंतिम वर्ष है।

अतः आपसे सविनय निवेदन है कि प्रार्थी के हित में पुनर्मूल्यांकन कर मेरा संशोधित परीक्षा परिणाम घोषित करें। यह मेरे भविष्य से जुडा गंभीर विषय है।

इस सन्दर्भ में समस्त अपेक्षित प्रपत्र प्रार्थना पत्र के साथ संलग्न है।

धन्यवाद

ओ०एम०आर सीट एवं कल्युकलेशन सीट भी चाहिए जिसके लिए पांच सौ रू० का ड्राफ्ट सलंग्न है।

प्रार्थी
जीतेन्द्र सिंह
अभ्यर्थी नेट परीक्षा जनवरी 2017
अनुक्रमांक - 84024171
जन्म तिथि- 07.07.1986
परीक्षा विषय- हिन्दुस्तानी संगीत
विषय कोड- 16
ग्राम- सावठ पो० दुर्गावती
जिला कैमूर बिहार (821105)
शिक्षण स्थल - काशी हिन्दू विश्वविद्यालय (वाराणसी)"

13. Learned counsel for respondent no.2 further submits that the dispute is with regard to question no.32 of 2nd paper of Hindustani Music of Net, 2017, which is "आलापिनी वीणा में कितनी तंत्रियां थी". The option ticked by the petitioner in the OMR sheet is option no.2 i.e. three tantriyas (strings) , whereas, option no.1 is the correct answer i.e. two tantriyas (strings), as per the answer key.

14. Learned counsel for respondent no.2 further submits that the opinion of the subject expert was obtained again about the correctness of the answer of question no.32 and the subject expert opined that the correct answer of question no.32 is option no.(2) i.e. two tantriyas (strings). Due to secrecy, the details of the subject expert cannot be disclosed, but the Court will be apprised about the same as and when required. It is further contended that the report of the subject expert has been brought on record at page no.11 onwards, of the counter affidavit, along with relevant

page of book, namely, *Sangeet Bodh (page no.138)*.

15. Learned counsel for respondent no.2 further submits that on the representation made by the petitioner, the respondent called for expert opinion about the question No.32 of Paper-II of Hindustani Music and as per the opinion of the subject expert, the correct answer of the question no. 32 of Paper-II of Hindustani Music of Net, 2017 is option no. (1), which means that there are two Trantriyas in Alapini Veena. Therefore, it is not true that in answer key, incorrect answer was published. Learned counsel for respondent no.2 further submits that the OMR sheet of the petitioner is examined/evaluated properly and no mistake in any manner is committed. The answer key has been prepared by the body of subject experts and again opinion of the subject experts qua question no.32 of Paper-II of Hindustani Music has been obtained. Therefore, it cannot be said that the answer given by the petitioner as option no. (3) against question no.32 is correct. The petitioner did not approach the authorities concerned, as per the instructions of the examination bulletin. He also did not fulfill the requirements for examining genuineness of his claim, as per circular/notification issued for this purpose. The petitioner did not avail the remedy provided for this purpose.

Even otherwise, there is no provision of re-evaluation of answer-sheets provided under any law.

On the cumulative strength of the aforesaid, learned counsel for respondent no.2 submits that the present writ petition is not maintainable and the same is liable to be dismissed.

16. I have considered the submissions made by the learned counsel for the parties and have gone through the records of the present writ petition.

17. Learned Counsel for the petitioner has not brought to this Court's attention any rules, regulation or any guidelines framed by the respondent, notification or circular, bulletin issued by the respondent or any authority of law that may permit re-evaluation.

18. Even otherwise, in paragraph-12 of the counter affidavit filed on behalf of respondent no.2, it has been stated as follows:

*"12. That in reply to the contents of paragraph no.9 of the writ petition, it is submitted that the OMR sheet of the petitioner is examined/evaluated properly. No mistake, in any manner, is committed and t**here is no provision of reevaluation."***

Whereas, in reply to the aforesaid averments, in rejoinder affidavit learned counsel for the petitioner has not rebutted or controverted the same.

19. For ready, reference, paragraph-8 of the rejoinder affidavit filed on behalf of the petitioner, reads as follows:

"8.That the contents of para 12 of the counter affidavit are not admitted as stated hence denied. In reply thereto the contents of para-9 of the writ petition are reiterated. It is further submitted that the OMR sheet of the petitioner was wrongly

examined, which requires re-evaluation of the same."

20. The issue of re-evaluation of answer book or sheet is no more res integra. This issue was considered at length by the Apex Court in the case of **Maharashtra State Board of Secondary and Higher Secondary Education & Anr. Vs. Paritosh Bhupesh Kurmarsheth & Ors.,** reported in *AIR 1984 SC 1543*, wherein the Apex Court rejected the contention that in absence of provision for re-evaluation, a direction to this effect can be issued by the Court. The Apex Court further held that even the policy decision incorporated in the Rules/Regulations providing for rechecking/ verification/re-evaluation cannot be challenged unless there are grounds to show that the policy itself is in violation of some statutory provision. The Apex Court held as under:-

"In our opinion, this approach made by the High Court was not correct or proper because the question whether a particular piece of delegated legislation - whether a rule or regulation or other type of statutory instrument - is in excess of the power of subordinate legislation conferred on the delegate as to be determined with reference only to the specific provisions contained in the relevant statute conferring the power to make the rule, regulation, etc. and also the object and purpose of the Act as can be gathered from the various provisions of the enactment. It would be wholly wrong for the court to substitute its own opinion for that of the legislature or its delegate as to what principle or policy would best serve the objects and purposes of the Act and to sit in judgment over the wisdom and effectiveness or otherwise of the policy laid down by the regulation-making body and declare a regulation to be ultra vires merely on the ground that, in the view of the Court, the impugned provisions will not help to serve the object and purpose of the Act. So long as the body entrusted with the task of framing the rules or regulations acts within the scope of the authority conferred on it, in the sense that the rules or regulations made by it have a rational nexus with the object and purpose of the Statute, the court should not concern itself with the wisdom or efficaciousness of such rules or regulations. It is exclusively within the province of the legislature and its delegate to determine, as a matter of policy, how the provisions of the Statute can best be implemented and what measures, substantive as well as procedural would have to be incorporated in the rules or regulations for the efficacious achievement of the objects and purposes of the Act. It is not for the Court to examine the merits or demerits of such a policy because its scrutiny has to be limited to the question as to whether the impugned regulations fall within the scope of the regulation-making power conferred on the delegate by the Statute.

In our opinion, the aforesaid approach made by the High Court is wholly incorrect and fallacious. The Court cannot sit in judgment over the wisdom of the policy evolved by the legislature and the subordinate regulation-making body. It may be a wise policy which will fully effectuate the purpose of the enactment or it may be lacking in effectiveness and hence calling for revision and improvement. But any draw-backs in the policy incorporated in a rule or regulation will not render it ultra vires and the Court cannot strike it down on the ground that in its opinion, it is not a wise or prudent policy, but is even a foolish one, and that it will not really serve to effectuate the purposes of the Act. The

legislature and its delegate are the sole repositories of the power to decide what policy should be pursued in relation to matters covered by the Act and there is no scope for interference by the Court unless the particular provision impugned before it can be said to suffer from any legal infirmity in the sense of its being wholly beyond the scope of the regulation-making power or its being inconsistent with any of the provisions of the parent enactment or in violation of any of the limitations imposed by the Constitution."

21. This view referred to above has been approved, relied upon and reiterated by the Apex Court in the case of **Pramod Kumar Srivastava Vs. Chairman, Bihar Public Service Commission, Patna & Ors**, reported in J.T. 2004 SC 380 observing as under:

*"Under the relevant rules of the Commission, there is no provision wherein a candidate may be entitled to ask for re-evaluation of his answer-book. There is a provision for scrutiny only wherein the answer-books are seen for the purpose of checking whether all the answers given by a candidate have been examined and whether there has been any mistake in the totalling of marks of each question and nothing them correctly on the first cover page of the answer-book. There is no dispute that after scrutiny no mistake was found in the marks awarded to the appellant in the General Science paper. In the absence of any provision for re-evaluation of answer-books in the relevant rules, no candidate in an exa*mination has got any right whatsoever to claim or ask for re-evaluation of his marks."

22. In view of the above, the case stands squarely covered by the aforesaid judgment of the Hon'ble Supreme Court and this Court does not see any ground to interfere in the matter.

23. Undoubtedly, conduct and holding of examinations in a most appropriate and fair manner is imperative and it is solemn duty of the examining body to provide for fair procedure, rules, regulations, or bye-laws for the same as career of students depends upon the result of the examinations.

24. A Constitution Bench of the Apex Court in the case of **University of Mysore Vs. C.D. Govinda Rao & Anr., reported in AIR 1965 SC 491,** has held that where the decision under challenge has been taken by the Committee of Expert, "normally the Courts should be slow to interfere with the opinion expressed by the experts" unless there are allegations of mala fide against any of the Members of the Expert Committee. The Court further observed as under:-

".....It would normally be wise and safe for the Courts to leave the decisions of academic matters to experts who are more familiar with the problems they face than Courts....."

25. Similar view has been taken by the Apex Court in **State of Bihar & Anr. Vs. Dr. Asis Kumar Mukherjee, AIR 1975 SC 192; M.S. Gupta etc. Vs. A.K. Gupta & Ors., (1979) 2 SCC 339; Rajendra Prasad Mathur Vs. Karnataka University & Anr., AIR 1986 SC 1448; Dr. Umakant Vs. Dr. Bhikha Lal Jain & Ors., AIR 1991 SC 2272; The Chancellor**

& Anr. Vs. Dr. Bijay Nanda Kar & Ors., (1994) 1 SCC 169; State of Orissa & Ors. Vs. Prajnaparamita Samanta & Ors., (1996) 7 SCC 106; Chairman, J & K State Board of Education Vs. Fayaz Ahmed, (2000) 3 SCC 59; and The Dental Council of India Vs. Subharti K.K.B. Charitable Trust & Anr., AIR 2001 SC 2151.

26. Similarly, with regard to the issue of re-evaluation, the Apex Court in the case of **Ran Vijay Singh and others vs. State of Uttar Pradesh and Others, reported in** *(2018) 2 SCC 357,* specially in paragraph nos. 30 to 33, has observed as follows:

"30. The law on the subject is therefore, quite clear and we only propose to highlight a few significant conclusions. They are:

30.1. If a statute, Rule or Regulation governing an examination permits the re-evaluation of an answer sheet or scrutiny of an answer sheet as a matter of right, then the authority conducting the examination may permit it;

30.2. If a statute, Rule or Regulation governing an examination does not permit re-evaluation or scrutiny of an answer sheet (as distinct from prohibiting it) then the court may permit re-evaluation or scrutiny only if it is demonstrated very clearly, without any "inferential process of reasoning or by a process of rationalisation" and only in rare or exceptional cases that a material error has been committed;

30.3. The court should not at all re-evaluate or scrutinise the answer sheets of a candidate--it has no expertise in the matter and academic matters are best left to academics;

30.4. The court should presume the correctness of the key answers and proceed on that assumption; and

30.5. In the event of a doubt, the benefit should go to the examination authority rather than to the candidate.

31. On our part we may add that sympathy or compassion does not play any role in the matter of directing or not directing re-evaluation of an answer sheet. If an error is committed by the examination authority, the complete body of candidates suffers. The entire examination process does not deserve to be derailed only because some candidates are disappointed or dissatisfied or perceive some injustice having been caused to them by an erroneous question or an erroneous answer. All candidates suffer equally, though some might suffer more but that cannot be helped since mathematical precision is not always possible. This Court has shown one way out of an impasse -- exclude the suspect or offending question.

32. It is rather unfortunate that despite several decisions of this Court, some of which have been discussed above, there is interference by the courts in the result of examinations. This places the examination authorities in an unenviable position where they are under scrutiny and not the candidates. Additionally, a massive and sometimes prolonged examination exercise concludes with an air of uncertainty. While there is no doubt that candidates put in a tremendous effort in preparing for an examination, it must not be forgotten that even the examination authorities put in equally great efforts to successfully conduct an examination. The enormity of the task might reveal some lapse at a later stage, but the court must consider the internal checks and balances put in place by the

examination authorities before interfering with the efforts put in by the candidates who have successfully participated in the examination and the examination authorities. The present appeals are a classic example of the consequence of such interference where there is no finality to the result of the examinations even after a lapse of eight years. Apart from the examination authorities even the candidates are left wondering about the certainty or otherwise of the result of the examination -- whether they have passed or not; whether their result will be approved or disapproved by the court; whether they will get admission in a college or university or not; and whether they will get recruited or not. This unsatisfactory situation does not work to anybody's advantage and such a state of uncertainty results in confusion being worse confounded. The overall and larger impact of all this is that public interest suffers."

27. Thus, it is settled law that when a decision is taken by the Committee of Expert having high academic qualifications and long experience in the specialised field, the Courts should not normally probe the matters unless there are compelling circumstances for doing so.

28. The aforesaid issue is also well settled in view of judgment of Apex Court in case of **Bihar Staff Selection Commission vs. Arun Kumar, reported in** *(2020) 6 SCC* 362. There are otherwise catena of judgments of Supreme Court holding that in the competitive selection test, prayer for re-evaluation of marks cannot be accepted unless a rule for it exist.

29. With the aforesaid observations, this Court would also like to keep in mind the question against which objection has been raised but keeping in mind the ratio propounded by the Apex Court in the case of **Ran Vijay Singh (supra)** and more specifically para 30 of the said judgment quoted above, the Court is to presume the correctness of answer key and proceed on that assumption. In the event of any doubt, benefit should go to the examination authority rather than to the candidate. It is with a rider that the Court should not re-evaluate or scrutinize the answer-sheet of the candidate as it has no expertise in the matter. The academic matters are best left to the academics.

30. In the result, considering the submissions made by the learned counsel for respondent no.2 and the law laid down by the Apex Court referred to herein above, this Court finds no good ground to interfere in the present writ petition. The same is accordingly dismissed.

(2022)01ILR A827
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.12.2021

BEFORE

THE HON'BLE NEERAJ TIWARI, J.

Writ C No. 54917 of 2017

Jagdamba Prasad ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Pankaj Kumar Gupta

Counsel for the Respondents:
C.S.C.

A. Fair Price Shop – License – Cancellation – Pendency of criminal case – No allegation of black marketing – Effect – Held, license of fair price shop was cancelled only on the ground of lodging of FIR as well as pendency of criminal case. Apart from that there is no allegation with regard to black marketing or misuse of food-grains, therefore, this cannot be a ground for cancellation of license of fair price shop. (Para 8)

Writ petition allowed. (E-1)

List of Cases cited :-

1. Civil Misc. Writ Petition No. 16723 of 2010; Anil Kumar Dubey Vs St. of U.P. & ors. decided on 17.01.2011

2. Civil Misc. Writ Petition No. 55977 of 2006; Raj Kumar Vs St. of U.P. & ors. decided on 10.10.2006

(Delivered by Hon'ble Neeraj Tiwari, J.)

1. Heard learned counsel for the petitioner and learned standing counsel for State- respondents.

2. Present petition has been filed with following relief;

"(i) a writ, order or direction in the nature of Certiorari quashing the impugned order dated 17.10.2017 passed by Sub Divisional Magistrate, Meja, Allahabad, respondent no. 5."

3. Learned counsel for the petitioner submitted that license of fair price shop was issued to the petitioner on 22.3.2001 which, he was running smoothly. Due to village party bandi, a criminal case being case crime no. 391 of 2017, under Sections 147, 148, 149, 323, 504, 506, 307, 308, 452 I.P.C. was registered against the petitioner. He next submitted that considering the registration of criminal case against the petitioner, his license of fair price shop was cancelled by Sub Divisional Magistrate-respondent no. 5 vide order order dated 17.10.2017. Against which, he has preferred present writ petition and after hearing the parties, Court has stayed the suspension order vide order dated 30.11.2017. He next submitted that till date, neither any enquiry has been initiated nor any proceeding is pending against the petitioner and in the aforesaid criminal case, petitioner has already been enlarged on bail. He next submitted that Government Order dated 17.08.2002 prohibits for allotment of fair price shop to a person against whom a criminal case is registered, but that is having no provision to cancel the license of fair price shop in case of involvement in a criminal case after allotment. There is no allegation of misuse of food grains or black marketing of the same and the only ground of suspension of license of fair price shop is pendency of criminal case against the petitioner. He next submitted that this Court in the matter of ***Anil Kumar Dubey Vs. State of U.P. and others; (Civil Misc. Writ Petition No. 16723 of 2010)*** decided on 17.01.2011 has considered this aspect that even after submission of charge sheet, Court is of the view that mere pendency of criminal case and filing of charge sheet cannot be a ground for cancellation of license of fair price shop until there is order of conviction, therefore, suspension order is bad and liable to be set aside.

4. Learned standing counsel has vehemently opposed, but could not dispute the factual and legal submission made by learned counsel for the petitioner before this Court.

5. I have considered the rival submissions made by the counsel for the

parties and perused the record. Facts of the case are undisputed that license of fair price shop was issued to the petitioner on 22.3.2001 and due to only lodging of FIR against the petitioner, his license of fair price shop was suspended by respondent no. 5 vide order dated 17.10.2017, which was also stayed by this Court vide order dated 30.11.2017. Further, after suspension of shop, no enquiry has been initiated.

6. The very same issue was before this Court in the matter of ***Anil Kumar Dubey (Supra)*** and after considering the judgement of Division Bench in the matter of ***Raj Kumar Vs. State of U.P. and others (Civil Misc. Writ Petition No. 55977 of 2006)*** decided on 10.10.2006, Court has allowed the writ petition, setting aside the order of cancellation of license of fair price shop by Sub Divisional Magistrate as well as appellate order passed by Divisional Commissioner.

7. Relevant paragraphs of the aforesaid judgement are being quoted herein below;

"Division Bench of this court in Civil Misc. Writ Petition No. 55977 of 2006 (Raj Kumar Vs. State of U.P. and others), decided on 10.10.2006 has taken the view that mere lodging of the first information report is not a sufficient ground for cancelling the fair price shop license and the authority cancelling the fair price shop agreement is required to apply mind. Coupled with this this court in Civil Misc. Writ Petition No. 43133 of 2008 (Ram Sewak Vs. State of U.P. and others) decided on 27.8.2008 has taken the view which is being extracted below:-

" The petitioner is a fair price shop licensee. He is aggrieved by an order of the Up Zila Adhikari, Etah dated 18.7.2008 by which his fair price shop agreement has been cancelled. The ground stated in the order is that a first information report in Case Crime No. 661 of 2006, under Sections 147, 148, 149, 341, 436, 506, 427 I.P.C., 3 P.P.R. Act and 7 Criminal Law Amendment Act has been lodged against him. Reference has been made in the order to the government order dated 17.8.2002 that no criminal case should be pending against a person. It is not alleged in the order that the petitioner had concealed pendency of any criminal case against him in obtaining the allotment. No doubt the District Supply Officer is not required to conduct any detailed inquiry but a prima facie inquiry to satisfy himself about the truth of the allegations of irregularity alleged against the licensee has to be made. This is also provided under the government order dated 29.7.2004 of which reference is made in the case of Harpal Vs. State of U.P. and others 2008 (3) A.D.J. 36.

Counsel for the petitioner also relied upon a decision of this Court in Raj Kumar Vs. State of U.P. in Writ Petition No. 55977 of 2006 decided on 10.10.2006 by a Division Bench of this Court. It was held that mere lodging of the first information report is not a sufficient ground for canceling the fair price shop licence and the authority canceling the fair price shop agreement is required to apply mind . There is nothing in the order to indicate that the Up Ziladhikari has applied mind to the truth or falsity of the allegations against the petitioner. For these reasons the order passed by the Up Ziladhikari, Etah cannot be sustained and it is set aside. It is open to the respondents to initiate fresh proceedings against the

petitioner in case the petitioner has played any fraud or has concealed any fact in obtaining the allotment of the shop. If the petitioner has committed breach of any government order and in case it is found that the petitioner committed any irregularity in the distribution of essential commodities it will be open to the respondents to pass a fresh order.

With these observations the writ petition is disposed of."

In the present case, as the order in question has been passed on account of complicity of the petitioner in criminal case and charge sheet filed against him and till date no order of conviction has been passed, then in such a situation order of cancellation is not at all subscribed by law and same is clerly transgression and over stepping of jurisdiction.

Consequently, orders dated 21.1.2009 passed by the Sub Divisional Magistrate, Tehsil Sadar, District Mirzapur and order dated 11.3.2010 passed by the Divisional Commissioner, Vindhyachal Mandal, Vindhyachal are hereby quashed and set aside.

Consequently, writ petition is allowed."

8. In present case also, license of fair price shop was cancelled only on the ground of lodging of FIR as well as pendency of criminal case. Apart from that there is no allegation with regard to black marketing or misuse of food-grains, therefore, this cannot be a ground for cancellation of license of fair price shop.

9. Accordingly, under such facts of the case as well as law laid down by this Court referred hereinabove, impugned order dated 17.10.2017.2017 passed by Sub Divisional Magistrate- respondent no. 5 is hereby quashed and writ petition is allowed.

10. This Court vide order dated 30.11.2017 has stayed the effect and operation of the order dated 17.10.2017 passed by respondent no. 5 and petitioner is running the fair price shop as on date, therefore, no further order is required for reinstatement of license and fair price shop.

(2022)01ILR A830
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.01.2022

BEFORE

THE HON'BLE J.J. MUNIR, J.

Matters Under Article 227 No. 7815 of 2021

Prem Singh ...Petitioner
Versus
Brij Bhushan Parashar & Ors. ...Respondents

Counsel for the Petitioner:
Sri Jitendra Kumar, Sri Sanjeev Kumar Rai

Counsel for the Respondents:
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A. Civil Law - The Court observed that the applications for temporary injunctions are inherently urgent in nature and ought to be dispensed of swiftly. (Para 4)

Petition Disposed of. (E-10)

(Delivered by Hon'ble J.J. Munir, J.)

1. The Court is convened via Video-conferencing.

2. This petition has been filed seeking a direction to the Trial Court to decide the temporary injunction application in Original Suit No. 1088 of 2021 Prem Singh vs. Brij Bhushan Parashar, pending before the Court of the Civil Judge (Junior Division), Mathura within a determinate period of time.

3. In compliance with the order dated 17.01.2022 passed by this Court, the Civil Judge (Junior Division), Mathura has submitted a very accurate report about the proceedings, which this Court must appreciate. The material part of the report reads thus:

2. उक्त के क्रम में संबंधित मूलबाद संख्या 1088/2021 प्रेम सिंह प्रति बृजभूषण आदि की पत्रावली के सम्यक परिशीलनोपरानंत सादर अवगत कराना है कि उक्त वाद अधोहस्ताक्षरी के न्यायालय में वादी द्वारा मूलतः दो प्रतिवादीगण बृजभूषण व श्रीमती मानवती के विरुद्ध स्थाई निषेधाज्ञा की याचना के साथ दिनांक 11.06.21 को संस्थित किया गया था। जिसमें संस्थितिकरण की दिनांक को एकपक्षीय अंतरिम व्यादेश के आधा पर्याप्त न पाते हुये विपक्षीगण/प्रतिवादी गण को नोटिस दिनांक 19.07.21 हेतु निर्गत किये गये थे। किन्तु नियत दिनांक 19.07.21 से पूर्व ही वादी द्वारा दिनांक 12.07.21 को श्रीमती मछला व श्रीमती सोनदेवी को नवीन प्रतिवादी प्रस्तावित करते हुये एक संशोधन प्रार्थना पत्र 16 क पत्रावली पर प्रस्तुत किया गया। जोकि दिनांक 05.08.21 को अधोहस्ताक्षरी न्यायालय द्वारा स्वीकार करते हुये वादी को वांछित संशोधन अंदर सात दिन किये जाने तथा संशोधनपरांत समस्त प्रतिवादी गण पर अंदर तीन दिवस पैरवी किये जाने हेतु निर्देशित किया गया था।

3. वांछित संशोधन तथा पैरवी उपरांत सभी प्रतिवादीगण पर दिनांक 13.10.21 को तामील पर्याप्त अभिधारित करते हुये प्रतिवादपत्र हेतु सभी प्रतिवादीगण को दिनांक 20.11.21 को वादी द्वारा अस्थाई निषेधाज्ञा हेतु पुनः एक प्रार्थना पत्र 20ग दिया गया।

4. नियत दिनांक 20.11.21 को प्रतिवादी संख्या 1 व 2 ने उपस्थित आकर नकलों की याचना की। अग्रिम नियत दिनांक 30.11.21 को वादी ने प्रतिवादीगण को नकलें प्रदान की तथा पक्षों को अस्थाई निषेधाज्ञा प्रार्थना पत्र के निस्तारण के संबंध में अंतिम अवसर दिया गया।

5. अग्रिम नियत दिनांक 03.01.211 को पक्षकार अनुपस्थित रहे, यद्यपि प्रतिवादी संख्या 1 लगायत 4 द्वारा प्रतिवादपत्र व अस्थाई निषेधाज्ञा प्रार्थना पत्र के विरुद्ध आपत्ति पत्रावली पर प्रस्तुत की गयी। जिसके क्रम में अग्रिम दिनांक 01.02.22 नियत की गयी है।

6. इस प्रकार प्रार्थना पत्र अस्थाई निषेधाज्ञा के निस्तारण में हुआ विलंब प्रक्रियात्मक है तथा नियत दिनांक को पक्षों को सुनकर अस्थाई निषेधज्ञा प्रार्थना पत्र का विधिनुसार निस्तारण करने हेतु अधोहस्ताक्षरी न्यायालय कृतसंकल्प

4. It goes without saying that temporary injunction applications are inherently urgent in nature and ought to be disposed of swiftly. Here the report submitted by the learned Judge shows that the defendants have appears and filed their written statements as also objections to the temporary injunction application. The next date fixed is 01.02.2022.

5. Looking to the nature of the order that this Court proposes to pass, issue of notice to the private respondents is dispensed with. However, in case the said

respondents feel aggrieved, it will be open to them to make an application in the decided petition.

6. In the circumstances, the learned Civil Judge (Senior Division), Mathura is directed to dispose of the pending interim injunction application in Original Suit No. 1088 of 2021 Prem Singh vs. Brij Bhushan Parashar, positively on the next date fixed i.e. 01.02.2022, after hearing all parties to the suit. If for some reason, the temporary injunction application cannot be disposed of on the next date fixed, it shall be disposed of within the next 15 days.

7. It is made clear that the case will not be adjourned because of any strike or other resolution from the Bar Association asking their members not to abstain from judicial work. Learned Counsel appearing in this case or those who desire to appear at the hearing of the temporary injunction application will assist the Court irrespective of any Bar resolution.

8. This petition is **disposed of** in terms of the aforesaid orders.

9. Let this order be communicated to the learned Civil Judge (Junior Division), Mathura through the learned District Judge, Mathura **by Monday, the 24th January, 2022**.

(2022)01ILR A832
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 17.01.2022

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Civil Misc. Arbitration Appl. No. 12 of 2021

CG Power & Indus. Solutions Ltd.
...Applicant

Versus

U.P. Power Transmission Corp. Ltd.
...Opp. Party

Counsel for the Applicant:
Gantavya, Meha Rashmi

Counsel for the Opp. Party:
Karuna Thareja, Romit Seth, Shishir Prakash

Electricity Act, 2003 -Section 67 - Applicant served notice proposing three persons for appointment as Arbitrator-respondent refused to give consent-insisted that under clause 38 only chairman of UPPTCL could from Arbitral tribunal-upon failure to agree upon appointment of Arbitrator-present Application filed-Applicant neither a licensee nor a generating company-neither generated electricity nor supplied to the Respondent-Supply Agreement is for supply of materials and equipment-dispute-Reliance upon section 67 of Electricity Act, 2003 misconceived.

Application allowed. (E-9)

List of Cases cited:

1. Haryana Space Application Centre Vs Pan India Consultants Private Limited (Civil appeal No.131 (8) of 2021 decided on 20.01.202 Ltd.2017(4) SCC 665

2. TRF Ltd. Vs Aniruddha Engineering Projects Ltd. 2017 (8) SCC 377

3. Gujarat Urja Vikas Nigam Ltd. Vs Essar Power Ltd. 2008 (4) SCC 755

4. Tamil Nadu Generation & Distributiotd. 2014 (11) SCC 53

5. Hindustan Zinc, 2019 (17) SCC 882

6. Writ-C No.11295 of 2019 (Akhilesh Kumar Vs St. of U.P.)

7. Duro Felguera S.A. Vs Gangavaran Port Limited 2017 (9) SCC 729

8. Vidya Drolia Vs Durga Trading Corporation reported in (2021) 2 SCC 1

9. Babita Lila Vs U.O.I. & ors. reported in 2016 (9) SCC 647

10. Dharmendra Textiles Processors reported in 2008 (13) SCC 369

11. Suresh Shah Vs Hipad Technology reported in 2021 (1) SCC 529

12. Enzen Global Solutions Vs Central Electricity Supply Utility Odisha, 2018 (4) ARBLR 250

13. Messers Technical Associates Vs U.P. Power Transmission Corporation Limited Arbitration Application No.66 of 2019

14. Perkins Eastman Architects DPC & ors.Vs HSCC India Ltd. 2019 SCC Online Supreme Court 1517

15. Stock Vs Frank Jones (Tipton). Ltd. 1978 (1) All England Reporter 948

16. Crawford Vs Spooner 1846 (6) Moo PC 1

17. Nirmala J. Jhala Vs St. of Gujarat 2013 (4) SCC 301

18. Shin Etsu chemical Co Ltd. Vs Akash Optifibre Ltd. 2005 (7) SCC 234

19. Vimal Kishor Shah Vs Jayesh Dinesh Shah 2016 (8) SCC 788

20. Silver Dry Bulk Co. Ltd. Vs Hometd.Vs Pradyuat Deb Burman 2019 SCC Online Supreme Court 1164

21. Trading Engineers International Ltd. Vs U.P. Power Transmission Corporation Limited Arbitration Application No.5 of 2020

22. SBP and Co. Vs Patel Engineering Ltd. & anr. 2005 (8) SCC 618

23. ONGC Mangalore Petrochemicals Ltd. Vs A.N.S. Constructions 2018 (3) SCC 373

24. National Insurance Company Ltd. Vs Bogra Polyfab 2009 (1) SCC 267

(Delivered by Hon'ble Mrs. Sangeeta Chandra, J.)

1. This Application has been filed by the Applicant under Section 11(6) of the Arbitration and Conciliation Act, 1996 as amended, saying that the Applicant is a public limited company duly incorporated under the Companies Act and the Respondent U.P. Power Transmission Corporation Limited (here in after referred to as UPPTCL) is a State Transmission Utility notified under Section 39 of the Electricity Act, 2003.

2. It has been argued by the learned counsel for the Applicant that a Tender was floated by the Respondent Corporation in 2010-11 bearing Specification No.ESD-8/48 for construction of a 400/220 kW Substation at Banda on turnkey basis. The contract was awarded to the Applicant on 28.12.2011, in furtherance whereof three separate Agreements were executed between the parties, the first one being for supply of equipment and materials for construction of the Substation, that is, the Supply Agreement. In between January 2013, and March 2013, the Applicant manufactured certain equipment and the same was inspected by the Respondent. The Applicant wanted to supply the equipment two months earlier to the initially agreed date of supply. A letter was written in this regard by the Applicant to the Respondent saying that it wished to supply equipment in June 2013 before the scheduled date of delivery i.e. August 2013. The Respondent refused to accept delivery prior to the due date citing procedural issues. After correspondence

and discussion, when the Applicant agreed to bear the interest towards pre-ponement of the delivery and payment towards the equipment for the period of two months on the total cost of the equipment, the Respondent agreed to take the delivery before time. However, the Respondent instead of releasing Rs.11 Crore 76 lakhs, released only a sum of Rs.10 crores on an ad-hoc basis. It also indicated that interest at the rate of 12% per annum on the payment of Rs.10 crores shall have to be be paid by the Applicant until the date of erecting of the equipments.

3. The Applicant addressed several letters to the Respondent objecting to the unilateral levy of interest up to the date of erecting of the equipment and calling upon the Respondent to pay balance outstanding dues of Rs.1.76 crores towards delivery of equipment under the Supply Agreement. This correspondence continued all through 2016 and 2017. The Applicant thereafter supplied the second set of Transformers and Reactors in accordance with the terms of the Supply Agreement. On 06.02.2018 the Respondent unilaterally deducted a sum of Rs.3 Crores and 24 lacs as interest on the amount paid in advance towards supply of equipment in July 2013. In effect, the Respondent had withheld Rs.5 crores and the Applicant objected to unwarranted deductions being made by the Respondent in its various correspondence in 2018. On 4 May 2019 the entire project was successfully completed by the Applicant and it requested for inspection, finally the Respondent took over the Banda Substation on 29.11.2018.

4. The Applicant served a legal notice on 25.01.2020 calling upon the Respondent to clear outstanding principal amount of Rs.5 crores along with interest at the rate of 18% per annum from the date of delivery of equipment till the date of making payment aggregating to an amount of Rs.10.91 crores and to further pay a sum of Rs.50 lakhs as token damages and Rs.50 lakhs for indulging in illegal enrichment in violation of the terms of the agreement. The Respondent refused to pay and the Applicant invoked Arbitration Under Clause 38 of Form A of the Supply Agreement (General Conditions of Contract) subject to modification in the said Clause on account of Statutory amendment to the Arbitration and Conciliation Act, 1996.

5. On such a notice being delivered to the Respondent on 17.12.2020 alongwith Applicant's proposed panel of three persons for appointment as Arbitrator, the Respondent refused to give its consent for the appointment of any of the persons proposed by the Applicant as the Arbitral Tribunal and insisted that under Clause 38 only the Chairman UPPTCL could form the Arbitral Tribunal to adjudicate upon the disputes which have arisen between the parties. The Applicant replied on 31.12.2020 pointing out the Statutory amendment to the Arbitration and Conciliation Act 1996 with effect from 23.10.2015, by which a Departmental Authority cannot be appointed as an Arbitration Tribunal or nominate someone in his behalf, nor can any person known to either of the parties be appointed as Arbitrator and requesting the Respondent to give its consent for appointment of Arbitrator in terms of the legal notice dated 14 December 2020.

6. In its letter of 6.1.2021, the Respondent maintained its stand regarding the power of the Chairman UPPPTCL to appoint an Arbitrator. The parties having

failed to agree upon a procedure for appointment of Arbitrator within 30 days from the date of the initial notice, the present Application for appointment of a sole Arbitrator to Act as Arbitral Tribunal to adjudicate upon the disputes which have arisen between the parties has been filed on 03.02.2021.

7. Clause 38 of the Supply Agreement which is the Arbitration Clause provides that "*..if any dispute or difference or controversy shall at any time arise between the bidder on the one hand and the U.P. Power Transmission Corporation Limited and the engineer of the contract or other issues touching the contract, or as to the true construction meaning and intent of any part of condition of the same ..... or as to any other matter or thing whatsoever connected with or arising out of the contract, and whether before or during the progress or after the completion of the contract, such question, difference or dispute shall be referred for adjudication to the Chairman UPPTCL, or any other person nominated by him in this behalf, and his decision in writing shall be final, binding and conclusive. This submission shall be deemed to be a such submission within the meaning of Indian Arbitration Act 1940 or any statutory modification thereof....."*

8. It has been argued by Miss Meha Rashmi the counsel for the Applicant that on account of statutory modification to the Arbitration and Conciliation Act, 1996 by the Arbitration and Conciliation Amendment Act, 2015 with effect from 23.10.2015, a Departmental Authority cannot be appointed as an Arbitrator nor can he nominate someone in his behalf nor can any person known to either of the parties be appointed as Arbitrator. The learned counsel for the Applicant has referred to judgements rendered by the Supreme Court in **Haryana Space Application Centre versus Pan India Consultants Private Limited (Civil appeal No.131 of 2021 decided on 20.01.2021), and Voestalpine Schienen GMBH v. Delhi Metro Rail Corporation Limited 2017(4) SCC 665;**

9. It has been argued by the learned counsel for the Applicant that in the judgement of **TRF Ltd. versus Aniruddha Engineering Projects Ltd. 2017 (8) SCC 377**, the Supreme Court was considering the question "*Whether an ineligible Arbitrator, like the Managing Director, could nominate an Arbitrator, who may be otherwise eligible and a respectable person, after the amendment came into effect in 2015?"*

10. Counsel for the applicant has referred to paragraphs 12 to 16 of the judgement in TRF Ltd. (Supra) where the Supreme Court had considered Section 12 (5) of the Act along with the Fifth and the Seventh Schedule. It referred with approval to the argument raised by raised by the learned counsel appearing for the appellants that the Arbitrator could not have been nominated by the Managing Director as the said authority had been statutorily disqualified. It rejected the argument raised by the Respondent that the Managing Director may be disqualified to Act as an arbitrator, but he is not deprived of his right to nominate an arbitrator who has no relationship with the respondent or that if the appointment is hit by the Fifth, Sixth or the Seventh Schedule, the same has to be raised before the Arbitral Tribunal during the arbitration proceedings but not

in an Application under Section 11 (6) of the Act. The Supreme Court considered several judgements rendered by it earlier in the subsequent paragraphs and observed that the purpose of referring to the said judgement was that the courts in certain circumstances have exercised the jurisdiction to nullify the appointments made by the authorities as there had been failure of procedure or ex facie in contravention of the inherent facet of the arbitration clause. It referred to the Seven Judges Bench in SBP and Co in paragraph 41 of judgment, and the conclusion given by the Constitution Bench in Paragraph-47, and observed that if there is a clause requiring the parties to nominate the respective arbitrator, their authority to nominate cannot be questioned. *What really in that circumstance can be called in question is the procedural compliance and the eligibility of their arbitrator depending upon the norms provided under the Act and the Schedule appended there too. But in the case before it where the Managing Director is the named sole arbitrator and he has also been conferred with the power to nominate one who can be arbitrator in his place, and in such a case if the nomination of an arbitrator by ineligible arbitrator is allowed, it would tantamount to carrying on the proceeding of arbitration by himself. Ineligibility strikes at the root of his power to arbitrate or get it our treated upon by a nominee.*

11. It was observed by the Supreme Court in paragraph 57 that:- *"... by our analysis, we are obliged to arrive at the conclusion that once the Arbitrator has become ineligible by operation of law, he cannot nominate another as an Arbitrator. The Arbitrator becomes ineligible as per prescription contained in Section 12 (5) of the Act. It is inconceivable in law that a person who is statutorily ineligible can nominate a person. Needless to say, once the infrastructure collapses, the superstructure is bound to collapse. One cannot have a building without the plinth. Or to put it differently, once the identity of the Managing Director as a sole Arbitrator is lost, the power to nominate someone else as an Arbitrator is obliterated. Therefore, the view expressed by the High Court is not sustainable and we say so..."*

12. In response to the said submissions made by the learned counsel for the Applicant, Shri Shishir Prakash appearing for the Respondent has argued that the Arbitration Application has been cleverly drafted only to invoke the jurisdiction of this Court in a highly time-barred dispute. The agreement between the parties was signed in 2011 and supply of equipment for which the Applicant alleges unwarranted deductions being made in payment, was made in the year 2013-14. Once the payment having been made against the Supply Agreement the Applicant wishes to extract more from the Respondent than permissible under the contract. The Learned counsel for the Respondent has pointed out that the Arbitration and Conciliation Act, 1996 is a "general law'. All disputes relating to licensees and generating companies are to be referred to the U.P. State Electricity Regulatory Commission or to an Adjudicator nominated by it. Reference has been made to the Preamble of the Electricity Act, 2003, that it is "... *an Act to consolidate the laws relating to generation, transmission, distribution, of Electricity and generally for taking measures conducive to development of Electricity industry, promoting competition there in, protecting interest of consumers and supply of Electricity to all areas, rationalisation of*

Electricity tariff, ensuring transparent policies regarding subsidies, promotion of efficient and environmentally benign policies, constitution of Central Electricity Authority Regulatory Commission and Establishment of Appellate Tribunal and for matters connected there with or incidental thereto."

13. "Great Emphasis has been placed by the learned counsel for the Respondent on the phrase *"Matters connected therewith or incidental thereto'*. It has been argued that the Applicant agreed to supply equipment, and construct a Power Substation at Banda for the supply and transmission of Electricity. There were three contracts signed between the parties:- 1) for supply of equipment and materials that is, the Supply Agreement; 2) Erection, Testing and Commissioning and Operation and Maintenance of the Power Substation;3) Civil works. The specific timeline and procedure as well as terms of payment was decided between the parties in all these agreements. The Company requested the preponement of supply of materials and equipment without constructing the supporting civil works like laying down the plinth on which such equipment was to be placed. The firm delivered the equipment in the month of June 2013, two months prior to the stipulated schedule of supply in August 2013 at its own risk and cost. The Respondent had to taken a loan from the Power Finance Corporation. The liability to pay interest had been specifically agreed upon by the Applicant in its letter dated 24.06.2013, and due to the laxity in the construction of the Power Substation the Respondent had to suffer losses. Nevertheless, it released a sum of Rs.10 Crores which was already much more then what was due under Paragraphs 4.2 and .4.3 of the Agreement.

14. It has also been pointed out by the learned counsel for the Respondent that Section 86(1)(F) of the Electricity Act 2003, mandates that any dispute between the licensee and the generating company can be referred to the Regulatory Commission for appointment of an expert to adjudicate the dispute. Since the Electricity Act is a special Act by implication Section 11 of the Arbitration and Conciliation Act will not apply to disputes between licensees and generating companies. This is because of the principle that "*special law overrides the general law*". In the matter of **Gujarat Urja Vikas Nigam Limited versus Essar Power Ltd 2008 (4) SCC 755**, the Supreme Court observed in Paragraph-28 that Section 86(1)(F) is a special provision and hence will override the general provision in Section 11 of the Arbitration and Conciliation Act 1996, for Arbitration of dispute between the licensee and the generating company. The learned counsel for the Respondent has read out the relevant Paragrah which observes thus:- *"...it is well settled that the special override the general law. Hence, in our opinion Section 11 of the Arbitration and Conciliation Act 1996 has no application to the question who can adjudicate/arbitrate disputes between licensees and generating companies and only Section 86(1)(F) shall apply in such a situation. ..."*

15. Under Paragraph-61 of the same judgement it was observed that *"..,we make it clear that it is only with regard to authority which can adjudicate or arbitrate the dispute that the Electricity Act 2003 will prevail over Section 11 of the*

Arbitration Conciliation Act. However, as regards the procedure to be followed by the State Commission or the Arbitrator nominated by it, and other matters related to Arbitration other than appointment of the Arbitrator, the Arbitration and Conciliation Act 1996 will apply, except if there is a conflict with the provisions in the Act of 2003. In other words, Section 86(1)(F) is only restricted to the authority which is to adjudicate or arbitrate between licensees and generating companies. Procedure and other matters relating to such proceedings will of course be governed by the Arbitration and Conciliation Act 1996, unless there is a conflicting provision in the Act of 2003."

16. In Paragraph-64 it was further observed:- "*this appeal is filed regarding deduction of Rs.5crores. The appellant may file an application under Section 94(2) of the Electricity Act 2003 before the appropriate Commission, to pass such an interim order, as it may consider appropriate. This appeal is accordingly dismissed"*

17. The learned counsel for the Respondent has referred to various paragraphs in the Counter Affidavit wherein it has been stated that the Applicant was responsible for creating hurdles in the smooth execution of the contract. It requested for preponement of supply of equipment and to ignore the terms and conditions of the Agreement. It supplied the equipment in June 2013 two months prior to the stipulated time of August 2013, at its own risk and cost. The Applicant company had not constructed the plinth, knowing fully well that they were required to be completed prior to the delivery of the said equipments and equipments were to be unloaded on the respective plinths exclusively. For the Construction of the Banda Substation the Respondent had taken a loan from Power Finance Corporation and interest on the loan had to be borne by the Public Sector Undertaking on making payment as demanded by the Applicant. The contract had provided for payment of only 70% of the cost of the material and equipment and hundred percent cost of transportation and insurance and of the tax and duties levied on such equipment , subject as to their due dates as per approved Delivery/ Completion Schedule. However, the insistence of the Applicant for delivery of equipment before time and for making of payment before time had led to the Corporation suffering losses as it resulted in preponement of liability to pay interest.

18. The learned counsel for the Respondent has referred to another decision of the Supreme Court in **Tamil Nadu Generation and Distribution Corporation Limited versus PPN Power Generation Company (Private) Limited 2014 (11) SCC 53**, to emphasize that in respect of disputes relating to generation, transmission and distribution of Electricity, dispute resolution should be done only under the Electricity Act 2003.

19. The learned counsel for the Respondent has referred to Section 2 (17) of the Definition Section of the Electricity Act 2003, which defines a "distribution licensee" and also Section 2 (28) which defines the "generating company" and Section 2(29) and 2(38). He has referred to Section 14 of the Electricity Act of 2003 and Paragraphs 13 to 24 and 59 of the judgement rendered in Gujarat Urja (supra). The learned counsel for the Respondent has also referred to paragraphs 13 and Para 26 of the **Hindustan Zinc,**

2019 (17) SCC 882 and the Statement of Objects and Reasons of the Electricity Act of 2003. It has been argued that the Banda Substation was a Transmission Station and construction of a transmission station is as much a part of a distribution licensees' work as any other. Like laying of power lines it is a technical matter which is a function that is incidental to the supply of Electricity, and it would always be better that this adjudication is dealt with by some person who has special knowledge of the domain.

20. The learned counsel for the Respondent has also referred to Section 2(22) and Section 2(25) of the Act 2003 and argued that the Electricity supply system is an integrated whole. It has also been pointed out that instead of approaching the Chairman of UPPTCL invoking the Arbitration Clause, the Applicant repeatedly addressed all its correspondence to the Managing Director U.P.P.T.C.L.

21. Learned counsel for the Respondent has also pointed out paragraphs from the contract which provided that *"the Substation has to be constructed, erected, tested, commissioned and completed in all respects within 24 months from the date of issue of letter of intent or from the date of handing over of land which ever is later. The progress shall be monitored as per the approved project implementation schedule and PERT chart to be submitted by the contractor."*

22. It has been argued by the learned counsel for the Respondent that any deductions that have been made from the payments of the Applicant have been because of the various clauses of the Contract which required that entire construction and running of the Substation was to take place as per Schedule/timetable, which was not adhered to by the Applicant. The Project was finally commissioned in May 2018, that is, after inordinate delay of more than four years, as per the terms and condition of the Agreement. Because of delay in charging the said substation, the Respondent suffered huge losses in terms of tariffs and Electricity supply which was mainly due to the Applicant company. The Learned counsel for the Respondent has referred to the Special Conditions which were attached to the sanction letter for loan by the Power Finance Corpn. Ltd. and has pointed out Paragraph-23.1 wherein the UPPTCL had to submit an undertaking that it would not make any investment in a Scheme for which approval had been denied by the UPERC. The UPPTCL had to submit evidence that the investment in the Project/Scheme has been intimated to the UPERC, indicating the financing plan and repayment obligation in tariff. The argument of the learned counsel for the Respondent is that since the Power Finance Corporation Ltd. while approving loan to be given to the Respondent had laid down a condition that all progress, stage wise, had to be duly intimated to the UPERC, it meant that the UPERC had effective control over the project i.e. erecting of the Substation at Banda. The UPERC being closely associated was entitled to nominate an Arbitrator for adjudication of any dispute arising in the performance of such contract.

23. Learned counsel for the Respondent referred to Sub Sections 22, 25, 30, 36, 50, 72 and 77 of Section 2 of the Electricity Act, to buttress his argument

that although the word "*transmission*" has not been included, it is intended that "*transmission*" shall also be dealt with in the same manner as in Section 86 (1)(f). He also referred to Section 174 of the Electricity Act which gave it overriding effect over all other laws and argued that the Electricity Act and the provision there in for settlement of disputes shall override the provisions of the Arbitration Act insofar as Disputes relating to Electricity are concerned. The learned counsel for the Respondent referred to judgment rendered by a Division Bench in Writ-C No.11295 of 2019 (**Akhilesh Kumar versus State of U.P**.) and paragraph 23 thereof, to say that "casus omissus' should be supplied by the Court in certain cases where it is necessary to give full effect to the provisions of the Statute. He argued that the word "transmission" although was not mentioned along with "distribution" in sub Section (5) of Section 2, distribution would include transmission also.

24. The learned counsel for the Respondent also referred to Section 150 and Section 174 of the Electricity Act, and to the judgement rendered by the Supreme Court in the case of Mayavti Trading Private Limited, 2019 SCC Online SC 1164, during the course of his arguments. He referred to Sections 39 and 40 of the Act and argued that this Court will have to see whether "*generation'* includes "*transmission'* as all are interrelated and "*power system*" includes generation, transmission and distribution. All are technical. Only generation cannot be said to be technical, transmission lines and substations that facilitate transmission are also technical matters, that need to be referred to an expert in the field for adjudication. The Applicants are suppliers of components and build substations to facilitate transmission and therefore they are also covered by the Electricity Act and the learned counsel for the Respondent also referred to page 29 of the Contract and argued that the aggregate value of the first contract of Rs.92,71,72,000 is related to the second, and the third contract the learned counsel for the Respondent also referred to the Statement of Objects and Reasons of the Act and paragraph 1.1 and argued that transmission comes within "works relating to the supply of Electricity."

25. In rejoinder to the arguments raised by the learned counsel for the Respondent, the learned counsel for the Applicant has said that the reliance placed upon the provisions of the Electricity Act 2003, is erroneous and misconceived. The Electricity Act 2003 has no application in the facts of the present case which arise out of a purely commercial dispute between the parties. The parties are governed by the Indian Contract Act and the Arbitration and Conciliation Act alone. The Electricity Act 2003 deals with generation, transmission distribution and trading of Electricity and governs contracts in relation thereto. In this case there is no generation, distribution or trading of Electricity whatsoever. The dispute has arisen out of the provisions of the Supply Agreement dated 28.11.2011. The Supply Agreement was a contract for supply of equipment and material for construction of a Substation and the Applicant has simply sold the equipment and materials such as Transformers and Reactors to the Respondent for construction of the Substation. The State Electricity Regulatory Commission is a body set up under Section 86 of the Electricity Act 2003 to regulate the process of procurement of Electricity by distribution companies from a generating company under the agreement for purchase of power.

Under Section 86(1)(F) of the Act, the State Electricity Regulatory Commission has jurisdiction only over those disputes which arise under these agreements for purchase of power between the licensees/distribution companies and the generating companies. It has been argued that the Applicant is neither a licensee nor a generating company. It has neither generated Electricity nor supplied it to the Respondent. The Supply Agreement is a contract for supply of construction material and equipment simpliciter. In the performance of the Supply Agreement the Applicant has not undertaken any work of transmission, distribution or trading of Electricity as a licensee, and the Respondents' reliance on Section 67 of the Electricity Act 2003 is also misconceived. The judgement relied upon by the Respondents reported in 2002 (8) SCC 715, has no application to the present case. Also, the judgement reported in 2008 (4) SCC 755 is exclusively in respect of Electricity disputes between distribution companies and generating companies and the Power Purchase Agreement. It has been argued that this Court has been approached for appointment of Arbitrator as there was failure of both the parties to agree upon the same under Section 11 (6) of the Act of 1996. It has further been argued that the Respondents' claim that the loan taken from the Power Finance Corpn. was to facilitate the Applicant company, was inappropriate and false. The loan document filed as Annexure to the Counter Affidavit shows that the Respondent raised a loan of Rs.640 crores from the Power Finance Corpn to finance the project.

26. Miss Meha Rashmi has also argued that the learned counsel for the Respondent fairly admitted that the Applicant is neither a licensee nor a generating company and therefore not covered under Section 86(1)(f), but should be read as covered under the said Section by this Court and the definition of generating company should be extended to include the Applicant as well. Such a power is not given to the Court under Section 11 (6) of the Act where the jurisdiction is limited only to see whether there was a contract, and in the said contract there was an Arbitration Clause providing for settlement of disputes through an Arbitral Tribunal. It was also argued that there were three contracts signed between the Applicant and the Respondent. Dispute has arisen only with respect to the first contract which relates to supply of equipments and does not include construction of the Substation. It is an incorrect submission made by the Respondent that the Applicant is constructing the power Substation and laying down the power lines as well. The learned counsel for the Applicant referred to **Duro Felguera S.A. V. Gangavaran Port Limited 2017 (9) SCC 729**, and paragraphs 38 and 42 thereof. The contract between the Applicant and the Respondent is purely commercial and not a technical contract. The equipment has to be delivered tested on the site by the officials of the Respondent, and delivery has to be taken thereafter. It also requires replacement of defective equipment or material but it is not the case of the Respondent that defect was found in the equipment and materials that was supplied. Therefore no technical experience is required to adjudicate the dispute of holding back nearly 10 crores of rupees from the dues of the Applicant.

27. It has also been argued that the intention of the legislature in framing the

Arbitration Act is clear as also in framing the Electricity Act. When the intention of the legislature is clear and the language is unambiguous the court should not read a *''casus omissus'* in the language and supply the same while sitting in limited jurisdiction under Section 11 (6) of the Arbitration Act. Miss Meha Rashmi, further contended that the argument of the Respondent is misplaced in so far as he has communicated the anxiety of the Respondent regarding technical difficulties being discovered in the equipment supplied. Such is not the case. The case is that Applicant had preponed the supply of certain equipment and material and also had asked for preponement of payment and was willing to pay the interest calculated on preponement of payment by two months by the Respondent, to the Bank. In such a dispute only terms which would have to be in interpreted are commercial terms. The question to be decided by the Arbitrator was whether the deductions made by the Respondent was justified at the time of final payment. Moreover, it has been argued that while framing the Electricity Act, nothing prevented the Legislature from saying that any dispute of a licensee shall be referred to the Commission. Instead the words used are "*any dispute relating to generation*" shall be referred to the Commission. The judgements that have been relied upon by the learned counsel for the Respondent relate to power Purchase Agreements. The legislature did not intend that all the disputes relating to a licensee or a generating company be referred to the Commission. It intended that some disputes relating to generation could also be referred to the Arbitrator.

28. It has been argued further by the learned counsel for the Applicant that the State Electricity Commission is a body set up under Section 86 of the Electricity Act 2003, to regulate the process of procurement of Electricity by distribution companies and generating companies under an agreement for purchase of power. Under Section 86(1)(F) of the Act the State Electricity Commission has jurisdiction only over those disputes which arise under these agreements for purchase of power between the distribution companies and the generating companies.

29. Learned counsel for the Applicant argued that the scope of judicial enquiry is limited and reference was made to para 132, 150 to 153 154 and 233 of the judgement rendered in **Vidya Drolia Vs. Durga Trading Corporation reported in (2021) 2 SCC 1**. The learned counsel for the Applicant also referred to **Babita Lila Vs. Union of India and Others reported in 2016 (9) SCC 647** and Para-63 thereof, and argued that this Court has to consider whether in the monitory claim it is necessary to add words which are not relevant for decision of the dispute. Where there is no ambiguity in the statute, the Court should not interpret the words in such a manner as to create confusion. Learned counsel for the Applicant referred to Paragraphs 64, 65 and 66 of **2016 (9) SCC 647 Babita Lila Vs. Union of India & Others and of Dharmendra Textiles Processors reported in 2008 (13) SCC 369**, and argued that similar matter had come up before this Court and the Designated Judge had referred the dispute to a retired judge of this Court. Learned counsel for the Applicant referred to judgements in **Hindustan Zinc Limited Vs. Ajmer Vidyut Vitran Nigam reported in 2019 (17) SCC 82, Suresh Shah Vs. Hipad Technology reported in 2021 (1) SCC 529 and Gujarat Urja**

Vikas Nigam Vs. Essar Power reported in 2008 (4) SCC 755.

30. In **Suresh Shah versus Hipad Technology India Private Limited 2021(1) SCC 529**, in paragraph 19 the Supreme Court had observed in a dispute relating to tenancy/ lease agreement which was not covered under the Rent Control Act that *"in so far as eviction or tenancy relating to matters governed by special statutes, where the tenant enjoys statutory protection against the eviction, whereunder the court/forum is specified and conferred jurisdiction under the statute alone can adjudicate such matters. Hence, in such cases the dispute is non-arbitrable. If the special statutes do not apply to the premises/property under lease/tenancy created thereunder as on the date when the cause of action arises, to seek eviction or such other relief and in such transaction if the parties are governed by an arbitration clause; the dispute between the parties is arbitrable and there shall be no impediment whatsoever to invoke the arbitration clause."* The Supreme Court in the said judgement relied upon observations made in **Vidya Drolia versus Durga Trading 2021 (2) SCC 1.**

31. The learned counsel for the Applicant has also placed reliance upon and **Enzen Global Solutions versus Central Electricity Supply Utility Odisha, 2018 (4) ARBLR 250**; and paragraphs 10 to 15 where a single judge of the Odisha High Court observed, after referring to various communication between the parties that a commercial agreement between the parties with regard to arbitration clause is not to be interpreted by the strict rules of interpretation, as may be applicable to formal documents or conveyances but by gathering the intention of the parties to the agreement. A common sense meaning of the agreement is to be taken as to what was the intention of the parties with regard to the settlement of disputes. From the perusal of communication between the parties the clear intention of the parties had emerged that they were in agreement to first settle the dispute amicably and if not then by referring to Odisha Electricity Regulatory Commission, the parties and also agreed that 0ERC would not be obliged to Act as arbitrator. The Court looking into the reluctance of OERC to Act as Arbitator directed the parties to suggest an agreed name of a person to be appointed as arbitrator, and on failure to do so the court would appoint an arbitrator.

32. Counsel for the Applicant has also placed reliance upon a coordinate bench decision in **Messers Technical Associates Versus U.P. Power Transmission Corporation Limited Arbitration Application No.66 of 2019**, where the Bench after hearing the parties at length had observed basis of judgement rendered in TRF (supra) that the Chairman of the Commission had become ineligible to Act as arbitrator, and therefore he could also not appoint an arbitrator to settle the dispute between the parties. This Court also referred to a later judgement of the Supreme Court in **Perkins Eastman Architects DPC and others Versus HSCC India Ltd. 2019 SCC Online Supreme Court 1517**; which also held that "*the ineligibility referred to was as a result of operation of law, in that a person having an interest in the dispute or in the outcome or decision thereof, must not only be ineligible to Act as an arbitrator but must also not be eligible to appoint anyone else*

as an arbitrator and that such person cannot and should not have any role in charting out any course to the dispute resolution by having the power to appoint an arbitrator."

33. This Court having heard the learned counsel for the parties at length finds that in **Babita Lila and others versus Union of India 2016 (9) SCC 647**, it has been held that *casus omissus* cannot be inferred when there is a conscious exclusion. In Para-63 of the said judgement the Supreme Court had observed that "there is no presumption that *casus omissus* exists and the Court should avoid creating *casus omissus* where there is none. It is the fundamental rule of interpretation that Courts would not fill the gaps in statute, their function being "*jus discre non facere* "that is, to declare or decide the law. The Supreme Court had relied upon observations made by it and ***Union of India versus Dharmendra Textile Processors 2008 (13) SCC 369***, where it had been ruled that a *"a Court cannot read anything in the statutory provision or stipulated provision which is plain and unambiguous. It was held that a statute being an edict of the legislature, the language employed therein is determinative of the legislative intent."* It recorded with approval of the observation in **Stock versus Frank Jones (Tipton). Ltd. 1978 (1) All England Reporter 948**; that it is contrary to all rules of construction to read words into an Act unless it is absolutely necessary to do so. The observation there in that rules of interpretation do not permit the Courts to do so unless the provision as it stands is meaningless or doubtful and that the Courts are not entitled to read words into an Act of Parliament unless a clear reason for it is to be found within the four corners of the statute, was underlined. It was proclaimed that the *casus omissus* cannot be supplied by the Court except in the case of necessity and that reason for, is found in the four corners of the statute itself but at the same time *casus omissus* should not be readily inferred and for that purpose, all the parts of a statute or section must be construed together and every clause of a section should be construed with reference to the context and other clauses thereof so that construction to be put on a particular provision makes a consistent engagement of the whole statute.

34. In **Union of India and others versus Dharmender Textiles**, it has been observed by the Court on the basis of English precedents that 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 versus Spooner 1846 (6) Moo PC 1**, "*The Courts cannot aid the legislatures defective drafting of an Act, they cannot add or mend, and by construction make up deficiencies which are left there. "....."The question is not what maybe supposed and has been intended but what has been said. Statutes should be construed not as Theorems of Euclid, but words must be construed with some imagination of the purposes which lie behind them. ..."....Two principles of construction, one relating to casus omissus and the other in regard to reading the statute as a whole, appear to be well settled. Under the first principal casus omissus cannot be supplied by the Court except in case of clear necessity ...,The Golden Rule for considering all written*

instruments is that the grammatical and ordinary sense of the word is to be adhered to unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical or and ordinary sense of the word may be modified, so as to avoid that absurdity and inconsistency, but no further. The Later part of this Golden Rule must however be applied with much caution if the precise words used are plain and an ambiguous we are bound to construe them in their ordinary sense even though it may lead, in our view of the case, to an absurdity or manifest injustice. Words may be modified or varied, where their import is doubtful and obscure. But we assume the functions of legislators when we depart from the ordinary meaning of the precise words used, merely because we see ,or fancy we see, an absurdity or manifest injustice from an adherence to the literal meaning."

35. In DMRC case (supra) in Paragraph-19 the Supreme Court has observed that independence and impartiality of the arbitrator are the hallmarks of any arbitration proceedings. Rule against bias is one of the fundamental principles of natural justice which apply to all judicial and quasi-judicial proceedings. *"It is for this reason that notwithstanding the fact that relationship between the parties to the arbitrary tribunal and the arbitrators themselves are contractual in nature and the source of an arbitrators appointment is deduced from the agreement entered into between the parties, notwithstanding the same, non-independence and non-impartiality of such arbitrator (although contractually agreed upon) would render him ineligible to conduct the arbitration. The genesis behind this rationale is that even when an arbitrator is appointed in terms of contract and by the parties to the contract, he is independent of the parties. Functions and duties require him to rise above the partisan interest of the parties and not to Act in, or so as to further, the particular interest of either parties. After all the arbitrator has adjudicatory role to perform and, therefore he must be independent of the parties as well as impartial..."*

36. In **Haryana Space Application Centre versus Pan India Consultants Private Limited reported in 2021 (3) SCC 103**, a three judges Bench of the Supreme Court observed in Paragraphs 17 and 18 thus- "*we are of the view that the appointment of the Principal Secretary Government of Haryana as a nominee arbitrator of HARSAC which is the nodal agency of the Government of Haryana, would be invalid under Section 12 (5) of the Arbitration and Conciliation Act 1996, read with Seventh Schedule. Section 12(5) of the Arbitration Act 1996 (as amended by the 2015 Amendment Act), provided that notwithstanding any prior agreement to the contrary, any person whose relationship with the parties, or counsel, falls within any of the categories specified in the Seventh Schedule, shall be in eligible to be appointed as Arbitrator*. Item 5 of the Seventh Schedule of the Act which defines the various persons who would be ineligible to Act as arbitrator reads as under: "arbitrators relationship with the parties or counsel- **The arbitrator is a Manager Director or part of the Management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matter in dispute in the arbitration."**

37. In Vidya Drolia versus Durga Trading (supra), the Supreme Court has observed in paragraph 132 of the judgement that: - "the Courts at the referral stage do not perform ministerial functions. They exercise and perform judicial functions when they decide objections in terms of Sections 8 and 11 of the Arbitration Act. Section 8 prescribes the Courts to refer the parties to arbitration, if the action brought is the subject of an Arbitration Agreement, unless it finds that prima facie no valid arbitration agreement exists. Examining the term "*prima facie*" in **Nirmala J. Jhala versus State of Gujarat 2013 (4) SCC 301**, this Court had noted: *"48. - - 27 - - prima facie case does not mean a case proved to the hilt but a case which can be said to be established if the evidence which is led in support of the case was to be believed. While determining whether a prima facie case has been made out or not the relevant consideration is whether on the evidence led it was possible to arrive at the conclusion in question, and not whether that was the only conclusion which could be arrived at on that evidence - -)."*

38. The Supreme Court in paragraph 134 further observed: -*"prima facie examination is not full review but a primary first review to weed out manifestly and ex facie non-existent and invalid arbitration agreements and non-arbitrable disputes. The prima facie review at the Reference stage is to cut the dead wood and trim off the side branches in straight forward cases where dismissal is barefaced and pellucid and when on the facts and law The litigation must stop at the first stage. Only when the Court is certain that no valid arbitration agreement exists or the disputes /subject matter are not arbitrable, the application under Section 8 would be rejected. At this stage the Court should not get lost in the thicket and decide debatable questions of facts. Referral proceedings are preliminary and summary and not a mini trial. This necessarily reflects on the nature of the jurisdiction exercised by the Court and in this context,* the observations of B.N. Srikrishna J. of "good arguable case". In **Shin Etsu chemical Co Ltd. versus Akash Optifibre Ltd. 2005 (7) SCC 234**, are of importance and relevance. Similar views are expressed by this Court in **Vimal Kishor Shah versus Jayesh Dinesh Shah 2016 (8) SCC 788,** wherein the test applied at pre arbitration stage was whether there is a good arguable case for the existence of an arbitration agreement.

39. The Supreme Court in paragraph 135 referred with approval the observations made by the England and Wales High Court in **Silver Dry Bulk Co. Ltd. versus Homer Hulbert Maritime Co. Ltd. Reported in 2017 EWHC 44 (Comm**); Where it was observed that "*a good arguable case is somewhat more than merely arguable, but need not be one which appears more likely than not to succeed. ... It represents a relatively low threshold which retains flexibility for the Court to do what is just, while excluding those cases where the jurisdictional merits were so low that reluctant respondents ought not to be put to the expense and trouble of having to decide how to deal with arbitral proceedings where it was very likely that the tribunal had no jurisdiction....."*

40. In **Mayavti Trading 2019 (8) SCC 714**, the Supreme Court noticed the argument made by Shri Mukul Rohatgi Learned Senior Advocate that Sub Section (6A) has since been omitted by an amendment carried out in the Act in 2019, (though it has not yet come into force), on

the recommendations of a High-Level Committee Review regarding institutionalisation of arbitration in India headed by Justice B.N. Srikrishna. The Court observed however that the omission of Sub Section 6(A) is not to resuscitate the law that was prevailing prior to the Amendment Act of 2015. The Amendment Act of 2019 omitted Section 11 (6A) because appointment of arbitrators is to be done institutionally, in which case the Supreme Court or the High Court under the old statutory regime are no longer required to appoint Arbitrators and consequently to determine whether an arbitration agreement exists. In Paragraph-38 of Duro Felguera, (supra), it was observed that it is not possible for a composite reference to be made for settling the disputes under different contracts by constitution of a single Arbitral Tribunal for dealing with such arbitration. As per the amended provisions of Subsection (6A) of the Section 11, the power of the Court is only to examine the existence of arbitration agreement. When there are five separate contracts each having independent existence with separate arbitration clauses,There cannot be a single Arbitral Tribunal.

41. Under paragraph 42 of the said judgement the Supreme Court negatived the arguments raised by the Learned senior counsel for the respondents that where various agreements constitute a composite transaction, the Court can refer disputes to a single Arbitral Tribunal if all ancillary agreements are relatable to the principal agreement and performance of one agreement is so intrinsically interlinked with the other agreements. The Supreme Court observed that the case before it stood entirely on a different footing. All five different packages as well as the corporate guarantee have separate arbitration clauses and they do not depend on the terms and conditions of the original contract or the MOU which was only intended to have clarity in the execution of the work. In Paragraph-50 of the said judgement Justice Kurian Joseph concurred with the view expressed by Justice Bhanumati that five different agreements could not be subsumed into one agreement on the basis of Memorandum of Understanding. Each of such five agreements have separate elements and therefore it should have a separate Arbitral Tribunal. A Coordinate Bench decision of this Court in **Trading Engineers International Ltd. versus U.P. Power Transmission Corporation Limited Arbitration Application No.5 of 2020**, this Court had observed that certain disputes regarding monitory claims of the petitioner had accrued which were not being addressed by the respondent. There was in the aforesaid agreement between the parties an arbitration clause in Clause No.38 of the Agreement. The petitioner had invoked arbitration clause, notice of which was served upon the respondents however the respondent had not replied to the same nor participated in the formation of the Arbitral Tribunal. In the Arbitration Application filed thereafter the Court had issued notice and the respondents had appeared through Counsel and orally submitted that they did not wish to file any response as they had no objections to the Court appointing an Arbitrator. The Court had thereafter appointed a Retired judge of this Court as Arbitrator.

42. In **Messers Mayavti Trading Private Limited versus Pradyuat Deb Burman 2019 SCC Online Supreme**

Court 1164; a three-judge Bench of the Supreme Court has considered the scope of interference under Section 11(6) of the Arbitration Act. It referred to judgement rendered in United India Assurance Co. Ltd. versus Antique Art Exports Private Limited 2019 (5) SCC 362 which had distinguished the judgement in Duro Felguera S.A. v Gangavarman Port Ltd. 2017 (9) SCC 729, By negativing, The argument raised by the Learned counsel for the respondent that after insertion of SubSection (6) (A) to Section 11 of the Amendment Act 2015, the jurisdiction of this Court is curtailed and the limited mandate of the Court is to examine the factum of existence of an Arbitration clause, by holding that it is only a general observation relating to the facts in the case of Deuro Felguera. The Supreme Court in United India (Supra) had observed that in Duro Felgeura the Supreme Court had taken a note of the facts of that particular case and that Sub Section (6A) introduced by Amendment Act 2015, and in that context had observed that preliminary disputes are to be examined by the Arbitrator and not for the Court to be examined within the limited scope available for appointment of Arbitrator under Section 11 (6)of the Act.

43. The Supreme Court in Mayavti Trading (supra) thereafter referred to the facts and circumstances leading to the introduction of Section 11 (6A) by way of Amendment Act of 2015. Section 11 (6A) provided that the Supreme Court or the High Court while considering any application under SubSection (4) or SubSection (5) or SubSection (6) of Section 11 shall confine itself to examination of the existence of an Arbitration Agreement. Prior to SubSection 11 (6A) being introduced, the Supreme Court in several judgements beginning with **SBP and Co. versus Patel Engineering Ltd. and Another 2005 (8) SCC 618**, had held that at the stage of Section 11 (6) application being filed the Court need not merely confine itself to the examination of the existence of an arbitration agreement , but could also go into certain preliminary issues such as stale claims ,accord and satisfaction having been reached , etc.

44. In **ONGC Mangalore Petrochemicals Ltd. versus A.N.S. Constructions 2018 (3) SCC 373**, a case which arose before the insertion of Section 11 (6A), the Supreme Court had dismissed a Section 11 petition on the ground that accord and satisfaction had taken place as no dues certificate was submitted by the contractee company and on the request completion certificate was issued by the appellant contractor. The 246th Law Commission Report dealt with some of these judgements and felt that at the stage of Section 11 (6) application only existence of an arbitration agreement has to be looked at and not other preliminary issues. In SBP and Co. (supra) a seven judge Bench overruled the view taken earlier that the power of the Chief Justice under Section 11 (6) of the Act is administrative in nature. The seven judges Bench had held that the power to appoint an arbitrator under Section 11 is a judicial and not administrative power. One of the conclusions in SBP & Company (supra) was as follows:- "*the Chief Justice or the Designated Judge will have the right to decide the preliminary aspects as indicated in the earlier part of this judgement. These will be (1) his own jurisdiction to entertain the request, (2) the existence of a valid arbitration agreement, (3)existence or otherwise of a live claim, (4) the existence of the conditions for the exercise of his*

power and (5) on the qualifications of the Arbitrator or the Arbitrators." This position was further clarified in **National Insurance Company Limited versus Bogra Polyfab 2009 (1) SCC 267**, where the Supreme Court observed in paragraph 22 as follows: -"*where the intervention of the Court is sought for appointment of an Arbitral Tribunal under Section 11, the duty of the Chief Justice or his designate as deferred in SBP and Co 2005 (8) SCC 618, this Court identified and segregated, the preliminary issues that may arise for consideration in an application under Section 11 of the Act into three categories, that is, (1) issues which the chief Justice or his designate is bound to decide; (2)issues which he can also decide, that is, issues which he may choose to decide; and (3) issues Which should be left to the Arbitral Tribunal to decide.*

45. In National Insurance Company (supra), the Supreme Court further observed in Para 22.1 as follows:-

"22.1 the issues (first category) which the Chief Justice/designate will have to decide are: a) whether the party making the application has approached the appropriate High Court, (b)whether there is an arbitration agreement and (c) whether the party who has applied under Section 11 of the Act is a party to such agreement. 22.2 the issues (second category)which the chief Justice /his designate may choose to decide or leave them to the decision of the Arbitral Tribunal are: a) whether the claim is a dead (long barred) claim or a live claim, (b) whether the parties have concluded the contract/transaction by recording satisfaction of the mutual rights and obligations or by receiving the final payment without objection. 22.3 the issues (third Category) which the Chief Justice/his designate should leave exclusively to the Arbitral Tribunal are: (a) Whether a claim made falls within the arbitration clause (for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration, (b) The merits of any claim involved in the arbitration." The Supreme Court observed in Mayavati Trading that as a result of these judgements the door was left wide open for the Chief Justice or his designate to decide a large number of preliminary aspects which could otherwise have been left to be decided by the Arbitrator under Section 16 of the Act. As a result, the Law Commission of India vide its Report No.246, suggested that various sweeping changes be made in the 1996 Act. Referring to SBP and Co and Bogra Polyfab, the Law Commission recommended addition of a new Subsection, namely Subsection (6A) in the Section 11. The Law Commission referred to the judgement of the Supreme Court in **Shin Etsu chemical Ltd. Versus Aksh Optifibre 2005 (7) SCC 234**, Where the Supreme Court ruled in favour of looking at the issues/controversy only prima facie.

46. After addition of Section 11 (6A) the scope of judicial intervention is only restricted to situations where the Courts or Judicial Authority finds that the arbitration agreement does not exist or is null and void. In so far as the nature of intervention is concerned, the Commission recommended that in the event the Court or judicial Authority is prima facie satisfied against the argument challenging to have an Arbitration Agreement, it shall appoint the Arbitrator and/or refer the parties to arbitration, as the case maybe. The

amendment envisages that Judicial Authority shall not refer the parties to Arbitration only if it finds that there does not exist an Arbitration Agreement, or that it is null and void. If the judicial authority is of the opinion that Prima facie an Arbitration Agreement exists, then it shall refer the dispute to arbitration, and leave the existence of the Arbitration Agreement to be finally determined by the Arbitral Tribunal. However, if the Judicial Authority concludes that the agreement does not exist, then its conclusion will be final and not prima facie. The Amendment also envisages that there shall be a conclusive determination as to whether the arbitration agreement is null and void. In the event that the judicial authority refers the dispute to arbitration and/or appoint an arbitrator, under Sections 8 and 11 respectively, such a decision will be final and non-appealable. An appeal can be maintained under Section 37 only in the event of refusal to refer parties to arbitration, or refusal to Appoint an arbitrator.

47. The Supreme Court in Mayavti Trading (supra) considered the Objects and Reasons as mentioned in the Ordinance which later was introduced as Amendment Bill of 2015. A few of the objects were and enumerated by the Court i.e. an application for appointment an Arbitrator shall be disposed of by the High Court or the Supreme Court as the case maybe as expeditiously as possible say within a period of 60 days, and while considering such an application the High Court or the Supreme Court shall only examined, the existence of a prima facie arbitration agreement and not other issues. "*A reading of the Law Commission Report together with Statement of Objects and Reasons, shows that the Law Commission felt that the judgements in SBP and Co and Bogra Poly fab required a relook, as a result of which, so far as Section 11 is concerned, the Supreme Court or the High Court while considering an application under Section 11 (4) to 11 (6) is to confine itself to the examination of the existence of an arbitration agreement and leave all other preliminary issues to be decided by the arbitrator."* Supreme Court further observed in paragraph 10 of Mayavti Trading that the law prior to 2015 Amendment that had been laid down by the Supreme Court which would have included going into whether accord and satisfaction has taken place, has now been legislatively overruled. The Supreme Court overruled the observations made by this Court in United India Insurance Co. Ltd. It specifically held that Section 11 (6A) is confined to the examination of the existence of an arbitration agreement and is to be understood in the narrow sense as has been laid down in the judgement and Deuro Felguera SA.

48. The decision in Mayavti Trading was rendered by three judges bench on 5 September 2019, and having overruled the observations made by the division bench in United India Insurance Company Limited versus Antique Art Exports Private Limited and lays down the law that in so far as exercise of judicial power under Section 11 (6A) of the Act is concerned, the Designated Judge should confine himself only to the examination of the existence of an arbitration agreement in the narrow sense, as has been laid down and Duero Felguera, and leave all other issues to be decided under Section 16 of the Act by the Arbitral Tribunal.

49. This Court having considered at length the argument of learned counsel for

the parties and case laws relied upon by the facts that reliance on the provisions of the Electricity Act 2003 is misplaced. The Applicant is neither a licensee nor a generating company. It has neither generated Electricity not supplied it to the Respondent and the Supply Agreement is a contract for supply of materials and equipment. The Applicant has not undertaken any work of Transmission, Distribution and Trading of Electricity as a licensee, and the Respondent counsels' reliance on Section 67 of the Electricity Act is also misplaced. The judgements relied upon by the Respondent have no application to the present case as these judgements deal exclusively with Electricity disputes between distribution companies and generating companies under Power Purchase Agreements. The Arbitration application deserves to be allowed and is allowed. This Court proposes the name of Justice O.P. Srivastava (Retd.) to Act as Arbitrator.

50. Let the office issue notice to the proposed Arbitrator seeking his consent under Section 12 of the Act.

(2022)01ILR A851
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.12.2021

BEFORE

THE HON'BLE SUNEET KUMAR, J.

Arbitration & Concili. Appl. U/S 11(4) No. 112 of 2004

M/s Manish Engg. Entp. ...Applicant
Versus
Indian Farmers Fertilizer Coop. Ltd. & Ors. ...Opp. Parties

Counsel for the Applicant:
Sri Vivekanand Srivastava, Sri Dharmendra Shukla, Sri P.K. Ganguly, Sri Santosh Kumar Tiwari, Sri Anil Tiwari

Counsel for the Opp. Parties:
Ms. Sushmita Mukherjee, Sri Vivek Ratan Agrawal, Sri Sanjay Grover, Sri Sunil Gupta

Application u/s 11 95)-for appointment of arbitrator—no original contract/work order filed—non existent and manufactured document-in its absence-Application u/s 11 not maintainable-claim of applicant is ex facie time barred by more than fifteen years-absence of pleading and proof of mode and manner of giving or delivery-and receipt of notice-pre condition of section 11 r/w section 3 and 21-not satisfied-

Application rejected. (E-9)

List of Cases cited:

1. Vidya Drolia & ors. Vs Durga Trading Corporation", reported in (2021) 2 SCC 1,

2. Velugubanti Hari babu Vs Parvathini Narasimha Rao & anr., (2016) 14 SCC 126 para 23

3. Atul Singh & ors. Vs Sunil Kumar Singh & ors.s(2008) 2 SCC 602

4. Geo Miller & Comp. Pvt. Ltd. Vs Chairman, Rajsthan Vidyut Utpadan Nigam Limited, (2020) 14 Supreme Court 643 (paras 23-24, 29)

5. Inder Singh Rekhi Vs Delhi Development Authority, (1988) 2 SCC 338

6. Reliance Asset Reconstruction Company Limited Vs Hotel Poonja International Pvt. Ltd. 2021 SCC Online 289 (para 32)

7. Khan Bahadur Shapoor Fredoom Mazda Vs Durga Prasad Chamaria & ors., AIR 1961 SC 1236

8. Bharat Sanchar Nigam Limited & anr. Vs M/S Nortel Network India Pvt. Ltd. 2021 SCC online SC 207

9. Secunderabad Cantonment Board. Vs B Ramchandriah & Sons , (2021) SCC online SC 219 (para 20)

10. Datar Switchgears Ltd. Vs Tata Finance Ltd. & anr., 2000) 8 SCC 151

11. Goldbrush Sales & Services Ltd. Vs Managing Director, U.P. St. Road Transport Corporation & anr., 2019 SCC Online AII 5833

12. Udai Shankar Awasthi Vs. St. of U.P., (2013) 2 SCC 435

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

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

A. Remand Order
B. Pleadings
(i) Application under section 11;
(ii) Further pleadings;
(iii) Objections by respondent-IFFCO
C. Existence of Arbitration Agreement
D. Claim - time barred, deadwood
(i). Limitation Act: Section 18
E. Conditions for maintaining application under Section 11
F. Vexatious, frivolous dishonest claim
G. Conclusion

2. Heard Sri Anil Tiwari, learned Senior Counsel assisted by Sri Santosh Kumar Tiwari and Sri Dharmendra Shukla, learned counsels for the applicant/petitioner and Sri Sunil Gupta, learned Senior Counsel assisted by Ms. Sushmita Mukherjee and Sri Sanjay Grover, learned counsels appearing for the respondent. Parties were heard at length for several days.

A. Remand Order :

3. The instant application/petition has been filed under Section 11(5) of the Arbitration and Conciliation Act, 19961, invoking the jurisdiction of this Court for appointment of an arbitrator. The matter was heard pursuant to remand order dated 9 March 20212. Relevant portion of the Supreme Court order reads thus:

"Our attention has been invited to the recent three Judge Bench decision of this Court in "**Vidya Drolia & Ors. vs. Durga Trading Corporation**", reported in (2021) 2 SCC 1, which is directly on the point. Amongst others, it has been held that the High Court in a given case while deciding an application under Section 11(4) of the Arbitration and Conciliation Act, 1996, can undertake "the prima facie test' examination to check manifest cases of non-existent and invalid arbitration agreements and ex facie time barred and dead claims. This limited exercise is to weed out and stop barefaced and pellucid meritless, frivolous and dishonest litigation at the threshold. However, the principle "when in doubt, do refer' applies. Therefore, when the contentions are arguable, when consideration in summary proceedings would be insufficient and inconclusive, when facts are contested etc., the matter/disputes should be 3 referred to the Arbitrator.

The counsel for the respondents vehemently submitted that they have placed on record the document, namely, the arbitration agreement, which is a genuine document. However, we need not elaborate on the arguments advanced before us for the nature of the order we propose to pass as we are of the opinion that the issue and contentions require reconsideration in accordance with law keeping in mind the legal ratio in Vidya Drolia (supra). These

contentions can be considered by the High Court in the remand proceedings.

We accordingly set aside the impugned order and the judgment and relegate the parties to the High Court by restoring the application for appointment of the arbitrator to its original number for being considered afresh. The examination would be in terms of the ratio in Vidya Drolia (supra).

We may not be understood to have expressed any opinion either way on any of these contentions, or as may be available to the parties in the remanded proceedings. All contentions are left open."

4. Supreme Court directed that while considering the application under Section 11 of the Arbitration Act, the Court to prima facie, examine: (i) whether the agreement exists; (ii) whether the litigation is meritless, frivolous and dishonest; (iii) whether the claim, ex facie, is time barred/deadwood, and/or, the application (Section 11) is itself barred under the Limitation Act, 19633.

5. The instant application under Section 11(5) of the Arbitration Act was presented on 17 December 2004, the application came to be disposed of vide order dated 22 January 2019, appointing an arbitrator. The respondent, Indian Farmers Fertilizer Cooperative Ltd.4, a public sector undertaking of the government, carried the order in appeal to the Supreme Court, which was set aside and remanded.

B. Pleadings :

(i) Application under Section- 11

6. It is pleaded that the applicant-firm came to be awarded work order No. 36/0000/1060/12463 dated 29 March 1985, for complete cleaning and painting of structures, equipments, vessels and pipelines etc. in different plants of Phoolpur. The total value of the work order was at Rs.3,60,000/-. It is asserted by the applicant that the work order was executed and completed as per the terms and conditions to the satisfaction of the respondent-authorities. It is, further, pleaded that after completion of the work, the bills for the entire work was submitted with the respondent-authority but the payment was not made for the reasons best known to the IFFCO authorities. It is further pleaded that despite repeated request for payment of the bills arising from the work order and for various other work order payment was not made.

7. Aggrieved, petitioner was compelled to institute a petition being Civil Misc. Writ Petition No. No. 19922 of 2001, for another work order No.43/57061/1916B1/35252, dated 1 February 1996, and not for the present work order. It is further asserted that conduct of the applicant approaching this Court invoking writ jurisdiction annoyed the IFFCO authorities, consequently, applicants were subjected to harassment and trouble causing hindrance in the contract work and payment of bills already submitted by the applicants.

8. It is further pleaded that applicant was prohibited from entering the premises at Phoolpur Unit of IFFCO and was not permitted to look after the material and documents kept by the applicant in their store-cum-office within the IFFCO premises, nor was the applicant permitted to remove the material and documents from the premises. It is further pleaded that on

inspection of the site on 16 May 2003, along with the arbitrator appointed in another proceeding, (M/s S.K. Associates), sister-firm of the applicant-firm, it is alleged that the material and documents of the applicant-firm lying in the store-cum-office within the IFFCO premises was missing/removed by the respondent-authorities. It is consequently asserted that the cause of action arose on 7 December 2001, 6 May 2003, thereafter, on 9 October 2004.

9. In paragraph (14) of the application, it is pleaded that despite repeated approach and request, applicant was not given payment of the bills in respect of the work order, hence, a notice dated 9 November 2004, was sent/dispatched on 16 November 2004, by post requesting the IFFCO-authorities to make payment, of the bills along with compound interest @ 18% per annum, and/or, to appoint an arbitrator to decide the dispute.

10. It is, thereafter, pleaded that the respondent- IFFCO neither made payment nor appointed an arbitrator till filing of the instant petition (17.12.2004) even after expiry of the notice period. Hence, applicant was compelled to invoke the jurisdiction of this Court under the Arbitration Act. It is further pleaded that as per clause-17 of the work order, there is a provision for arbitration. It is further asserted that the application filed under Section 11 is well within limitation and if there is any delay, the same may be condoned. In para-19, it is unequivocally pleaded that the bills at Rs.3,60,000/- plus interest thereon, is lying pending with the IFFCO-authorities w.e.f. 29 March 1986.

11. It would be apposite to reduce the dates, as pleaded by the applicant in Section-11 Application, in tabular form to comprehend the time line of the case setup by the applicant.

TABLE - I

Dates	Events
29.03.1985	Alleged Work Order No. 36/0000/1060 C/12463 for complete cleaning and painting of structures, equipment, vessels & pipelines of the plant in Phoolpur unit. (Value of Rs. 3,60,000/-). The Work Order had a duration of one year.
29.03.1986 29.04.1986 29.05.1986	Taking the above allegation at its face value, since the Work Order period ended on 29.03.1986, the bill should and would have been submitted in 30 days by 29.04.1986 & then paid in 30 days by 29.05.1986.
19.05.1989	Thus, cause of action, if any, arose on 29.05.1986. The 3 years limitation started running & expired on 29.05.1989.
09.11.2004	Notice under clause 17 of the Work Order to appoint arbitrator.
17.12.2004	Petition filed under section 11 of Arbitration Act.

(ii) Further pleadings:

12. Supplementary affidavit dated 18 November 2014, came to be filed by the applicant bringing on record the correspondence with the respondent-IFFCO with regard to the payment of the work order. Letters written by the applicants are

dated 29 May 1993, 26 February 1994, 20 April 1996, wherein, reference is to several work orders, including, the present work order requesting IFFCO authorities to release the pending bills. The communication dated 20 April 1996 specifically pertains to the instant work order, wherein, it has been noted that more than 10 years have lapsed, an additional work at Rs.3,51,590/- arising from the work order was executed by the applicant at behest of the IFFCO authorities but despite on having completed the work, payments presently standing at Rs.7,11,590/- along with compound interest @ 18%, is due and pending.

13. The document dated 1 July 19985, purportedly to have been issued by IFFCO (Joint General Manager Maintenance), the subject reads, *"submission of final bills'*. It is a typed, partially legible document with interpolations by hand. The document refers to work order of the year 1983, 1984, 1985 and 1993. It appears that the document has been filed to mislead and misrepresent the Court. It is not clear whether the document pertains to the present work order.

14. In the rejoinder affidavit dated 6 November 2017 filed by the applicant (to the counter affidavit filed by IFFCO to the application under Section 11), it is pleaded6 that the application under Section 11 of the Arbitration Act is within time and not barred by limitation. It is further pleaded that, "*the crucial date for invoking the limitation is 17 April 2002 when respondent sought no claim certificate from the applicant for release of the payment. The applicant invoked the arbitration clause on 09 November 2004 and the petition was filed on 17 December 2004 and hence the claim of the applicant is well within time".*

15. The purported notice dated 9 November 20047, for appointment of arbitrator with respect to the present work order (29 March 1985) reads thus:

"Sir,

The above work order was awarded to M/s Manish Engineering Enterprises and **was completed within time whose bills for payment were submitted**. On the instructions of IFFCO authorities, bills were again submitted.

Most of the relevant papers in respect of the above said work order and other work orders were lying in the store-cum-office within IFFCO plant maintained by the M/s Manish Engineering Enterprises, wherein the **entry of undersigned has been banned by IFFCO authorities about for the last 3-4 years.**

In compliance of IFFCO letter dt. 07.12.2001 the reply dt. 07.12.2001 i.e. on the same day was given that the **bills already submitted are lying in your office for payment with a prayer to make the payment thereof with interest @ 18% per annum** (Compound Interest)

Date : 09.11.2004

M/s Manish Engineering Enterprises"

(emphasis supplied)

16. The notice was dispatched by speed post on 16 November 2004.

17. On perusal of the notice, it categorically states that the firm had completed the work order within time and the bills for payment were submitted. In the subsequent paragraph it is stated that the relevant papers in respect of the work order was lying in the store-cum-office within

IFFCO plant maintained by the firm, wherein, entry was banned by IFFCO authorities about 3-4 years ago. It is further stated that pursuant to and in compliance of IFFCO's letter dated 7 December 2001, a reply was submitted by the firm on the same day that bills already submitted are lying in the office of IFFCO for payment along with compound interest @ 18% per annum. Since nothing has been done, hence, the instant notice, as per clause 17 of the work order, for appointment of arbitrator.

18. The applicants have further referred to several letters written by the respondent authorities in response to the communications of the applicant. The letter written by the IFFCO authorities is dated 13 January 1997, wherein, it is certified that applicants carried out substantial painting work in IFFCO plant at about Rs. 20 lakh. The work and performance was found satisfactory. The letter dated 3 March 2000, is again in the same tenor certifying that the firm (applicant) had executed several civil work and painting at IFFCO. It is certified that the firm is technically and financially sound and their work is satisfactory. The next communication dated 20 March 2000, is in reference to the present work order (29.03.1985), wherein, it is stated that the firm has already informed through earlier correspondence (05.10.1999, 21.10.1998, 03.01.1997, 05.04.1996 and 29.12.1995) that it is not possible for the IFFCO to pay Rs. 3,51,519/- towards the additional work executed by the firm without amendment/modification of the work order. After modified/amended work order is issued the payment would be released.

19. The next communication placed on record, alleged to have been issued by the respondent, is communication dated 30 November 2001, which is hand written on a rough note sheet. The letter has been signed by one Rashid Iqbal. The designation of the officer is not indicated and the copy of the letter is marked to Senior Manager (civil). The communication refers to six bills pertaining to different works undertaken and executed by the applicant firm. There is reference to the instant work order, as well as, other work orders since 1985 to 1996. The letter merely records that the work orders noted therein is in the Account department for verification. The firm was directed to contact the Senior Manager (civil) for no claim certificate etc. so that necessary action may be taken for release of payment.

20. The applicants have placed on record letter dated 17 April 2002, issued by the respondent authority, addressed to the applicant-firm. The subject refers to the present work order. The contents of the letter is in reference to the earlier communication dated 30 November 2001, issued by the civil department asking the firm to submit no claim certificate so as to enable the authorities to release the payment against the work order. The letter further communicates that the amendment to the work order has already been issued vide letter dated 23 November 2001, accordingly, the firm was requested to submit no claim certificate to the Senior Manager (civil) for necessary action to be taken thereon for release of payment.

21. The additional pleadings and the communication referred therein by the applicant, for the sake of convenience, is reduced in a tabular form.

TABLE - II

DATES	EVENTS
29.05.1993 26.02.1994 20.04.1996	Three letters, 7 years after end of the period of completion of the alleged Work Order, are stated to be the Applicant's requests for payment. These letters have seen the light of day for the first time after 20 years only in the 2015 Supplementary Affidavit.
13.01.1997	The letter by IFFCO recording successful completion of work by the Applicant
21.10.1998 28.10.1998	The letters demanding payment again but not pertaining to or making reference to the present Work Order.
03.03.2020	A Certificate of Manager of IFFCO to the effect that the Applicant has completed work including painting work, written 14 years after alleged completion of the work order. The document having no reference to the present Work Order.
25.03.2000	IFFCO's alleged reply to the Applicant's letter dated 22.02.2000 acknowledging that the Applicant has completed additional painting work to the tune of Rs. 3,51,590 payment of which would be done after extension of amendment of the Work Order. The communication is 14 years after the alleged completion
10.05.2001 09.10.2001	The letters of the Applicant regarding release of payment which are dated 15 years after the alleged completion of work.
30.11.2001 7.12.2001 17.4.2002	Alleged letter by IFFCO asking the Applicant to give No Claims certificate for release of outstanding payment is alleged. Protest letter by Applicant seeking 18% compound interest also. IFFCO, referring to letter dated 30.11.2001 again asked for NOC. The letters are 15 years after the alleged completion.
17.12.2004	Application under Section-11 filed before the Court.

(iii) Objections by the respondent-IFFCO

22. Respondents in response to the application filed under Section 11 and the other affidavits have categorically pleaded and setup a case that the claim is malicious, false based on non existing work order. The communications/correspondence from the period 1992 to 2002 were not filed along with original application presented in 2004. It is further pleaded that proprietor of the firm (Shri S.K. Pandey) is a person of questionable intent, who has filed series of fraudulent litigations against the respondent IFFCO and the instant litigation is one such matter which has been filed after twenty years of the alleged date of work order (29 March 1985). The respondents have denied of having an employee in the name *"Rashid*

Iqbal'. The respondents have further denied existence of the work order and have insisted that the original arbitration agreement be placed on record by the applicant. It is further pleaded that respondents are not party to the alleged non existent agreement. The document and the correspondence is forged, manufactured with interpolations visible to naked eye.

23. A preliminary objection has been raised with regard to the maintainability of the application being highly belated and prima facie suffers from delay and laches. The work order was for a period of one year for cleaning and painting. Issue of non-payment is being raised after twenty years, which according to the respondents is barred by laches, even if the work order is to be taken on face value.

24. In the backdrop of the pleadings noted herein above in detail, this Court has been called upon, to return a finding on: (a) existence of the arbitration agreement; (b) whether claim is ex-facie time barred, and/or, dead claim; (c) whether the application under section 11 is meritless, frivolous and dishonest litigation; (d) whether the application under Section 11 itself is barred by limitation.

C. Existence of Arbitration Agreement :

25. The work order is dated 29 March 1985 as per the case of the applicant. The quotation no. is nil dated 27 October 1984, and discussions held on 7 January 1985. The document on face value appears to be cyclostyled/typed. The reference number of the work order date and the description of the applicant firm is hand written. Clause (3) of the agreement specifies that the total value of the contract as per schedule rates is at Rs. 3,60,000/-. The document further clarifies that the maximum value will not exceed Rs. 3,60,000/-. After clause 3.0/3.1, as visible to naked eye, some interpolation has been made in the work order. Between clause 3.1 and 4.0 a new clause (8) has been interpolated/inserted which mandates that the contractor shall ensure payment of minimum wages. The interpolated clause(8) is an extract of page 2 of some other document. On bare perusal of the first page of the work order the clauses therein is as follows:

1.0 ---- Scope of Work
1.1 ---- .....
2.0 ---- Contractor's Delegation
3.0 ---- Rates & Total Work Order Value
3.1 ---- .....
- 2 -
8. ---- Interpolation i.e. cut/paste
4.0 ---- Safety

26. In between clause 3.1 and 4.0, clause (8) has been interpolated, partially effacing clause 3.2 i.e. payment of minimum wages, which is clearly visible to naked eye. An attempt has been made to efface clause 3.2 and clause (8), contained in page -2-, of another document has been superimposed.

27. The next page of the work order is again marked page -2- and is with regard to terms of payment which, *inter alia*, provides that 100% payment shall be made against rest/final payment submitted to Manager (Finance and Accounts) within 30 days of submission of temporary verified bills. It further provides that if a bill is not submitted within 30 days after completion of work then IFFCO will not take any responsibility for measurement/sheet verification.

Clause 6.0 ---- Effective Date

Clause 6.1 ---- The duration of the contract shall be valid for a period of one year from the effective date. The effective date will be the date of issue of work order. However, it will be at the discretion of IFFCO to extend the validity for another one year at same terms and conditions on mutual consent.

28. The last page of the work order (page-6) bears the signature of the *''Materials Manager*', whereas, the columns for the signature and seal of the contractor *''received and accepted*' is not sealed, stamped nor bears the signature of the applicant firm. In other words, there is no endorsement of having received and accepted the work order by the firm with its seal and signature.

29. The applicant filed a counter affidavit in response to an affidavit filed by Sanjay Kudesia on behalf of IFFCO. In paragraph 6, it is stated that the respondents are guilty of denying existence of their own document (work order) and the subsequent correspondence. It is further pleaded that applicant would produce the original work order in the Court, "*the applicant is in possession of the original work order which will be produced on the order of the Hon'ble Court". In the subsequent paragraph (7) it is stated that the "work order dated 29 March 1985 was subsequent revise in 2001 and due to increase in following of the work and it was amended in 2001[....] the applications filed pertaining to the work order was kept in store/office maintained in IFFCO Phoolpur Branch which was subsequently misappropriated by IFFCO, when the applicants' entry was banned."*

30. In other words the original work order, is in possession of the applicant as claimed, but was not placed on the record, nor, produced during the course of arguments.

31. The plea of non-existence of arbitration agreement in an application under Section 11, if raised, is to be decided by the Court. In **Velugubanti Hari babu v. Parvathini Narasimha Rao and another**8, Supreme Court made the following observations:

"The High Court ought to have decided the questions itself and recorded a finding as to whether the MoU dated 27.05.2013 is a valid and genuine document or it is a forged and fabricated document and then depending upon the findings, appropriate directions, if necessary, should have been passed for disposal of the application finally. Unfortunately, it was not done."

32. In **Atul Singh and others v. Sunil Kumar Singh and others**9, Supreme Court held on Section 8(2) as follows:

"There is no whisper in the petition dated 28.2.2005 that the original arbitration agreement or a duly certified copy thereof is being filed along with the application. Therefore, there was a clear non-compliance of sub-section (2) of Section 8 of 1996 Act which is a mandatory provision and the dispute could not have been referred to arbitration."

33. The applicant, admittedly, has not filed the original but photocopy of the contract/work order dated 29 March 1985 with arbitration clause 17. Keeping in view

the contested nature of "*existence*' of the agreement, it was incumbent in law on the applicant to produce the original as claimed and pleaded by them. In the absence of the original, the application under Section 11, read with Section 8, of the Arbitration Act is per se not maintainable.

34. The ratio of Supreme Court in ***Vidya Drolia***10 is that the same standard, parameters and mandate as apply to Section 8 are applicable also to Section 11 for the purposes of determining the issue of "*existence*' and "*genuineness*' of the arbitration agreement and deciding whether the parties should be referred to arbitration. Therefore, the Court cannot entertain any application under Section 11, unless as per the mandate of Section 8, the original arbitration agreement is accompanying it. Section 8 reads thus:

"8. Power to refer parties to arbitration where there is an arbitration agreement

(1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists11.

(2) The application referred to in sub-section (1) **shall not be entertained unless it is accompanied by the original arbitration agreement** or a duly certified copy thereof:

Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court12."

(emphasis supplied)

35. Applying the *"prima facie'* test of *Vidya Drolia*, it follows:

(i) In the absence of the original arbitration agreement, the application under Section 11(5) is on the face of it not maintainable and cannot be entertained.

(ii) The question of the original not being available with the applicant does not arise. The applicant has, in its reply to IFFCO's application for production of the original, categorically accepted and asserted on 15 November 2018 that it is in possession of the original:

"6 ... The applicant is in possession of the original work order which will be produced on the order of the Hon'ble Court."*13*

(emphasis supplied)

(iii) Since the original is admittedly in the possession of the applicant and still not filed, the mandate of Section 11 read with Section 8(2) is that the Court shall draw an adverse inference against the applicant and dismiss its application summarily.

(iv) Act 3 of 2016, inserted a Proviso in Section 8(2), even in a case where the original is not available with the applicant, the applicant is required to -

(a) make that averment on pleading in its application under Section 11 and

(b) also file a petition ***"praying to the court to call upon the other party to produce the original***' before the Court.

(emphasis supplied)

(v) In the present case, rather than the applicant, it is the respondent which filed a petition (August 2018) before this Court that the applicant be directed to produce the original work order/agreement. The applicant's reply to the same is that the original is in its possession. But the original contract has not been produced, nor, placed on record.

36. Having regard to the work order dated 29 March 1985, and taking it on face value, the document, ex facie, is a forged/ manufactured work order with interpolations writ large to naked eye. The applicant failed to produce the original work order. The work order which is the basis of the application filed under Section-11 of the Arbitration Act, ex facie, is a non existent and manufactured document.

D. Ex facie - time barred, deadwood claim :

37. It is submitted by the learned counsel for the respondent that the alleged claim of the applicant is ex facie time-barred, dead-wood and not maintainable. It has been filed long after the expiry of the three years limitation period. In paras 10-11 of Section-11 Application, applicant itself states:

"10. That after.... Writ petition, the entry of the applicant within IFFCO.... Was banned and he was not permitted to look after his... documents... in hs store-cum-office... and... remove them from there.

11. That a letter dated 5.8.2000 was handed over to the applicant written by one of the employees of IFFCO Sri S.K. Pandey, Junior Officer (Civil) and C.R. Joshi asking the applicant to remove his store from IFFCO premises.... The true copy.... Annexure No. 3..."

38. As per the applicant, respondent-IFFCO, admittedly, disengaged the applicant well before 5 August 2000, where was the occasion of the alleged extensions/amendments of work order (29.3.85) being granted to the applicant by subsequent alleged letters written after fifteen years. It is improbable, even taking that letters were written, as is being asserted by the applicant, that would not overcome the bar of limitation. The time commences to run as the cause occurs.

39. In the alleged work order dated 29 March 1985, the payment terms, therein, reads thus:

"5.0 PAYMENT TERMS

Subject to Clause 7 and 8, **100% payment shall be made** against running/final bills submitted to Manager (Finance & Accounts) **within 30 days of submission of duly verified bills.** If a bill is not submitted within 30 days after completion of work, then IFFCO will not take any responsibility for measurement sheet verification."

(emphasis supplied)

40. Cause of action, if at all, would have accrued to the applicant legally is in May 1986. Under clause 5.0 Payment Terms, applicant was required to submit bill within 30 days after completion of work. The work order being valid for one year only i.e. up to 28 March 1986, the bill could have been submitted within thirty days i.e. latest by 28 April 1986. Had bill-

compliance been done, the entire payment due to the applicant should have been made by IFFCO within further thirty days latest by 28 May 1986 and, if not so made, cause of action would have arisen and right to sue for its dues would have accrued to applicant on 29 May 1986. (See Table-I)

41. In paras 4 and 14 of the present application under Section 11, applicant has asserted:

"4. That ***after the completion of the work, the bills for the entire job of the work order were submitted but the payments were not made*** *on one count or the other deferring the matter for reasons best known to the IFFCO authorities.*

14. That in spite of repeated approaches and requests, ***the applicant was not given payment of his bills*** in respect of the work order dated 29.3.1985. Hence, ***vide notice dated 9.11.2004 sent on 16.11.2004 by post requested the IFFCO authorities*** to make the payment of the bills with interest @ 18% per annum (compound interest) or to appoint an arbitrator to decide the dispute at the earliest..."

(emphasis supplied)

42. The present case is not one of any contractual term of "*finalization'* of bills by the employer as asserted by the applicant. The process of finalization of bills is a different concept from a final bill. [**See Geo Miller and Company Private Limited Versus Chairman, Rajsthan Vidyut Utpadan Nigam Limited**]14

43. Clause 5 of the work order mentions running bills and a *"final bill'*. The final bill is the last bill submitted by the contractor. Clause 5 does not provide for any act of finalization of bills by IFFCO after the submission of bills by the contractor. It provides only for *measurement sheet verification* by IFFCO and that too before submission of bills by the contractor to Manager (Finance & Accounts). The submission of bills, including the final (last) bill, along with such verification is to be done within thirty days of completion of work.

44. Clause 5 provides that once the verification bills are submitted, 100% payment shall be made against the running /final bills submitted to the Manager (Finance and Accounts) within thirty days of submission of duly verified bills. Thus, even verification precedes the submission of bills and there is no process of finalization of bills but only payment of bills automatically after their submission by the contractor.

45. Applicant has categorically stated15 in the Section-11 application that "*after the completion of the work, the bills for the entire job of the work order were submitted but the payments were not made....".* The case pleaded by the applicant is simply of submission of bills followed by non-payment, not of finalization of bills pending at the end of IFFCO. Thus, there is neither any term of finalization of bills in the contract, nor even any plea of finalization of bills in the S.11 application. On the other hand, the allegations by the applicant are that it continued to send reminders to IFFCO for payment but still payment was not done by IFFCO.

46. It has been submitted by the learned counsel for the respondent-IFFCO, relying on ***Geo Miller***16 that unlike a case with contractual term of "finalization of bills' as in Major (Retd.) **Inder Singh Rekhi v. Delhi Development**

Authority17, in a case where bills are *"handed over'* by claimant to the respondent but respondent has failed to make payment, the right to sue accrues from "*the date on which the final bills was raised*".

47. Hence, as per the terms of the work order/contract, the right to apply accrued to the applicant latest on 29 May 1989, and, the notice for arbitration being allegedly sent on 16 November 2004, the claim of applicant is ex facie time barred by more than fifteen years. The correspondence and communications, thereafter, is of no avail to the applicant.

(i). Limitation Act : Section 18

48. The learned counsel for the applicant strenuously attempted to impress upon the Court that the case of the applicant would fall under Section 18 and not under Article 137 of Limitation Act. The law requiring conditions of "*acknowledgement*' under Section 18, including its timing and pleading, has been laid down in **Reliance Asset Reconstruction Company Limited v. Hotel Poonja International Private Limited**18. Under Section 18 of the Limitation Act, the acknowledgement of liability in writing, signed by a party in respect of any right or property claimed by such party within the prescribed period of limitation to file a suit, and/or application, leads to computation of the period of limitation afresh, from the time when the acknowledgement is so signed. In the present case, both the said conditions of Section-18 are not satisfied. The provision is extracted:

49. Section 18, Limitation Act provides that-

"where, before the expiration of the prescribed period for a suit application ..., an acknowledgement of liability .... has been made ...., a fresh period of limitation shall be computed from the time when the acknowledgement was so signed."

50. Thus, it is only if an acknowledgement is made *before the expiration of the prescribed period* of limitation that limitation will start from the date of acknowledgement. For that purpose, as per Art. 137, Limitation Act, the date of commencement of limitation i.e. the date when the right to apply accrues to the plaintiff or applicant is the first necessity.

51. In the present case, as noted above and also admitted by the applicant in para 19 of the Section 11 application, the said date of right to apply accrued to the applicant is latest on 29 May 1986. That being so, the three years' limitation expired on 29 May 1989. There is not even a whisper in pleadings of acknowledgement of liability by IFFCO until 29 May 1989. In fact, the first alleged letter from IFFCO to the applicant is only eight years later of the date, 13 January 199719 which too along with all subsequent alleged letters, are denied as non-existent by IFFCO (See Table II). The letters even assuming were written by IFFCO, do not acknowledge the liability with regard to the work order.

52. In **Khan Bahadur Shapoor Fredoom Mazda v. Durga Prasad Chamaria and others**20, Supreme Court held :-

"6. It is thus clear that acknowledgment as prescribed by Section 19 merely renews debt;[.....]Stated generally courts lean in favour of a liberal construction of such statements though it does not mean that where no admission is made one should be inferred, or where a statement was made clearly without intending to admit the existence of jural relationship such intention could be fastened on the maker of the statement by an involved or far-fetched process of reasoning.[...]"

53. The ratio of ***Bharat Sanchar Nigam Limited and another v. M/S Nortel Network India Private Limited***21 is as follows:

"**Sections 5 to 20** of the Limitation Act do not exclude the time taken on account of settlement discussions. Section 9 of the Limitation Act makes it clear that: "**where once the time has begun to run**, no subsequent disability or inability to institute a suit or make an application stops it...As regards "any intervening facts which may have occurred, which would extend the period of limitation falling within Sections 5 to 20 of the Limitation Act, (unless) there is **a pleaded case specifically adverting to the applicable Section**, and how it extends the limitation from the date on which the cause of action originally arose, there can be no basis to save the time of limitation."

(emphasis supplied)

54. Applicant has not pleaded "*acknowledgement*" by IFFCO or any case under Section 18. The foundation has not been laid down by the applicant in the application under Section 11. The issue of limitation is a question of fact, law and jurisdiction. The foundation has to be laid in pleadings followed by arguments. In other words, without pleadings, arguments cannot be raised, advanced or pressed. The letters and reminders by the applicant are wholly irrelevant.

55. The further ratio of ***BSNL v. Nortel*** (supra) is : *"The period of limitation for issuing notice of arbitration would not get extended by mere exchange of letters, or mere settlement discussions ..."*. The same is the ratio in ***Geo Miller***22 and ***Secunderabad Cantonment Board. v. B Ramchandriah & Sons***23. The said ratio applies directly to the facts of the present case rendering all the alleged correspondence, letters, reminders, exchanges, settlement papers, NOC demands etc. filed by the applicant wholly irrelevant and meaningless for the purposes of limitation.

56. The limitation prescribed under Article 137 of the Schedule to the Limitation Act, which applies to an application under Section 11(6) or Section 11(9) of the Arbitration Act filed before the High Court or before the Supreme Court cannot be mixed up with the period of limitation applicable to the claims prescribed in various other Articles of the Schedule to the Limitation Act. Both these periods of limitation i.e. one applicable to the claims being made and another being applicable to the application under Section 11(6) or Section 11(9) of the Arbitration Act to which Article 137 of the Schedule to the Limitation Act applies, are two different periods of limitation and cannot be made applicable to each other.

57. Applying the aforenoted proposition of law to the facts setup by the applicant in the present case, I find that the application under Section 11 was not filed

within the limitation period prescribed under Article 137 of the Limitation Act. Hence, the claim of the applicant is palpably and ex facie time-barred, deadwood and non-maintainable.

E. Conditions for maintaining Application under Section 11 :

58. It is urged by the learned counsel that the respondent that the application under Section 11 of the Arbitration Act is ex facie without jurisdiction and non-maintainable. The pre-conditions mandated under Section 11(5) and (6), read with Sections 3, 21 and 43 (2) are not satisfied.

59. It is urged that the present application is governed by Section 11 (6), read with, Section 11(5). Section 11(5) provides for a case where, though the parties have provided for arbitration by a sole arbitrator, they have not *''agreed on a procedure for appointing the arbitrator*', whereas, Section 11(6) provides for a case where the parties have agreed to a procedure for appointment of the arbitrator. The present case would fall under Section 11(6), assuming that the alleged Contract/Work Order/Arbitration Agreement, dated 29 March 1985, existed, the parties had agreed on a procedure for appointment of the arbitrator as follows:

"17.0 *ARBITRATION*

If at any time, any question, dispute or difference shall arise between the owner and contractor under or in connection with the contract, either party shall as soon as reasonably practicable **give to the other, notice** in writing of the existence of such question, dispute or difference specifying its nature and the point of issue and the same shall be **referred for arbitration to General Manager of Phulpur Unit who shall appoint an officer of IFFCO as Arbitrator** and the decision of the arbitrator shall be binding on both the parties."

(emphasis supplied)

60. Limitation period of thirty days is read in Section 11(6) by judicial interpretation derived from Section 11(4) and (5). as held by the Supreme Court in ***Datar Switchgears Limited v. Tata Finance Ltd. and another***24 :

19. So far as cases falling under Section 11(6) are concerned - such as the one before us - no time limit has been prescribed under the Act, whereas a period of 30 days has been prescribed under Section 11(4) and Section 11(5) of the Act. In our view, therefore, so far as Section 11(6) is concerned, if one party demands the opposite party to appoint an arbitrator and the opposite party does not make an appointment within 30 days of the demand, the right to appointment does not get automatically forfeited after expiry of 30 days. If the opposite party makes an appointment even after 30 days of the demand, but before the first party has moved the court under Section 11, that would be sufficient ..."

61. On reading the present application as falling under Section 11(6), read with Section 11(5), the *''giving of notice to the other'* party under the arbitration clause and, more importantly, the *''receipt of request by one party from the other party'* under Section 11 is a jurisdictional condition which needs to be satisfied before any demand for appointment can be said to have been made by one party to the other party, and upon failure to appoint

arbitrator by the other party, a request for appointment of arbitrator is made to the court.

62. In the present case, the said condition is not satisfied since there is no averment, pleading and proof that the notice in writing dated 9 November 2004, ***sent*** (or ***given***) by the applicant was *delivered to and received* by the General Manager of Phulpur Unit of IFFCO by fulfilment of the various mandatory factual requirements of Section 3 of the Arbitration Act. It is submitted by the learned counsel for the respondent-IFFCO that the present application, hence, is *ex facie* misconceived, pre-mature, without jurisdiction and non-maintainable.

63. Section 3 of the Arbitration Act reads as follows:

"3. Receipt of written communications - (1) Unless otherwise agreed by the parties, -

(a) any written communications is deemed to have been **received** if it is **delivered to the addressee personally or at his place of business**, habitual residence or mailing address, and

(b) **if none of the places referred to in clause (a) can be found after making a reasonable inquiry**, a written communication is deemed to have been **received if it is sent** to the addressee's last known place of business, habitual residence or mailing address **by registered letter or by any other means which provides a record of the attempt to deliver it.**

(2) The communication is deemed to have been received on the day it is so delivered.

(3) This section does not apply to written communications in respect of proceedings of any judicial authority."

(emphasis supplied)

64. Section 3, thus provides a fiction of "*receipt*' and a special mode of service for purposes of the Arbitration Act, distinct from other general enactments (e.g. Section 27 General Clauses Act, 1897, Order 5, Rule 9 of Code of Civil Procedure, 1973, Section 114 (f) Indian Evidence Act, 1872). It requires that any written communication (notice, request etc.) can be *deemed to have been received* only if it is delivered to the addressee in the manner prescribed in Section 3(1)(a), and, on failing that prescribed manner, in the alternative, in the manner prescribed in Section 3(1) (b).

65. The first and primary method is stipulated in Section 3(1)(a) and it requires the sender to deliver the communication to the addressee actually or *personally or at his place of business etc.* i.e. there has to be an actual delivery and only if that is so, there is deemed receipt.

66. The secondary method prescribed in Section 3(1)(b) by registered letter etc. is not a direct option and cannot be resorted to straight away. It can be resorted to only in the alternative if the said primary method has actually not worked because the sender has actually not been able to find the place of business etc. of the addressee. For establishing that the primary method has not worked, various factual ingredients in Section 3(1) (b) need to be satisfied by the sender. The sender has to discharge the burden of specifically pleading and proving that he *could not "find'* that is to say, he has not been able to actually, physically and geographically locate the other party *personally or his place of business etc*. even *after making reasonable enquiry*.

67. Further, the sender, even, when he resorts to the method in Section 3(1) (b), he has the further burden to plead and prove that he sent the communication by a *"registered letter or by any other means which provides a record of the attempt to deliver it.*' Even a plain registered letter (without AD - Acknowledgement Due), speed post or courier is not enough so long as the *record of the attempt to deliver it* e.g. the record of Acknowledgement of Delivery (Acknowledgement Card) or of "*attempt*' such as "*refusal* to *receive*', *"not found'*, not "*available*' etc. given by the postman or courier service is not adverted to and produced by the sender is his pleading on affidavit.

68. The interpretation of Section 3 is in line with the decision of this Court rendered in ***Goldbrush Sales & Services Limited v. Managing Director, U.P. State Road Transport Corporation and another*** 25. The relevant paragraphs is as follows:

"7. It is the contention that [....] **mere sending of intimation about appointment of Arbitrator is not sufficient. Such intimation, assuming that it was sent though not admitting it, is required to be delivered. Unless it is delivered, it can not be treated as having been communicated**, theretofore, his submission was that prior to filing of the application under Section 11 there was no communication by the competent Authority which was the M.D., U.P.S.R.T.C. of his decision appointing Shri Niranjan Kumar as Arbitrator. Accordingly, once the application under Section 11 had been filed no such appointment could have been made and the matter was purely within the domain of this Court to do so. ...

8. It was his contention that once that applicant has repeatedly denied on oath the receipt and delivery of the alleged communication [.....] the presumption under Section 114 of the Evidence Act as also Section 27 of the General Clauses Act stood rebutted and the onus shifted upon the opposite parties to prove such receipt/delivery of the communication referred hereinabove upon the applicant and as they had failed to do so, therefore, this Court should proceed to appoint an Arbitrator. ...

11.[.....] although this application has remained pending before the Court for almost 7 years, the fact of matter is that such **sending of the letters would at best raise a presumption about the fact that the same were sent, but, as per the provision contained in Section 3(2) of the Act, 1996 this is not sufficient in respect of matters pertaining to Arbitration and such communication has to be "delivered**". Even otherwise, the presumption referred hereinabove in terms of Section 114-III(f) of the Indian Evidence Act or in terms of Section 27 of the General Clause Act is rebuttable and once the applicant has stated on oath by way of an affidavit that it had never received any such letter dated 06.08.2012 or the decision of the M.D., U.P.S.R.T.C. dated 13.07.2012, then, **the onus shifted upon the opposite party no. 1 to prove by evidence that in fact it was served and delivered**. It was incumbent upon the opposite party no. 1 to produce the postman or ask for his summoning as he would be the best person to testify as to whether the aforesaid letters/orders were served upon the applicant or not **or produce a certificate of service issued by the postal department. None of these has been done**. ... In this view of the matter, it can not be said that

there is any proof of delivery or service of the decision of the M.D., U.P.S.R.T.C. dated 13.07.2012 upon the applicant. ... The opposite party no. 1 has not been able to prove such service/delivery of his decision upon the applicant. ... there is nothing to establish that the order of the M.D. U.P.S.R.T.C. dated 13.07.2012 had been **actually served/delivered on the applicant, which is a necessary pre pre requisite specially in terms of Section 3(2) of the Act, 1996**. ... In this case also the onus shifted upon the opposite party no. 1 who has not been able to discharge it.

12. The term "delivered" is distinct from the word "dispatch". Delivered means to bring and handover something to the addressee."
(emphasis supplied)

69. The working and operation of Sections 11, 21 and 43(2) of the Arbitration Act depends on Section 3. Section 11(5) of the Act provides:

"...if the parties fail to agree on the arbitrator within ***thirty days from receipt of a request by one party from*** *another party to so agree, the appointment shall be made, upon request of a party, by the Chief Justice ..."* (emphasis supplied)

70. Section 11(6) also requires that if the appointing party has "*failed*' to act as required within 30 days of the receipt of request, the appointment shall be made upon request by the Chief Justice. (See: Datar Switchgears)

71. Section 21 reads as follows:

"21. **Commencement of arbitral proceedings**. - Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is **received** by the respondent."

72. Finally, Section 43 provides the rule of limitation as follows:

"43. **Limitations**. - (1) The Limitation Act, 1963 (36 of 1963) shall apply to arbitrations as it applies to proceedings in court.

(2) For the purposes of this section and the Limitation Act, 1963 (36 of 1963), an arbitration shall be **deemed to have commenced on the date referred in Section 21."**

(emphasis supplied)

73. The effect of Section 11 read with Sections 3, 21 and 43(2) is two-fold:

(i) It cannot be said under Section 11(5) and (6) that a party has "failed' to appoint an arbitrator unless the request (notice) by the sender has been ***delivered*** to and has been ***received*** by the addressee. Such ***delivery*** and ***receipt of request*** is a jurisdictional fact to be satisfied before any application for appointment of arbitrator can be entertained by the court. If there is no receipt of request, there can be no application under Section 11. The onus to prove the receipt of request by the addressee is on the sender. The addressee has a period of 30 days to make the appointment. If he fails to appoint in spite of receipt of notice and expiry of thiery days, then alone the jurisdiction of the court under Section 11 can be invoked by the sender. The thirty day prescription under Section 11(6) read with (5) necessitates the clear establishment by the sender of the date of "receipt of request" by the addressee.

(ii) So also, the limitation period for ascertaining whether the substantive claim of the sender is time-barred or not under the Limitation Act, necessitated the clear establishment by the sender of the date of "receipt of request" by the addressee under Section 43(2), read with, Section 21.

74. In the present case, in paras 14 and 16 of the present application under Section 11, the applicant has made merely the following allegation/assertion:

"14. That in spite of repeated approaches and requests, the applicant was not given payment of his bills in respect of the work order dated 29.3.1985. Hence, vide **notice dated 9.11.2004 sent on 16.11.2004** by post requested the IFFCO authorities to make the payment of the bills with interest @ 18% per annum (compound interest) or to appoint an arbitrator to decide the dispute at the earliest....

16. That under clause 17 of the Work Order ..., applicant rightly **served a notice on the opposite parties vide notice dated 9.11.2004** for referring the dispute to the arbitrator by appointing an arbitrator which has not been done by the opposite parties in mala fide manner".
(emphasis supplied)

75. The respondent IFFCO in its counter affidavit26, denied the allegation made in the above noted paras 14 and 16. However, the applicant has not made any averment, nor, furnished any proof as to how, when and whether the notice was actually given or delivered to and received by the respondent-IFFCO.

76. Thus, as per the above averments of the applicant, the notice dated 9 November 2004 was merely "*sent ... by post*" on 16 November 2004., not given to, delivered to and received by the respondent. There is no averment satisfying the requirements and conditions of Section 3(1) (a) and (b) and no pleading that the notice/request was "*received*' by IFFCO. The applicant has particularly failed to plead and prove in terms of Section 3(1) (b) that -

(i) it could not find the addressee, IFCCO, and its place of business etc. so as to be able to deliver the request personally to the competent IFFCO official;

(ii) it took steps for making *''reasonable enquiry'* for finding but could not find the above place of business etc. of IFFCO and the steps thereto are enlisted;

(iii) it, therefore, sent the notice (request) to IFFCO by registered/speed-post AD;

(iv) to the knowledge of the sender-applicant, the notice (request) was kept in side the envelope which was posted by means of registered/speed-post AD etc. to the application and the proof thereof (true copies).

(v) the registered/speed-post AD etc. post bore specific registration particulars and number which are as follows "...".

(vi) the original *''record of delivery'* with proof i.e. Acknowledgement of Receipt/Attempt to Deliver (Refusal to Receive, Not Found, Not Available etc.) is also being produced as Annexure "...".

(vii) Thus, there has been a delivery of and receipt of the request by IFFCO on the date "...".

77. In the absence of any pleadings and proof of the mode, manner and date of "giving' or "delivery' and "receipt' of notice (request) to the respondent, the jurisdictional pre-condition of Section 11

read with Section 3 and 21 of the Arbitration Act and arbitration clause (17) of the work order is not satisfied.

78. Accordingly, the present application for appointment of arbitrator, as well as, prospective claim(s) of the applicant are ex facie without jurisdiction, time-barred, beyond limitation period and not maintainable.

F. Ex facie vexatious, frivolous claim :

79. It is submitted by the counsel for the respondent that the present case is an ex facie vexatious, merit less, frivolous and dishonest litigation and an invalid claim.

80. Admittedly, in 2001, the applicant filed Writ Petition No. 19922 of 2001, in respect of another work order and claim against IFFCO. This Court disposed it off directing it to file a representation before IFFCO27. The applicant has nowhere stated it acted seriously and filed representation nor filed any copy thereof.

81. It is urged that the Police Report dated 20 April 201028 is again eloquent testimony of the false, frivolous and dishonest nature of the civil litigations and criminal complaints filed by applicant against the Chairman of IFFCO. The foundation of the complaint rests upon the facts, document and correspondence relied by the applicant in the instant application.

82. On 09 January 2013, in **Udai Shankar Awasthi Versus State of Uttar Pradesh**29, Supreme Court rejected the theory of IFFCO stealing applicant's documents from his store-cum-godown, quashed criminal complaints against IFFCO officials as an "abuse of process of court', and recorded that applicant had himself misbehaved with the arbitrator, stood in front of his house, shouted slogans, abused and beat up IFFCO officials, and filed criminal cases to terrorise them as witnesses and extract payments in grossly delayed arbitrations.

83. It is urged that the present application under Section 11 is only a tip of an iceberg and scandal. The applicant and its brother concern (SK Associates) have adopted against IFFCO, since 2000 a stratagem of filing numerous unscrupulous, vexatious and dishonest writ petitions, arbitration application and criminal cases for unjust enrichment. The game-plan and modus operandi is to use writ petition, Section 11 jurisdiction of High Court and the criminal processes to make money from arbitrations against non existing agreement and manufactured documents, a complete abuse of the process of law.

84. It is submitted that several Section 11 applications filed by applicant and his brother have been rejected due to gross time-barred claims and non-existent documents: Manish Engg. Versus Managing Director IFFCO30; S.K. Associates Versus G.M. North Central Railway and others31; obstruction to arbitration forcing arbitrators to recuse etc.

85. The various arbitration and criminal cases (some decided as above) all form part of a well-planned design of arbitration mafia unleashed against IFFCO. The communications (01.07.1998 and 30.11.2001) have been relied upon by the applicant in the earlier application under section 11 (Civil Misc. Arbitration No. 41 of 2002). The stand of IFFCO was that both the communications are forged and manufactured documents. This Court

rejected the plea of the applicant based on the aforenoted communications. Aggrieved, applicant carried the order in appeal before the Supreme Court. The Court declined to interfere and dismissed the Special Leave Petition32.

86. The applicant in the instant application under Section 11 has placed reliance on the same communications to save the limitation. But, the applicant has not disclosed that the orders passed by this Court in the previous litigation had rejected the stand of the applicant. The order came to be affirmed by the Supreme Court, which is binding between the parties. The order was also not placed on record during the course of argument. It was pointed out by respondent-IFFCO.

87. That apart in the present case, assuming that there existed the agreement/work order dated 29 March 1985. For constituting an honest and valid claim under the alleged work order, it was incumbent on the applicant to give specific dates and details and file copies of the bills submitted by it to IFFCO. In the absence of such a basic ingredient establishing the "*honesty'* and "*validity'* of the claim, there can be no appointment of arbitrator. In its application under Section 11(5) filed in 2004, the applicant has neither given any specific date and detail nor has it filled copy of any bill submitted to IFFCO. It has merely made a vague and bald allegation in that regard in para 4 as follows:

"4. That after the completion of the work, the bills for the entire job of the work order were submitted but the payments were not made on one count or the other deferring the matter for reasons best known to the IFFCO authorities."

88. Apart from the above allegation in para 4, from paras 5 to 13, the applicant has made no averment as regards the dues under the alleged work order. In para 14 also (noted earlier), it has only mentioned notice for invocation of arbitration which itself has never been received by the respondent and has been denied by them.

89. The claim for payment sought to be made by the applicant on such an empty and non-existent basis, namely, non-existent bills not even filed with its application under Section 11(5) will give rise to an "ex facie, meritless, frivolous and dishonest litigation'. It is "deadwood' not permissible in view of the law laid down in Vidya Drolia case.

90. The further ex facie meritless, frivolous and dishonest nature of the case is manifest also from the fact that the alleged amount for which the applicant wants an arbitrator to be appointed became due, at the very best, in May 1987, whereas, the notice invoking arbitration prior to the present application under Section 11(5) is alleged to have been sent by post only as late as on 16 November 2004 i.e. 18 years after the completion of work in 1986, under the work order dated 29 March 1985.

91. In the application under Section 11(5), there is no mention of any document whatsoever between 1985 and 2004 even purporting to pertain to the alleged dues. Only 11 years after the filing of the present application under Section 11 in 2004, the applicant, for the first time, by means of a supplementary affidavit dated (18.11.2015), tried to introduce on the record, several documents which are altogether denied by the respondent and

are, in any case, wholly irrelevant in reviving the claim of the applicant from its "deadwood' status.

92. Thus, the alleged claim of the applicant is an out and out "deadwood' claim which is ex facie meritless, frivolous and dishonest.

Conclusions:

93. For the reasons indicated above, I have come to the conclusion that:

(i) The work order/arbitration agreement (29 March 1985) is a non existent and ex facie manufactured document;

(ii) The claim set up by the applicant is highly time barred and ex facie deadwood;

(iii) The application under Section 11 of the Arbitration Act is grossly barred by limitation;

(iv) The claim of the applicant is ex facie vexatious, meritless, frivolous and dishonest;

(v) The application under Section 11 is without jurisdiction and not maintainable;

(vi) The respondent-IFFCO is entitled to cost assessed at Rs. 11 lakhs to be paid by the applicant within one month from date.

94. The application under Section 11 of the Arbitration Act, accordingly, stands rejected.

(2022)01ILR A872
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 18.01.2022

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Crl. Misc. Bail Appl. No. 376 of 2022

Khalid ...Applicant

Versus

State of U.P. ...Opp. Party

Counsel for the Applicant:
Lal Bahadur Khan

Counsel for the Respondents:
G.A.

Criminal Law – Indian Penal Code, 1860 – Sections 354, 506 & 376 - complainant is bhabhi of accused-she lives in her parental home-accused for commiting obscene act with her-initialy only section 354 and 506 IPC was alleged, later 376 IPC also alleged in St.ment u/s 164 Cr.P.C.- nothing in medical-contradiction in FIR, St.ment u/s 161 Cr.P.C. and u/s 164 Cr.P.C-already a criminal case u/s 306 IPC lodged against complainant and her other family member for real brother of the Applicant-committed suicide-present case-to build pressure-absense of any convincing material to indicate the possibility of tampering evidence and unlikelihood of early conclusion of trial.

Bail granted. (E-9)

List of Cases cited:

1. Dataram Singh Vs St. of UP & anr, (2018) 3 SCC 22

(Delivered by Hon'ble Shamim Ahmed, J.)

1. Heard Shri Lal Bahadur Khan, the learned counsel for the applicant and Shri Ravish Kumar Mishra, the learned A.G.A. and perused the record.

2. The applicant, **Khalid**, has moved the present bail application seeking bail in F.I.R. No. 157 of 2021, under Sections 354, 506, 376 I.P.C., Police Station Hanswar, District Ambedkar Nagar.

3. Learned counsel for the applicant submits that the applicant has been roped in, in a false and and fabricated case by the complainant. The complainant alleges in the F.I.R. that she is the sister-in-law (Bhabhi) of the applicant. She got married with Mohammad Hashim, elder brother of the applicant, who died two years back, she is having two sons. Her brother-in-law, Khalid, used to visit her parental house, and on finding her alone he used to commit obscene act with her. When she complained about the same to her father-in-law and other brothers-in-law, then they threatened her for dire consequences.

4. Learned counsel for the applicant further submits that the applicant has been falsely implicated in the present case by the victim/ complainant. He is the brother-in-law(Devar) of the complainant. Initially the F.I.R. was lodged under Sections 354, 506 I.P.C. In her statement recorded under Section 161 Cr.P.C., the victim repeated the same version of the F.I.R. and there was no allegation of rape. Thereafter in her statement recorded under Section 164 Cr.P.C. the victim developed her case further and the allegation of rape was levelled against the applicant. Her medical examination was conducted. No sample of vaginal smear could be taken as the incident was occurred 17 days prior to the date of examination. No any internal or external injury was found or present on her person at the time of her examination. It was further submitted that there are huge contradictions between the averments made in the F.I.R., in the statement of the victim recorded under Section 161 Cr.P.C. and in her statement recorded under Section 164 Cr.P.C.

5. Learned counsel for the applicant further submits that the real brother of the applicant, Mohammad Hashim committed suicide on 11.12.2017, in this regard the applicant lodged a first information report bearing F.I.R. No. 162 of 2017, under Section 306 I.P.C. at Police Station Hanswar, District Ambedkar Nagar, against the complainant and her other family members. In the said case after due investigation the complainant and her other family members have been charge sheeted and the trial is going on.

6. Learned counsel further submits that the entire allegation against the applicant and his family members has been levelled by the complainant with intention to built pressure upon the applicant not to pursue the criminal case lodged against her and her family members, and also to get some share in the property of the applicant's father. This fact has also been chalked out from the statement given by the complainant in the statement recorded under Section 161 Cr.P.C., whereas, the facts remain the same that the complainant is living since long in her parental house and only to get the share she has roped in the entire family of the applicant in the criminal case.

7. Several other submissions in order to demonstrate the falsity of the allegations made against the applicant have also been placed forth before the Court. The circumstances which, according to the counsel, led to the false implication of the accused have also been touched upon at length. It has been assured on behalf of the applicant that he is ready to cooperate with the process of law and shall faithfully make himself available before the court whenever required and is also ready to accept all the conditions which the Court may deem fit to impose upon him. The applicant undertakes

that in case he is released on bail he will not misuse the liberty of bail and will cooperate in trial. It has also been pointed out that the applicant is not having any criminal history and he is in jail since 05.12.2021 and that in the wake of heavy pendency of cases in the courts, there is no likelihood of any early conclusion of trial.

8. Learned A.G.A. opposed the prayer for bail.

9. After perusing the record in the light of the submissions made at the Bar and after taking an overall view of all the facts and circumstances of this case, the nature of evidence, the period of detention already undergone, the unlikelihood of early conclusion of trial and also the absence of any convincing material to indicate the possibility of tampering with the evidence and considering the medical report and contradictions in the F.I.R. and in the statements recorded under Section 161 and 164 Cr.P.C. of the victim as also no sign of rape has been opined by the doctor nor any external or internal injury was found on the person of the victim, and as per the medical examination the victim was a major woman and was having two children, and considering the larger mandate of the Article 21 of the Constitution of India and the law laid down by the Hon'ble Apex Court in the case of ***Dataram Singh vs. State of U.P. and another***, reported in ***(2018) 3 SCC 22***, this Court is of the view that the applicant may be enlarged on bail.

10. The prayer for bail is granted. The application is allowed.

11. Let the applicant, **Khalid**, involved in F.I.R. No. 157 of 2021, under Sections 354, 506, 376 I.P.C., Police Station Hanswar, District Ambedkar Nagar, be enlarged on bail on his executing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned on the following conditions :-

(1) The applicant will not make any attempt to tamper with the prosecution evidence in any manner whatsoever.

(2) The applicant will personally appear on each and every date fixed in the court below and his personal presence shall not be exempted unless the court itself deems it fit to do so in the interest of justice.

(3) The applicant shall cooperate in the trial sincerely without seeking any adjournment.

(4) The applicant shall not indulge in any criminal activity or commission of any crime after being released on bail.

(5) In case, the applicant 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.

(6) The applicant shall remain present, in person, before the trial court on the dates fixed for (i) opening of the case, (ii) framing of charge and (iii) recording of statement under Section 313 Cr.P.C. If in the opinion of the trial court 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.

(7) 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.

(8) 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.

12. It may be observed that in the event of any breach of the aforesaid conditions, the court below shall be at liberty to proceed for the cancellation of applicant's bail.

13. It is clarified that the observations, if any, made in this order are strictly confined to the disposal of the bail application and must not be construed to have any reflection on the ultimate merit of the case.

(2022)01ILR A875
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 04.01.2022

BEFORE

THE HON'BLE VIKAS KUNVAR SRIVASTAV, J.

Crl. Misc. Bail Appl. No. 1510 of 2021

Nan Bhaiya @ Mohd. Saeed ...Applicant
Versus
State of U.P. ...Opp. Party

Counsel for the Applicant:
Akhlaq Ali, Davdutt Prakhar, Farooq Ayoob, Krishna Kumar Seth, Mohd. Islam Khan, Rekha Verma

Counsel for the Respondents:
G.A.

FIR alleged that accused-applicant committed rape on her on the promise to marry her-no whisper in the FIR or in statement u/s 164 Cr.P.C. that the victim was forced or allured -case of commission of rape not made out.

Bail allowed. (E-9)

List of Cases cited:

1. Uday Vs St. of Karnataka, (2003) 4 SCC 46

2. Prahlad Singh Bhati Vs. NCT, Delhi & anr.-(2001 4 SCC 280),

3. Sanjay Chandra Vs. Central Bureau of Investigation reported in [(2012 1 SCC 40)-(Spectrum Scam Case)]

4. Dataram Singh Vs. State of U.P. & ors. reported in [(2018) 3 SCC 22]

(Delivered by Hon'ble Vikas Kunvar Srivastav, J.)

1. The case is called on. Learned counsel Sri Krishna Kumar Seth, Advocate for the bail-applicant appeared to press the application for bail on behalf of the accused-applicant-Nan Bhaiya @ Mohd. Saeed, involved in Case Crime No. 131 of 2020, under Sections 376, 504, 506 IPC, Police Station Fursatganj, District Amethi. Learned Additional Government Advocate Sri Vishnu Deo Shukla, Advocate on behalf of the State is present.

2. Counter affidavit on behalf of the State has already been filed and rejoinder thereto is also on record.

3. Learned counsel referred the First Information Report which he told, registered after the application under Section 156(3) of the Cr.P.C. was allowed by the concerned Magistrate.

4. Briefly stating, it is complained in the First Information Report that at about 8 p.m. in the night of 07.05.2020, the complainant (whose name shall not be disclosed and the word 'complainant/victim' shall be read hereinafter wherever her reference is needed), went in the garden of Hazi Sultan situated near her house where the present accused-applicant Nan Bhaiya @ Mohd. Saeed committed rape on her and explained her that since both of them belong to the same caste, they will enter into marriage after some time, therefore she should not discreet the fact of sexual relation between them to any body else. Without specifying the time and date after the incident dated 07.05.2020, the complainant/victim has further stated that when she insisted to enter into marriage, the accused-applicant abused and threatened to beat her which led her to lodge the FIR. Further when she was produced before the court of Magistrate for recording the statement under Section 164 of the Cr.P.C., pursuant to lodging of the FIR, she stated, some times in May, 2020, the accused-applicant called telephonically early in the morning at about 4 a.m. to come his house, when she reached there he brought her to his brother's home and committed rape on her. Thereafter he called her again in the garden of Hazi Sultan and then also committed rape. She further stated that the mobile phone was provided by the accused-applicant himself to her for keeping in contacts. The grievance set forth in the complaint is the breach of promise to marry sexual intercourse made with her by the accused-applicant.

5. Learned counsel for the accused-applicant submitted that the fact emerging out from the First Information Report and the statement under Section 164 of the Cr.P.C. with regard to the consensual sexual intercourse and thereafter lodging of the First Information Report with allegation of false promise to marry intended to make sexual intercourse makes the case doubtful as the complainant/victim herself is of 24 years' age, a well grown girl and she admittedly entered consensually in sexual relations with the accused-applicant. The accused-applicant does not have criminal antecedent, is a local resident and also an relative of the complainant herself, therefore there is no possibility of fleeing away from the process of the Court. He is ready and willing to face the trial. If he is released on bail, the same would be helpful for him in putting his defence efficaciously and properly.

6. On the other hand, learned AGA, on the basis of material made available to him and the counter affidavit filed on behalf of the State, has no rebuttal to the admitted consensual sexual intercourse between the complainant and the accused-applicant on the alleged assurance of promise of marriage.

7. In the statement under Section 164 Cr.P.C., the very inception of the physical and sexual relation is alleged to have occasioned when the present accused-applicant made telephonic call to her at 4 a.m. in the early morning to come at his house. She went to his house where he made physical and sexual relation with her and then again called the complainant on 07.05.2020 in the garden of Hazi Sultan at about 8 p.m. in the night. She again went there and the accused-applicant made sexual relation with her. Such making of sexual relation by the accused-applicant is acquiesced by the complainant allegedly on the promise to marry her by the accused-applicant. There is no single whisper in the First Information Report or in the statement

of the complainant/victim before the court of Magistrate under Section 164 Cr.P.C. complaining that she was forced, put under fear or allured or otherwise for the purpose of getting her consent to make sexual relation.

8. Section 90 of the IPC is quoted hereunder where the consent when would not be treated as valid consent is prescribed:-

"90. Consent known to be given under fear or misconception.--A consent is not such a consent as it intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or

Consent of insane person.--if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or

Consent of child.--unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age."

9. The question is whether the complainant consented to sexual relation under any misconception of fact with regard to promise of marriage by the accused-applicant or was her consent based on fraudulent misrepresentation of marriage which the accused never intended to keep since the very inception of the relationship. There is no such allegation which made the consent invalid from the very inception rather she acquiesced in making sexual contact and therefore it is not possible to hold in the nature of evidence on record that the accused obtained her consent at the inception by putting her under any fear or otherwise. This is to keep into mind that she is a lady of 24 years' age, a well grown person of sound mind.

10. For the purpose of deciding the bail plea of the accused-applicant arraigned under the offence punishable under Section 376 IPC, it is necessary to see prima facie whether on the evidence collected by the prosecution, particularly the statement of the prosecutrix, the accused may be considered and held to have committed rape on the complainant/victim of the case.

11. Admittedly, the sexual intercourse, as alleged in the FIR and statement under Section 164 Cr.P.C. before the Magistrate, was established between accused and the complainant consensually. For the sake of ready reference Section 375 is quoted hereunder:-

"Section 375. Rape.--A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:--

(First) -- Against her will.

(Secondly) --Without her consent.

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

(Fourthly) --With her consent, when the man knows that he is not her husband, and that her consent is given because she

believes that he is another man to whom she is or believes herself to be lawfully married.

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

(Sixthly) -- With or without her consent, when she is under sixteen years of age. Explanation.--Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

(Exception) --Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.]"

12. The case of commission of rape, as set forth by the prosecution case in the First Information Report and the material collected by the Investigating Officer, is not made out.

13. Before parting with the discussion, it would be relevant to quote here para 25 of the judgment of the Apex Court in the case of **Uday Vs. State of Karnataka, (2003) 4 SCC 46:**

"25....It usually happens in such cases, when two young persons are madly in love, that they promise to each other several times that come what may, they will get married. As stated by the prosecutrix the appellant also made such a promise on more than one occasion. In such circumstances the promise loses all significance., particularly when they are overcome with emotions and passion and find themselves in situations and circumstances where they, in a weak moment, succumb to the temptation of having sexual relationship. This is what appears to have happened in this case as well, and the prosecutrix willingly consented to having sexual intercourse with the appellant with whom she was deeply in love, not because he promised to marry her, but because she also desired it. In these circumstances it would be very difficult to impute to the appellant knowledge that the prosecutrix had consented in consequence of a misconception of fact arising from his promise. In any even, it was not possible for the appellant to know what was in the mind of the prosecutrix when she consented, because there were more reasons than one for her to consent."

14. This is established principle of law that while assessing the entitlement of an accused to be released on bail, his role in the commission of offence with which, he is arraigned and the evidences as to his presence and involvement is to be given weight. In case the presence and involvement of accused is prima facie established then gravity of offence, apprehension as to the tampering of evidences and witnesses, if the accused is released on bail, are to be considered.

15. In **Prahlad Singh Bhati Vs. NCT, Delhi and another - (2001 4 SCC 280**), Hon'ble the Supreme Court has held some parameters for grant of bail, which are being quoted hereunder:-

"8. The jurisdiction to grant bail has to be exercised on the basis of well-settled principles having regard to the circumstances of each case and not in an arbitrary manner. While granting the bail, the court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail,

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

16. The purpose of the bail is neither to punish the accused-appellant by keeping him in jail or to teach him a lesson but the object of the bail is to ensure the presence of the accused-appellant during the trial. Hon'ble the Supreme Court in para 21, 22 and 23 of the judgment given in the case of **Sanjay Chandra Vs. Central Bureau of Investigation reported in [(2012 1 SCC 40)-(Spectrum Scam Case)],** has laid down certain objects of bail under Section 437 & 439 of the Cr.P.C. which are as follows:

"21. In bail applications, generally, it has been laid down from the earliest times that the object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it is required to ensure that an accused person will stand his trial when called upon. The courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty.

22. From the earliest times, it was appreciated that detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, "necessity" is the operative test. In this country, it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances.

23. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him a taste of imprisonment as a lesson."

17. Therefore, keeping into mind the valuable right of personal liberty and the fundamental principle not to disbelieve a person to be innocent unless held guilty and if he is not arraigned with the charge of an offence for which the law has put on him a reverse burden of proving his innocence as,

held in the judgment of Hon'ble the Supreme Court in **Dataram Singh Vs. State of U.P. and Others reported in [(2018) 3 SCC 22**], I find force in the submission of learned counsel for the bail-applicant to enlarge him on bail.

18. Considering the rival submissions of learned counsel for the parties, without expressing any opinion on the merits of the case and considering the nature of accusation, complicity of the accused-applicant, gravity of the offence and the severity of punishment in case of conviction and the period for which he is in jail, I find force in the argument of learned counsel for the accused-applicant. The accused-applicant is entitled to be released on bail in this case.

19. Let applicant-**Nan Bhaiya @ Mohd. Saeed** be released on bail in in Case Crime No. 131 of 2020, under Sections 376, 504, 506 IPC, Police Station Fursatganj, District Amethi, on his furnishing a personal bond worth Rs. 100,000/- and two reliable sureties of the like amount of two different sureties whose social and economic status shall be subject to satisfaction and verification of the court concerned subject to following additional conditions, which are being imposed in the interest of justice:-

(i) The applicant shall file an undertaking to the effect that he shall not seek any adjournment on the dates fixed for evidence when the witnesses are present in court. In case of default of this condition, it shall be open for the trial court to treat it as abuse of liberty of bail and pass orders in accordance with law.

(ii) The applicant shall remain present before the trial court on each date fixed, either personally or through his counsel. In case of his absence, without sufficient cause, the trial court may proceed against him under Section 229-A of the Indian Penal Code.

(iii) In case, the applicant misuses the liberty of bail during trial and in order to secure his presence, proclamation under Section 82 Cr.P.C. is issued and the applicant fails to appear before the court on the date fixed in such proclamation, then, the trial court shall initiate proceedings against him, in accordance with law, under Section 174-A of the Indian Penal Code.

(iv) The applicant shall remain present, in person, before the trial court on the dates fixed for (i) opening of the case, (ii) framing of charge and (iii) recording of statement under Section 313 Cr.P.C. If in the opinion of the trial court absence of the applicant is deliberate or without sufficient cause, then it shall be open for the trial court to treat such default as abuse of liberty of bail and proceed against him in accordance with law.

(2022)01ILR A880
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 03.01.2022

BEFORE

THE HON'BLE VIKAS KUNVAR SRIVASTAV, J.

Crl. Misc. Bail Appl. No. 8192 of 2021

Utkarsh Patel @ Uttu @ Raj Patel
...Applicant
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicant:
Ashutosh Kumar

Counsel for the Respondents:
G.A., Gulamali Rashidi

POCSO Act, 2012 -Victim is approx 4 years old-accused-Applicant is 18 years old-teased sexually and threatened her-Statement of child victim-accused-applicant tried to put his penis in the vagina of the victim-under life threat-act sufficient to come under ambit of aggravated sexual assault u/s 5 and u/s 376 AB IPC-Gravity of offence and severity of punishment do not warrant release on bail.

Bail Application rejected. (E-9)

List of Cases cited:

1.Prahlad Singh Bhati Vs. NCT, Delhi & anr.-(2001 4 SCC 280)

2. Subrata Biswas Vs. State, reported in 2019 Criminal Law General 4327

(Delivered by Hon'ble Vikas Kunvar Srivastav, J.)

1. The case is called out. Learned counsel Sri Ashutosh Kumar, Advocate for the bail-applicant and learned Additional Government Advocate for the State are present through video conferencing in virtual hearing of the case.

2. The present bail-application is moved for and on behalf of accused-applicant-Utkarsh Patel @ Utkarsh @ Uttu @ Raj Patel, aged about 18 years, involved in Case Crime No. 64 of 2021 registered under Sections 376AB, 323, 506 IPC and Sections 5/6 of the Protection of Children from Sexual Offences Act, 2012 at Police Station Banthra, District Lucknow.

3. Counter affidavit and rejoinder affidavit have already been exchanged between the parties of the case. The case is ripe for hearing.

4. The occasion of present bail-application arisen on rejection of bail-plea of the accused-applicant by learned Special Judge, POCSO Act/Addl. Sessions Judge, Lucknow vide order dated 12.07.2021.

5. The victim of the incident is approximately 4 years' old girl child (whose name is not being disclosed and in place of her name the word ''victim' shall be used hereinafter in view of Section 228-A of the Indian Penal Code). The First Information Report lodged on behalf of the victim by her mother on the same day of incident dated 25.02.2021 reveals that when the victim child was playing outside her house at about 2:30 p.m., the accused-applicant Utkarsh @ Uttu picked and taken away her to his house where he teased her sexually and threatened, if she tells the incident to anybody else, she will be killed. The victim came to her house weeping and stated the incident to her mother. The complainant-mother and father of the victim approached the police station with their daughter to lodge the First Information Report accordingly.

6. Primarily, the offence was registered under Section 354-A, 323, 506 IPC alongwith Section 11/12 of the POCSO Act. During the investigation the child was subjected to medico legal examination with regard to sexual violence two days after the incident on 27.02.2021. The help of interpreter was taken and the version of the child with regard to the incident, as told to the interpreter, was recorded, according to which on 25.02.2021 at 2:30 p.m. when she was playing outside her house, the accused Utkarsh @ Uttu seeing lonely picked and

taken away her to his house where he teased her sexually and threatened to life. No injury on the person and private part of the child is reported. The age of the victim child was medically assessed on the basis of medico legal examination as well as from her school certificates bearing date of birth 13.09.2016, approximately 4 year and 6 months' on the date of incident. She told doctors during her medico legal examination that the accused tried to put his penis in the vagina of girl child.

7. The bail application is moved on behalf of the present accused-applicant under Sections 376AB, 323, 506 IPC and Sections 5/6 of the Protection of Children from Sexual Offences Act, 2012. The Section 376AB IPC makes punishable the offence of rape under 12 years' age victim whereas the offence under Section 5 of the Protection of Children from Sexual Offences Act, 2012 defines the aggravated penetrative sexual assault enumerating several acts of the like nature, one of which is, whoever commits penetrative sexual assault on a child causing grievous hurt or causing bodily harm injury or injury to the sexual organs of the child, shall be punished under Section 6 of the Act with rigorous imprisonment of term which shall not be less than 20 years but which may extend to imprisonment for life which shall mean imprisonment for the reminder of natural life of that person and shall also be liable to fine or both.

8. Learned AGA by filing counter affidavit in para 12 has stated that truth of the matter is that the offence committed by the accused is heinous in nature. During investigation, sufficient evidences of committing the offence by the accused are obtained on the basis of which he is arraigned under Sections 376AB, 323, 506 IPC and Sections 5/6 of the Protection of Children from Sexual Offences Act, 2012, accordingly chargesheet has been sent to the court. Para 12 and 13 of the counter affidavit are quoted hereunder:-

"12. यह कि प्रस्तर–10 में वर्णित कथन असत्य एवं निराधार है। जबकि सत्यता यह है कि प्रार्थी/अभियुक्त द्वारा कारित की गयी घटना संगीन कोटि की है। विवेचना में प्रार्थी/अभियुक्त के विरुद्ध प्रमाणित साक्ष्य प्राप्त हुए है तथा अपराध धारा 376 एबी/323/506 भा0दं0वि0 व धारा 5/6 पाक्सो एक्ट का प्रमाणित पाया गया है, तद्नुसार आरोप–पत्र सम्बन्धित न्यायालय द्वारा उचित माध्यम प्रेषित किया गया है। आरोप–पत्र की प्रमाणित प्रति संलग्नक सी0ए0–8 है।

13. यह कि प्रस्तर–11 में वर्णित कथन असत्य एवं निराधार है। जबकि सत्यता यह है कि प्रार्थी/अभियुक्त द्वारा की गयी घटना के पर्याप्त साक्ष्य मौजूद है तथा अपराध कारित करने का दोषी है। विवेचना में प्रार्थी/अभियुक्त के विरुद्ध प्रमाणित साक्ष्य प्राप्त हुए है एवं अपराध प्रमाणित पाया गया है।"

9. Learned counsel for the bail-applicant, in view of the fact that First Information Report is lodged on the basis of statement of the victim, a four years' old child who might have been tutored by her parents. He emphasized on the report of medico legal examination wherein, no injury was found on the person and private part of the victim. Learned counsel further submitted that accused-applicant has no criminal antecedent, therefore, he should be granted bail.

10. This is established principle of law that while assessing the entitlement of an accused to be released on bail, his role in the commission of offence with which, he is arraigned and the evidences as to his presence and involvement is to be given weight. In case the presence and involvement of accused is prima facie established then gravity of offence, apprehension as to the tampering of

evidences and of influencing adversely the witnesses if the accused is released on bail, are to be considered. In **Prahlad Singh Bhati Vs. NCT, Delhi and another - (2001 4 SCC 280)**, Hon'ble the Supreme Court has held some parameters for grant of bail, which are being quoted hereunder:-

"8. The jurisdiction to grant bail has to be exercised on the basis of well-settled principles having regard to the circumstances of each case and not in an arbitrary manner. While granting the bail, the court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character, behaviour, means and standing of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public or State and similar other considerations. It has also to be kept in mind that for the purposes of granting the bail the legislature has used the words "reasonable grounds for believing" instead of "the evidence" which means the court dealing with the grant of bail can only satisfy it (sic itself) as to whether there is a genuine case against the accused and that the prosecution will be able to produce prima facie evidence in support of the charge. It is not expected, at this stage, to have the evidence establishing the guilt of the accused beyond reasonable doubt."

11. According to the parameters laid down by the Apex Court in the judgment referred herein-above, the matter is examined factually and legally. On facts, it is found that the medico legal examination was done with the assistance of interpreter, as provided in the POCSO Act as well as in the Evidence Act with regard to the child witnesses.

12. It comes out from the statement of the child victim of the incident that accused-applicant tried to put his penis in the vagina of the victim under threat to life and by beating her also. Such an act is sufficient to bring the accused in the ambit of offence of aggravated sexual assault as defined under Section 5 and made punishable under Section 6 of the POCSO Act. Moreover, the child is less than 12 years in age, therefore offence under Section 376AB is also constituted. The plea of lacking injuries on the person and private part of the victim is meaningless for the reason the victim was subjected to medico legal examination after two days of the incident on 27.02.2021. The aforesaid offence, as provisioned in the POCSO Act, is not only heinous but also sever in punishment of rigorous imprisonment for life.

13. The child repeatedly stated the incident in the same words and manner from the very inception firstly to mother thereafter before the doctors who examined her medically. The statements of the victim before the Child Welfare Committee and before the Magistrate under Section 164 Cr.P.C. have also no contradiction from the statement made by her at the very inception. The certified copies of the statements are annexed by the learned AGA with counter affidavit. Before Magistrate under Section 164 Cr.P.C., the child stated that presently she does not go to school. She was playing outside her house when Puttu, the accused, taken away her to his house. He shown his penis to her

and put that in the way of her urinal. He tried to allure her by giving an edible salty then beaten to force her and threatened to life if the incident is told to anyone else. Before CWC victim child stated the same thing by saying that the accused put down the underwear wore by her and penetrated his penis in her vagina. When she began to cry, he beaten her and threatened to life if she tells it to her parents.

14. On the basis of consistent statements as to the commission of offence and it's manner, the prosecution has sufficiently shown and established the prima facie case under the aforesaid Sections 376AB, 323, 506 IPC and Sections 5/6 of the Protection of Children from Sexual Offences Act, 2012.

15. It is no where explained in the affidavit supporting the bail application and rejoinder affidavit that why the statement of the child victim of tender age should be treated a false implication. In the absence of any such explanation the implication of offence over the applicant should be treated as true.

16. In the light of facts and circumstances discussed herein-above, it would be relevant to refer Section of 29 of the POCSO Act with regard to presumption as to certain offences which is quoted hereunder:-

"Presumption as to certain offneces:- Where a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3, 5, 7 and Section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved."

17. The aforesaid presumption, as provisioned under Section 29 of the POCSO Act, is quite applicable in the present case as the prosecution has successfully established the primary facts constitute the offence. In this regard, the decision of a Division Bench of Calcutta High Court in a similar set of facts in the case law as propounded in **Subrata Biswas Vs. State, reported in 2019 Criminal Law General 4327**, para 22 is quoted hereunder:-

"The statutory presumption applies when a person is prosecuted for committing offence under Sections 5 and 9 of the Act and a reverse burden is imposed on the accused to prove the contrary. The word "is prosecuted" in the aforesaid provision does not mean that the prosecution has no role to play in establishing and/or probablising primary facts constituting the offence. If that were so then the prosecution would be absolved of the responsibility of leading any evidence whatsoever and the Court would be required to call upon the accused to disprove a case without the prosecution laying the firm contours thereof by leading reliable and admissible evidence. Such an interpretation not only leads to absurdity but renders the aforesaid provision constitutionally suspect. A proper interpretation of the said provision is that in a case where the person is prosecuted under Section 5 and 9 of the Act (as in the present case) the prosecution is absolved of of the responsibility of proving its case beyond reasonable doubt. On the contrary, it is only required to lead evidence to establish the ingredients of the offence on a preponderance of probability. Upon laying the foundation of its case by leading cogent and reliable evidence (which does not fall foul of patent absurdities or inherent probabilities) the onus shifts upon the

accused to prove the contrary. Judging the evidence in the present case from that perspective, I am constrained to hold that the version of the victim (PW-1) and her mother (PW-2) with regard to twin incidents of 24th March, 2016 and 18th April, 2016 if taken as whole, do not inspire confidence and runs contrary to normal human conduct in the backdrop of the broad probabilities of the present case."

18. The want of criminal antecedent on the part of the accused is not of probative value in support of his plea of innocence as against the nature of accusation imputed on him by an innocent girl child of 4 years. The gravity of offence and severity of punishment also do not warrant the release on bail looking into the fact that accused-applicant resides in the neighbourhood of the child victim may under the fear of severe punishment in case the trial succeeds against him. Prima facie, there is no facts on record rebutting the presumption against the accused.

19. In view of the discussions made herein-above, without making any comment as to the merit of the case, keeping into mind the gravity of offence and severity of offence as well as the prima case of the prosecution is established against the accused-applicant, I find no force in the submission of learned counsel for the bail applicant for grant of bail. The bail application of accused-applicant-Utkarsh Patel @ Utkarsh @ Uttu @ Raj Patel, involved in Case Crime No. 64 of 2021, under Sections 376AB, 323, 506 IPC and Sections 5/6 of the Protection of Children from Sexual Offences Act, 2012 registered at Police Station Banthra, District Lucknow, is hereby **rejected**.

20. Learned trial court, keeping in view the future of the child, is directed to conclude the trial as practically as possible expeditiously. The trial court is further directed to not to be sweared with the observations made herein-above while deciding the case on merit on the basis of evidences duly examined and proved before it.

(2022)01ILR A885
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 06.01.2022

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Crl. Misc. Bail Appl. No. 11740 of 2021

Sumit Kumar @ Angrej ...Applicant
Versus
State of U.P. ...Opp. Party

Counsel for the Applicant:
Neelam Verma, Sanjiva Kumar Tripathi

Counsel for the Opp. Party:
G.A.

Criminal Law – Indian Penal Code, 1860 – Section 302 & 201 -Name of the Applicant not taken by neither informant nor by deceased's wife in her first St.ment-deceased's wife in her second St.ment recorded after 2 months took Applicant's name-present case-of circumstantial evidence-no continuing chain of evidence.

Bail granted. (E-9)

List of Cases cited:

1. Criminal Appeal no. 1704/2017-Balkrishna Tukaram Angre Vs The St. of Maharashtra

2. Dataram Singh Vs St. of UP & anr, (2018) 3 SCC 22

(Delivered by Hon'ble Shamim Ahmed, J.)

1. Heard Mrs. Neelam Verma, learned counsel for the applicant and learned A.G.A. for the State and perused the record.

2. Applicant has moved the present bail application seeking bail in Case Crime No. 98 of 2021 Under sections 302 and 201 I.P.C.,Police Station-Kheri, District Kheri.

3. Learned counsel for the applicant submitted that as per the prosecution case on 9.3.2021 Ankit Singh (complainant) had registered a Gumsudgi report regarding missing of his brother namely Pinku Singh (deceased) who had left his house on 8.3.2021 at about 6.00 p.m. having mobile no. 9838642966 and did not return to his house till 9.45 p.m. On 11.3.2021, the corpse of the deceased was found in the field. Thereafter a first information report was lodged unknown on 13.3.2021 at 14.01 Hrs. registered as case crime no. 98 of 2021 under sections 302 and 201, Police Station- Kheri, District Kheri.

4. Learned counsel for the applicant further submitted that in the statement recorded under section 161 Cr.P.C. first time i.e. on 13.3.2021, complainant has stated that deceased used to do farming with the accused applicant taking agricultural land on contract. The deceased used to collect the money from the group of ladies who were members of a group and deposit the same with the Bank. The account was opened in the name of two ladies namely Pappi and Sunita. He further stated that deceased had left his house informing his wife Radha that he is going to meet to Badey alias Atul Kumar Shukla, who had called him and he will also come to Oeal Puliya on his motorcycle to pick him.

5. Learned counsel for the applicant further submitted that complainant neither in the said statement nor in the first information report made allegation of commission of murder of the deceased by the accused applicant.

6. Learned counsel for the applicant further submitted that in the statement recorded under section 161 Cr.P.C. first time on 14.3.2021 , Radha wife of deceased has stated that deceased had gone to Khagi Oeal Puliya to meet to Badey alias Atul Kumar Shukla. On the said date, independent witness Ram Ratan and Veer Pal Singh have narrated the same version in the statement recorded under section 161 Cr.P.C. The name of the applicant was not taken by the wife of deceased.

7. Learned counsel for the applicant further submitted that on the basis of the call detail reports obtained it was found that the deceased had talked with Atul Kumar Shukla on 8.3.2021 at 6.42 p.m. Thereafter statement of Atul Kumar Shukla alias Badey was recorded under section 161 Cr.P.C. on 24.3.2021, in which he has neither stated anywhere about the alleged commission of murder of deceased nor he has taken the name of applicant regarding the alleged incident.

8. Learned counsel for the applicant further submitted that deceased's wife Radha in her statement recorded under section 161 Cr.P.C. on 5.5.2021 second time i.e. after about two months has stated that there was some money dispute between the accused applicant and deceased and raised suspicion that the applicant has committed murder of deceased. Independent witnesses namely Udai Veer Singh alias Surpanch and Arpit Singh who are her father and brother in

their statements recorded under section 161 Cr.P.C. on 5.5.2021 have narrated the same version.

9. Learned counsel for the applicant further submitted that complainant in the second statement recorded under section 161 Cr.P.C. on 29.5.2021 raised suspicion on one Ram Dularey and not on the present applicant. On 27.7.2021 deceased's wife Radha gave an application to the I/c Inspector, Police Station Kheri, District Kheri alleging therein that applicant has committed murder of the deceased and he has also confessed his guilt before Rahul Singh alias Dhirendra Singh (husband of the younger sister of deceased's wife). Radha, wife of deceased in the third statement recorded under section 161 Cr.P.C. on 27.7.2021 narrated the same story of application dated 27.7.2021. Witness Rahul alias Dhirendra Singh in his statement recorded under section 161 Cr.P.C. on 27.7.2021 has stated that applicant has confessed his guilt before him regarding commission of alleged offence.

10. Learned counsel for the applicant further submitted that accused applicant was not named in the first information report and his name surfaced in the application dated 27.7.2021 of the deceased's wife and the statement of her brother-in-law namely Rahul alias Dhirendra Singh recorded under section 161 Cr.P.C. on 27.7.2021.

11. Learned counsel for the applicant further submitted that neither the applicant was named nor any suspicion was raised against him in the first information report as well as in the statements of complainant and first statement of deceased's wife Radha recorded under section 161 Cr.P.C and first time his name was dragged in the present case through second statement of deceased's wife Radha only on the basis of suspicion on 5.5.2021. i.e. after about two months of the alleged incident. It is further submitted that the applicant has no motive to commit the crime in question and the alleged motive which has been assigned to the applicant to commit the crime in question is totally false and fabricated one, because no dispute had arisen between the applicant and deceased at any point of time, during life time of deceased. There are contradictions in the statements of the deceased's wife Radha, complainant and witnesses recorded under section 161 Cr.P.C. which create doubt on the allegations levelled against the accused applicant.

12. Learned counsel for the applicant further submits that applicant has falsely been implicated in the present case. The post-mortem report of the deceased does not confirm the incident. As per statements of the aforesaid witnesses recorded under Section 161, there is no eye witness to the above incident. He further submits that the whole prosecution story is false and concocted.

13. The submission of the learned counsel for the applicant is that it is a case based on circumstantial evidence. The circumstances appearing against the applicant are no more than his extra judicial confession. The applicant has neither been arrested from the alleged spot nor recovery of any incriminating evidence has been made by the police from the applicant or at his pointing out. The applicant has been roped in by the police on the basis of statement of Radha wife of the deceased recorded under section 161 Cr.P.C. on third

time on 27.7.2021 and also the statement of brother in law of Radha namely Rahul alias Dhirendra Singh recorded under section 161 Cr.P.C. on 27.7.2021. The recovery memo is totally false. It is also argued that there is no incriminating evidence available on record about the applicant's involvement in the commission of alleged offence. He further submits that no offence under Sections 302 and 201 of I.P.C. is made out against the accused applicant.

14. Learned counsel for the applicant has relied upon the decision of the Hon'ble Supreme Court in the case of **Balakrishna Tukaram Angre Vs. The State of Maharashtra in Criminal Appeal No. 1704 of 2017**. In the said decision, the Hon'ble Supreme Court was pleased to observe that case of the prosecution rests on circumstantial evidence and the accused has been in custody for fifteen months.

15. The present case is being a case of the circumstantial evidence. It is well settled law that where there is no direct evidence against the accused and the prosecution rests its case on circumstantial evidence; the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused. In other words, there must be chain of evidence so complete as not to leave any reasonable ground for conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused. All the links in the chain of circumstances must be complete and should be proved through cogent evidence. In the present case there is no continuing chain of evidence.

16. Several other submissions in order to demonstrate the falsity of the allegations made against the applicant have also been placed forth before the Court. The circumstances which, according to the counsel, led to the false implication of the accused have also been touched upon at length. It has been assured on behalf of the applicant that he is ready to cooperate with the process of law and shall faithfully make himself available before the court whenever required and is also ready to accept all the conditions which the Court may deem fit to impose upon him. It has also been pointed out that the accused is not having any criminal history and he is in jail since 30.7.2021 and that in the wake of heavy pendency of cases in the Court, there is no likelihood of any early conclusion of trial.

17. Learned A.G.A. opposed the prayer for bail.

18. After perusing the record in the light of the submissions made at the bar and after taking an overall view of all the facts and circumstances of this case, including the nature of evidence, the period of detention already undergone, the unlikelihood of early conclusion of trial and also the absence of any convincing material to indicate the possibility of tampering with the evidence as also the charge has been framed against applicant, but prosecution has not produced any single witness against applicant till today, in particular, the fact that the case rests on circumstantial evidence, the fact that the evidence against the applicant is one of extra judicial confession alone with no independent evidence to prima facie indicate his complicity and in view of the larger mandate of the Article 21 of the Constitution of India and the law laid down by the Hon'ble Apex Court in the case of **Dataram Singh vs. State of UP and another,** reported in **(2018) 3 SCC 22**, this

Court is of the view that the applicant may be enlarged on bail.

19. The prayer for bail is granted. The application is allowed.

20. Let the applicant Sumit Kumar alias Angrej involved in Case Crime No. 98 of 2021 Under sections 302 and 201 I.P.C., Police Station Kheri, District Kheri be released on bail on his executing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned on the following conditions:-

(1) The applicant will not make any attempt to tamper with the prosecution evidence in any manner whatsoever.

(2) The applicant will personally appear on each and every date fixed in the court below and his personal presence shall not be exempted unless the court itself deems it fit to do so in the interest of justice.

(3) The applicant shall cooperate in the trial sincerely without seeking any adjournment.

(4) The applicant shall not indulge in any criminal activity or commission of any crime after being released on bail.

(5) In case, the applicant misuses the liberty of bail during trial, 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.

(6) The applicant shall remain present, before the trial court on the dates fixed for (i) opening of the case, (ii) framing of charge and (iii) recording of statement under Section 313 Cr.P.C. If in the opinion of the trial court absence of the applicant is deliberate or without sufficient cause, then it shall be open for the trial court to treat such default as abuse of liberty of bail and proceed against him in accordance with law.

(7) 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.

(8) 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.

21. It may be observed that in the event of any breach of the aforesaid conditions, the court below shall be at liberty to proceed for the cancellation of applicant's bail.

22. It is clarified that the observations, if any, made in this order are 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.

(2022)01ILR A889
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.01.2022

BEFORE

THE HON'BLE SHEKHAR KUMAR YADAV, J.

Crl. Misc. Bail Appl. No. 12805 of 2021

Shankar Varik alias Vikram ...Applicant
Versus
Union of India ...Opp. Party

Counsel for the Applicant:
Sri Bhavya Sahai, Sri Brijesh Sahai (Senior Adv.)

Counsel for the Opp. Party:
Sri Ashish Pandey, Sri Pranay Krishna, Sri Ajit Kumar Srivastava

Narcotic Drugs & Psychotropic Substances, 1985 – Sections 8, 20 &29 - recovery of 1025 kg of Ganja-above commercial quantity-fcat that accused not in physical possession of contraband-not enough to conclude that accused is not guilty-contention of non compliance of mandatory provision of search and seizure –question of fact-decided at time of trial.

Bail rejected. (E-9)

List of Cases cited:

1. U.O.I .Vs Md. Nawaz khan, AIR 2021 SC 447

2. St. Vs Syed Amir Hasnain, (2002) 10 SCC 88

3. U.O.I. Vs Ram Samujh, (1999) 9 SCC 382

4. U.O.I. Vs Aharwa Deen, (2000) 9 SCC 382

5. Megh Singh Vs St. of Pun., 2004 (1) CCSC 337

6. Criminal Appeal no. 154-157 of 2020-St. of Kerela Vs Rajesh & ors

7. St. of M.P. Vs Kajad , (2001) 7 SCC 673

8. Anil Kumar Yadav Vs St. (N.C.T.) of Delhi & anr., 2018 91) CCSC 117

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

1. Heard Mr. Brijesh Sahai, learned Senior Counsel assisted by Mr. Bhavya Sahai, learned counsel for the applicant, Mr. Ashish Pandey, learned counsel for Narcotics Control Bureau.

2. This bail application under Section 439 of Code of Criminal Procedure has been filed by the applicant seeking enlargement on bail in Case Crime No.12 of 2020, under Section 8/20/29 of Narcotic Drugs and Psychotropic Substances Act at Police Station Challani-NCB Lucknow, District Jhansi.

3. The factual matrix of the present case is that on 27.05.2020 at about 07.00 AM, upon information that four persons, namely, Sanjay Kumar Singh, Vinod Singh, Shankar Varik (applicant-accused) and Chhote Lal in two Trucks bearing Registration No.CG-04 HZ-4685 and Dumper bearing Registration No.CG-04 JA-9801 are about to come from Teekamgarh towards Mauranipur at Khadiyan Crossing and they are carrying huge quantity of illegal Ganja, the informant of NCB with his team alongwith necessary items (proper kits) for further action in accordance with provisions of NDPS Act, reached the spot at about 09.00 AM and started patrolling at Khandiyan Crossing. It is alleged that in evening at about 18.30 hrs., the officers of NCB saw both trucks, which were coming towards Khandiyan Crossing of Teekamgarh. The officers of NCB intercepted the Dumper CG-04 JA-9808 and from the Cavity of Dumper, huge amount of Ganja weighing 1025 kg has been recovered, which was kept in 25 plastic gunny bags and upon testing by DD Kit, the samples tested positive for Ganja. The said Dumper was driven by co-accused Vinod Singh and the applicant was sitting on the truck. The aforesaid search was conducted in presence of two independent witnesses, namely, Chandra Shekhar and Kuldeep and also in presence of gazetted officer, namely, Dr. Pradeep Kumar Singh, C.O. Mauranipur, Jhansi. The aforesaid Dumper was also seized under Section 60 of NDPS Act. A notice under section 67 of NDPS Act was

served upon the accused persons and their statements were also recorded.

4. Mr. Sahai, learned Senior Counsel appearing for the applicant has submitted that the applicant has been falsely implicated in the present case. During lock-down, the applicant went to Jhansi for his personal work and he did not get any vehicle to return back to his village at Chhattisgarh. The applicant was neither owner of the Dumper nor driver of the Dumper. The applicant was merely a passenger in the vehicle in question. He has further submitted that the applicant has no knowledge about recovered contraband. The alleged Dumper, from which the contraband has been recovered, does not belong to the applicant. He has further submitted that neither any recovery has been made nor any recovery memo has been prepared on the spot. At the time of arrest, mandatory provision of Sections 42, 50, 52, 53, 57 of NDPS Act have not been complied with. He has further submitted that nothing has been recovered from the possession of the applicant and the alleged recovery is false and fabricated. There is no independent eye witness of the alleged recovery, which has been shown. He has further submitted that there is no evidence on record which shows that applicant was in conscious possession or constructive possession of the recovered contraband. The applicant is having no criminal history. Several other submissions in order to demonstrate the falsity of the allegations made against the applicant have also been placed forth before the Court. The circumstances which, according to the counsel, led to the false implication of the applicant have also been touched upon at length. The applicant is in jail since 29.05.2020.

5. Learned AGA for the State as well as Mr. Ashish Pandey, learned counsel for NCB have opposed the prayer for bail and have submitted that the applicant was arrested on spot. The applicant and other co-accused persons were very much involved in inter-state trafficking as they themselves have admitted in their voluntary statement under Section 67 of NDPS Act, which belie all statements. He has further submitted that so far as compliance of Section 50 of NDPS Act is concerned, the accused persons were searched in the presence of Dr. Pradeep Kumar Singh, C.O. Mauranipur, Jhansi, who is a gazetted officer, hence, Section 50 of NDPS Act has fully complied with. Recovery has also been made in presence of two independent witnesses, namely, Chandra Shekhar and Kuldeep. He has further submitted that it is an admitted fact that the recovery of 1025 kg. Ganja, which is more than the commercial quantity, has been recovered from the Dumper in question, hence, Section 37 of NDPS Act is attracted in the present case, therefore, the bail application is liable to be rejected.

6. In support of his submission, Mr. Ashish Pandey, learned counsel for NCB has relied upon the judgment of Hon'ble Apex Court in the case of ***Union of India through Narcotics Control Bureau, Lucknow vs. Md. Nawaz Khan*** passed in Criminal Appeal No.1043 of 2021 arising out of SLP (Crl.) No.1771 of 2021 dated 22.09.2021.

7. I have considered the rival submissions advanced by learned counsel for the parties and perused the material available on record.

8. It is evident that on 27.05.2020 during the checking, the vehicle mentioned

above, Ganja weighing 1025 kilograms was recovered from the vehicle, which admittedly is more than the commercial quantity, as such, rigors of Section 37 of the NDPS Act are applicable in the instant case.

9. This court has considered the recent case of ***Union of India Vs Md. Nawaz Khan, reported in, AIR 2021 SC 447***, which is a case where contraband was concealed under the bonnet near the wipers of the car and it was held by Supreme Court that factum of absence of possession of contraband by the accused in itself cannot be sole ground for grant of bail. In paragraph nos. 20 & 29, it has been said as under:-

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

29. In the complaint that was filed on 16 October 2019 it is alleged that at about 1400 hours on 26 March 2019, information was received that between 1500-1700 hours on the same day, the three accused persons would be reaching Uttar Pradesh. The complaint states that the information was immediately reduced to writing. Therefore, the contention that Section 42 of the NDPS Act was not complied with is prima facie misplaced. The question is one that should be raised in the course of the trial."

10. The Hon'ble Apex Court further in the case of ***Md. Nawaz Khan (supra)*** in paragraph nos. 24 & 25 has also stated as under:

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

25. In line with the decision of this Court in Rattan Mallik (supra), we are of the view that a finding of the absence of possession of the contraband on the person of the respondent by the High Court in the impugned order does not absolve it of the level of scrutiny required under Section 37(1)(b)(ii) of the NDPS Act."

11. It is further asserted by the Hon'ble Supreme Court vide para 25, referred to above, that finding of the absence of possession of the contraband on the person of the accused does not absolve him of the level of scrutiny required under Section 37 (1)(b)(ii) of the NDPS Act.

12. Further from the record it is evident that the prosecution has cited two independent witnesses, so at this stage merely on the ground that the accused has been in custody for more than one and half years, bail cannot be granted, particularly when there are serious allegations of recovery of 1025 kilograms of Ganja,

which is above the commercial quantity as per the schedule.

13. Learned counsel for the accused has not been able to point out anything to this Court so as to come to conclusion that the accused is not guilty of the offence. The fact that accused was not in physical possession of contraband would not be enough to conclude that accused is not guilty. The contention that recovery was not from conscious possession of the accused is noted to be rejected in view of recent decision of Supreme Court in ***Md. Nawaz Khan's case (supra).***

14. So far as the contention of learned counsel for the applicant that the arresting officials did not comply with the mandatory provisions of search and seizure of narcotics substance as per the provisions of the NDPS Act is concerned is also a question of fact which requires to be decided at the time of trial. It is also a question of fact as to whether the recovery was made on the spot or any substantial delay in taking inventory, photograph and samples of seized articles as contemplated in Section 52-A of the said Act would vitiate the trial or not, can only be decided during trial on the basis of evidence on record.

15. In the case of ***State vs. Syed Amir Hasnain, (2002) 10 SCC 88***, the Hon'ble Apex Court has held in view of the two judgments of this Court in ***Union of India Vs Ram Samujh, (1999) 9 SCC 382 and Union of India Vs Aharwa Deen, (2000) 9 SCC 382***, even the High Court would be bound by the provisions of Section 37 of the NDPS Act and would not be entitled to release the accused under the provisions of the NDPS Act unless the provisions of Section 37 of the Act are satisfied.

16. In the case of ***Megh Singh Vs State of Punjab, 2004 (1) CCSC 337***, the Hon'ble Supreme Court held that a bare reading of Section 50 shows that it only applies in case of personal search of a person. It does not extend to search of a vehicle or a container or a bag, or premises.

17. The learned counsel appearing for the applicant submits that no public witness was taken by the police in the alleged recovery proceedings despite the alleged recovery was made on the Highway, therefore, this recovery cannot be presumed to be an impartial recovery. According to the recovery memo, it is evident that the recovery was made at night and due to pandemic prevalent at that time and seclusion no public witness could be secured. Apart from this, the law is well settled that the evidence of a public officer cannot be thrown only on the ground that he is a police officer.

18. The accusation in the present case is with regard to the commercial quantity. Once the bail is opposed to a person accused of the enumerated offences, in case, the Court proposes to grant bail to such a person, two conditions are to be mandatorily satisfied in addition to the normal requirements under the provisions of the Code of Criminal Procedure, 1973 or any other enactment, (i) the Court must be satisfied that there are reasonable grounds for believing that the person is not guilty of such offence.

19. In ***Criminal Appeal No(s) 154-157 of 2020 State of Kerala Vs. Rajesh and others***, the Hon'ble Supreme Court has

held on 24.01.2020 that the expression "reasonable grounds" means something more than prima facie grounds, and (ii) that person is not likely to commit any offence while on bail. It is the mandate of the legislature which is required to be followed. The non-obstante clause with which this Section starts should be given its due meaning and clearly it is intended to restrict the powers to grant bail. To check the menace of dangers drugs and psychotropic substances flooding the market, the Parliament has provided that the person accused of the offences under the Act should not be released on bail during the trial unless the mandatory conditions provided under Section 37 of the Act, 1985 are satisfied.

20. In ***State of M.P. Vs. Kajad, (2001) 7 SCC 673,*** the Hon'ble Supreme Court has held that negation of bail is the rule and its grants an exception under (ii) of clause (b) of Section 37(1) of the Act, 1985.

21. In Criminal Appeal No(s) 154-157 of 2020 (Supra) the Hon'ble Supreme Court has held that liberal approach in the matter of bail under the NDPS Act, is uncalled for. Therefore, it is quite clear that an order of bail cannot be granted in an arbitrary or fanciful manner. A ratio decidendi of the judgment of Hon'ble Apex Court in ***Anil Kumar Yadav Vs. State (N.C.T.) of Delhi and another, 2018(1) CCSC 117*** is that in serious crimes, the mere fact that the accused is in custody for more than one year, may not be a relevant consideration to release the accused on bail.

22. In the light of the facts and circumstances of the present case, it would be inappropriate to discuss the evidence in depth at this stage because it is likely to influence the trial of accused. But, from the perusal of the evidences, collected during investigation so far, prima facie, the involvement of the accused in the present case cannot be ruled out. No reason is found to falsely implicate the applicant/accused. Therefore, there is no good ground to release the applicant-accused on bail at this stage. All the contentions raised by the learned senior counsel for the accused pertain to the merits of the case and the same cannot be considered while considering application for grant of bail. This court is unable to form an opinion at this stage that the accused has not committed an offence.

23. In the ultimate conclusion, considering the facts and circumstances of the case, gravity of the offence, severity of punishment, in my opinion, no case for bail is made out. Accordingly, the bail application is hereby **rejected**.

24. It is clarified that the observations made regarding the bail application is limited to the decision of the bail application and any observations made herein shall not effect the trial of the case.

25. However, it is expected that the trial court shall make all sincere endeavours to expedite the proceedings of the trial and conclude the same as expeditiously as possible, in accordance with law, within a period of six months.

(2022)01ILR A894
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 10.01.2022

BEFORE

THE HON'BLE RAJAN ROY, J.

Civil Revision No. 102 of 2019

Anil Kumar Singh ...Revisionist
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Revisionist:
Ashish Chaturvedi

Counsel for the Opposite Parties:
Manish Mehrotra, Manoj Kumar Tiwari, Mohammad Aslam Khan, Mohd. Danish, Sudhanshu Chauhan, Virend Singh

A. Civil Law - Impeadment of Stranger to the Suit - Civil Procedure Code, 1908: Order I Rule 10 - In a question whether in a suit for specific performance of a contract for sale of a property instituted by a purchaser against the vendor, a stranger or a third party to the contract claiming to have an independent title or possession over the contracted property is entitled to be added as a party-defendant in the suit or not. This Court opined that as in the instant case where the applicant is a stranger i.e., he was claiming independent and adverse title to the parties to the suit, is not under a compulsion to implead such party as he being a *dominus litis.* (Para 36)

Revision Rejected. (E-10)

List of Cases cited:

1. Gurmit Singh Bhatia Vs Kiran Kant Robinson & ors. 2019 SCC OnLine SC 912

2. Mohamed Hussain Gulam Ali Shariffi Vs Municipal Corporation of Greater Bombay & ors. (2020) 14 SCC 392

3. Usha Sinha Vs Dina Ram & ors. (2008) 7 SCC 144

4. Ram Swaroop Singh & ors. Vs Karan Singh & ors. (2010) 6 Alld LJ 425

5. Vidur Implex & Traders Pvt. Ltd. & ors. Vs Tosh Apartments Pvt. Ltd. & ors. (2012) 8 SCC 384

6. Ramesh Hirachand Kundanmal Vs Municipal Corporation of Greater Bombay & ors. (1992) 2 SCC 524

7. Dr. Shyam Chandra Srivastava Vs Estate of Padmasri Smt. Savitri Sahni (2010) 111 RD 182

8. Amit Kumar Shaw & anr. Vs Farida Khatoon & anr. (2005) 11 SCC 403

9. Shyama Devi Vs A.D.J. Sultanpur & ors. 2014 (4) ALJ 559

10. Aliji Momonji & co. Vs Lalji Mavji & ors. (1996) 5 SCC 379

11. Richard Lee Vs Girish Soni & anr. (2017) 3 SCC 194

12. Kesardeo Chamria Vs Radha Kissen Chamria & ors. AIR 1953 SC 23

13. Thomson Press (India) Ltd. Vs Nanak Builders & Investors (P.) Ltd. (2013) 5 SCC 39

14. Government of Orissa Vs Ashok Transport Agency & ors. (2005) 1 SCC 536

15. Khafiladdin Vs Samiraddin AIR 1931 Calcutta 67

16. Durga Prasad Vs Deep Chand AIR 1954 Supreme Court 75

17. R.C. Chandiok Vs Chunni Lal Sabbarwal (1970) 3 SCC 140

18. Khem Chand Shankar Chaudhari Vs Vishnu Hari Patil (1983) 1 SCC 18

19. Kasturi Vs Iyymperumal & ors. (2005) 6 SCC 733 *(followed)*

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

1. This is a revision filed by the plaintiff under section 115 of the Code of Civil Procedure challenging an order dated 31.10.2019 passed by the Civil Judge, Junior Division, Lucknow, allowing an application bearing No. A-47 filed by the transferees pendent lite for impleadment.

2. The application A-47 has been allowed by the Court below on the finding that the applicants (respondent nos. 3 and 4

in the revision) are the bona fide purchasers whose presence is necessary in order to enable court to effectually and completely adjudicate upon and settle all the questions involved in the suit.

3. The facts of the case, in brief, are that respondent no. 1 and 2 (defendant nos. 1 and 2 in the suit) entered into an agreement to sell in respect to the suit property on 8.5.2015 with the revisionist-plaintiff, but failed to perform their part of the agreement, consequently a suit for specific performance of contract was filed by the revisionist on 5.10.2016 before the court below at Lucknow. The civil court issued summons which were served upon defendant nos. 1 and 2 on 20.10.2016. Thereafter, i.e., during pendency of the said suit bearing No. 1857 of 2016, Anil Kumar Singh v. Pappu & anr., defendant nos. 1 and 2 (respondent nos. 1 and 2 in the revision) executed a sale-deed in favour of defendant nos. 3 and 4 (respondent nos. 3 and 4 in the revision) on 23.11.2016 which, according to the revisionists' counsel was hit by section 52 of the Transfer of Property Act 1882. The defendant nos. 1 and 2 filed their written statement on 21.2.2018 and issues were framed by the Civil Court on 15.5.2018. On 1.12.2018 P.W. 1 was examined. He was cross-examined by the defendant nos. 1 and 2 on 13.12.2018. On 9.1.2019 P.W.2 was examined. He was cross-examined on 19.10.2019. In the interregnum when the matter was fixed for examination of Defence witness 2, respondent nos. 3 and 4 filed an application bearing no. A-47 for their impleadment on 5.7.2019 stating that they had purchased the suit property vide sale-deed dated 23.11.2016. It is this application which has been allowed by the impugned order dated 31.10.2019.

4. Contention of Sri N.K. Seth, learned counsel for the revisionist was that the plaintiff being the *dominus litis* cannot be compelled to implead stranger in the suit, especially **a transferee pendent** lite as neither any relief has been sought against him nor is he a necessary or proper party in the matter. It was his submission that the issues involved in the suit are between the plaintiff and defendant nos. 1 and 2 who had entered into an Agreement-to-sell and the plaintiffs are claiming their rights against the said defendants. In this regard he has placed reliance upon a decision of this court in the case of ***Gurmit Singh Bhatia v. Kiran Kant Robinson & ors., 2019 SCC OnLine SC 912 and*** another decision reported in ***(2020) 14 SCC 392, Mohamed Hussain Gulam Ali Shariffi v. Municipal Corporation of Greater Bombay & ors.***

5. The other argument advanced by him was that the objections raised by the revisionist before the Civil Court were not even taken note of and without a proper consideration of relevant aspects of the matter the impugned order has been passed. He submitted that even the sale-deed was not annexed with the application by the respondent nos. 3 and 4. The application for impleadment did not even mention as to how and when they came to know about the pendency of the suit. Their impleadment at the stage of examination of defence witness 2 was prejudicial to the interest of the plaintiff and would delay the suit. The applicants were not bona fide purchasers. Purchase itself was hit by the doctrine of lis pendens. Sri Seth relied upon the decision reported in **(2008) 7 SCC 144**, Usha Sinha v. Dina Ram & ors.; and another decision reported in **(2010) 6 Alld. LJ 425, Ram Swaroop Singh & ors. v. Karan Singh & ors.**

6. On the other hand, Sri M.A. Khan, learned counsel appearing for respondent

nos. 3 and 4, i.e., the transferees *pendent lite*, submitted that they were necessary and proper parties for a complete and effective adjudication of the suit and the court below has rightly allowed the application for impleadment. He invited attention of the court to relevant clauses of the sale-deed to drive home the point that the sale-deed did not disclose the pendency of the suit proceedings between the plaintiff and defendant nos. 1 and 2 and that his clients were *bona fide* purchasers. He submitted that the suit proceedings are going on between the plaintiff and defendant nos. 1 and 2 in collusion. The transferees pendent lite are entitled to protect their rights as they would be bound by the decree passed in the suit and also have a right to challenge the said decree, therefore, no interference is called for in exercise of the revisional jurisdiction under section 115, C.P.C. In this regard he has relied on the decisions reported in ***(2012) 8 SCC 384, Vidur Implex and Traders Pvt. Ltd. & ors. v. Tosh Apartments Pvt. Ltd. & ors.; (1992) 2 SCC 524, Ramesh Hirachand Kundanmal v. Municipal Corporation of Greater Bombay & ors.; (2010) 111 RD 182, Dr. Shyam Chandra Srivastava v. Estate of Padmasri Smt. Savitri Sahni; (2005) 11 SCC 403, Amit Kumar Shaw & anr. v. Farida Khatoon & anr.; 2014 (4) ALJ 559, Shyama Devi v. A.D.J. Sultanpur & ors.; (1996) 5 SCC 379, Aliji Momonji & co. v. Lalji Mavji & ors.; (2017) 3 SCC 194, Richard Lee v. Girish Soni & anr.***

7. Learned counsel appearing for the respondent nos. 1 and 2 informed the court that his clients were opposing the claim of the plaintiff as also the claim of defendant nos. 3 and 4 based on the sale-deed dated 23.11.2016 which in fact has been challenged by his clients seeking cancellation of the same, *albeit*, after filing of the application for impleadment by respondent nos. 3 and 4. He informed the court that his clients were contesting the suit and were not in collusion with the plaintiff or for that matter with the applicants/respondent nos. 3 and 4.

8. It has not been denied by the revisionist-plaintiff before this court that sale-deed was executed by the defendant nos. 1 and 2 in favour of the applicants/defendant nos. 3 and 4 on 23.11.2016 with respect to the property which is the subject matter of the suit bearing no. 1857 of 2016.

9. Before proceeding to consider the merits of the issue it would be worthwhile to refer to a few decisions as to the scope of revisional jurisdiction under section 115, C.P.C. by the High Court. A Four Judges' Bench of the Supreme Court of India had an occasion to consider this aspect of the matter in the case of **Kesardeo Chamria v. Radha Kissen Chamria & ors., AIR 1953 SC 23**. Relevant extract of the said judgment is quoted hereinbelow:

"17. We now proceed to consider whether a revision was competent against the order of 25th April, 1945, when no appeal lay. It seems to us that in this matter really the High Court entertained an appeal in the guise of a revision. The revisional jurisdiction of the High Court is set out in the 115th section of the Code of Civil Procedure in these terms:

"The High Court may call for the record of any case which has been decided by any court subordinate to such High Court and in which appeal lies thereto, and it such subordinate court appears:

(a) to have exercised a jurisdiction not vested in it by law, or

(b) to have failed to exercise a jurisdiction so vested, or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

the High Court may make such order in the case as it thinks fit." A large number of cases have been collected in the fourth edition of Chitaley & Rao's Code of Civil Procedure (Vol. 1), which only serve to show that the High Courts have not always appreciated the limits of the jurisdiction conferred by this section. In Mohunt Bhagwan Ramanuj Das v. Khetter Moni Dassn the High Court of Calcutta expressed the opinion that sub-clause (c) of Section 115 of the Civil Procedure Code, was intended to authorise the High Courts to interfere and correct gross and palpable errors of subordinate courts, so as to prevent grave injustice in non-appealable cases. This decision was, however, dissented from by the same High Court in Enat Mondul v. Baloram Dey but was cited with approval by Lort-Williams, 3., in Gulabchand Bangur v. Kabiruddin Ahmed. In these circumstances it is worthwhile recalling again to mind the decisions of the Privy Council on this subject and the limits stated therein for the exercise of jurisdiction conferred by this section on the High Courts.

***18**. As long ago as 1894, in Rajah Amir Hassen Khan y. Sheo Baksh Singhi the Privy Council made the following observations on Section 622 of the former Code of Civil Procedure, which was replaced by Section 115 of the Code of 1908:*

"The question then is, did the Judges of the lower courts in this case, in the exercise of their jurisdiction, act illegally or with material irregularity. It appears that they had perfect jurisdiction to decide the case, and even if they decided wrongly, they did not exercise their jurisdiction illegally or with material irregularity."

In 1917 again in Balakrishna Udayar v. vasudeva Aiyar the Board observed:

"It will be observed that the section applies to jurisdiction alone, the irregular exercise or non-exercise of it, or the illegal assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved."

In 1949 in Venkatagiri Ayyangar v. Hindu Religious Endowments Board, Madrass the Privy Council again examined the scope of Section 115 and observed that they could see no justification for the view that the section was intended to authorise the High Court to interfere and correct gross and palpable errors of subordinate courts so as to prevent grave injustice in non-appealable cases and that it would be difficult to formulate any standard by which the degree of error of subordinate courts could be measured. It was said -

"Section 115 applies only to cases in which no appeal lies, and, where the legislature has provided no right of appeal, the manifest intention is that the order of the trial court, right or wrong, shall be final. The section empowers the High Court to satisfy itself on three matters, (a) that the order of the subordinate court is within its jurisdiction; (b) that the case is one in which the court ought to exercise jurisdiction; and (c) that in exercising jurisdiction the court has not acted illegally. that is, in breach of some provision of law, or with material irregularity, that is, by committing some error of procedure in the course of the trial which is material in that it may have affected the ultimate decision. If the High Court is satisfied on those three matters, it has no power to interfere because it differs,

however from the conclusions of the subordinate court on questions of fact or law."

19. Later in the same year in Joy Chand Lal Babu v. Kamalaksha Choudhuryis Their Lordships had again adverted to this matter and reiterated what they had said in their earlier decision. They pointed out:

"There have been a very large number of decisions of Indian High Courts on Section 115 to many of which Their Lordships have been referred. Some of such decisions prompt the observation that High Courts have not always appreciated that although error in a decision of a subordinate court does not by itself involve that the subordinate court has acted illegally or with material irregularity so as to justify Interference in revision under sub-section (c), nevertheless, if the erroneous decision results in the subordinate court exercising jurisdiction not vested in it by law, or failing to exercise a jurisdiction so vested, a case for revision arises under sub-section (a) or sub-section (b) and sub-section (c) can be ignored."

20. Reference may also be made to the observations of Bose, 3. in his order of reference in Narayan Sonaji v. Sheshrao Vithobail wherein it was said that the words "illegally" and "material irregularity" do not cover either errors of fact or law. They do not refer to the decision arrived at but to the manner in which it is reached. The errors contemplated relate to material defects of procedure and not to errors of either law or fact after the formalities which the law prescribes have been complied with."

10. Though section 115 C.P.C. has undergone some changes over the years, especially so far as its application in the State of U.P. is concerned and in addition to the requirements contained in Clause (a) to (c) of section 115, C.P.C. which are required to be satisfied for exercise of such revisional jurisdiction, now, by virtue of the U.P. Act 14 of 2003, two other requirements are required to be satisfied, (i) the order if it had been made in favour of the party applying for revision, would have finally disposed off the suit or other proceeding; or (ii) the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it is made. However, as far as clauses (a), (b) and (c) laying down the jurisdictional parameters for exercise of revisional jurisdiction under section 115(1), C.P.C. they stand as it is, therefore, to this extent the law as laid down in Kesardeo Chhamaria (supra) applies even today as to the meaning and purport of the said clauses.

11. It is not in dispute that the suit has been filed by the revisionist-plaintiff for specific performance of contract against the defendant nos. 1 and 2 who had entered into an Agreement-to-sell with the plaintiff. The defendant nos. 3 and 4 are not parties to the said Agreement-to-sell, but, they have purchased the property which is the subject matter of such Agreement-to-sell, during pendency of suit proceedings.

12. Now it is very well settled that section 52 of the Transfer of Property Act and the doctrine of lis pendens on which it is based do not operate to annul such transfers pendent lite, but, they operate to render the same subservient to the rights of the parties to a litigation. Such transfer is neither illegal nor void ab initio, but the subsequent purchaser is bound by the litigation between the parties to the suit. A

reference may be made in this regard to the decision of the Supreme Court of India in the case of ***Thomson Press (India) Ltd. V. Nanak Builders & Investors (P.) Ltd., (2013) 5 SCC 397 (Paras 26 to 29)***. If such sale is in violatioi of any injunction or restraint order than the legal position may be different, but that is not the case here.

13. Now the question before this court is as to whether the court below has committed a jurisdictional error so as to require interference by this court in exercise of its revisional power under section 115 C.P.C. as it applies in the State of U.P. or not ?

14. It is implicit in this question as to whether the court below has rightly exercised its jurisdiction in allowing the application of the transferees *pendent lite* for impleadment in the suit of the revisionist which is for specific performance of contract and in which relief claimed is the defendant nos. 1 and 2, or not ?

15. In this context we may first refer to the provisions contained in Order I Rule 10 which reads as under:

*"**10. Suit in name of wrong plaintiff**.-(1) Where a suit has been instituted in the name of the wrong person as plaintiff or where it is doubtful whether it has been instituted in the name of the right plaintiff, the Court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as the Court thinks just.*

***(2) Court may strike out or add parties**.-The Court may at any stage of the prxdings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any puty improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Count effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.*

(3) No person shall be added as a plaintiff suing a next friend or as the next friend of a plaintiff under any disability without his consent.

***(4) Where defendant added, plaint to be amended**.-Where a defendant is added, the plaint shall, unless the Court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the Court thinks fit, on the original defendant.*

(5) Subject to the provisions of the Indian Limitation Act, 1877 (15 of 1877), Section 22, the proceedings as against any person added as defendant shall be deemed to have begun only on the service of the summons.

16. The court may in this this context fruitfully refer to the decision of the Supreme Court in the case of **Thomson Press India Ltd. (supra)** wherein after considering the provisions of Order I Rule 10, C.P.C. it has been held ... *"From the bare reading of the aforesaid provision, it is manifest that sub-rule (2) of Rule 10 gives a wider discretion to the court to meet every case or defect of a party and to proceed with a person who is either a necessary party or a proper party whose presence in the court is essential for*

effective determination of the issues involved in the suit."

17. The court may also refer to another decision of the Supreme Court in the case of **Ramesh Hirachand Kundanmal v. Municipal Corpn. of Greater Bombay (1992) 2 SCC 524**, which has also been considered in the case of Thomson Press India ltd., wherein it has been held as under ...

"14. It cannot be said that the main object of the rule is to prevent multiplicity of actions though it may incidentally have that effect. But that appears to be a desirable consequence of the rule rather than its main objective. The person to be joined must be one whose presence is necessary as a party. What makes a person a necessary party is not merely that he has relevant evidence to give on some of the questions involved; that would only make him a necessary witness. It is not merely that he has an interest in the correct solution of some question involved and has thought of relevant arguments to advance. The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action and the question to be settled, a therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party. The line has been drawn on a wider construction of the rule between the direct interest or the legal interest and commercial interest. It is, therefore, necessary that the person must be directly or legally interested in the action the answer i.e. he can say that the litigation may lead to result which will affect him legally that is by curtailing his legal rights. is difficult to say that the rule contemplates joining as a defendant a person whose only object is to prosecute his own cause of action. Similar provision was considered in Amon v. Raphael Tuck & Sons Ltd., (1956) 1 QB 357, wherein after quoting the observations of Wynn-Parry, J. in Dollfus Mieg et Compagnie SA v. Bank of England, (1950) 2 All ER 605, that the true test lies not so much in an analysis of what are the constituents of the applicants' rights, but rather in what would be the result on the subject-matter of the action if those rights could be established, Devlin, J. has stated: (Amon casels, QB p. 371)

... the test is: "May the order for which the plaintiff is asking directly affect the intervener in the enjoyment of his legal rights?"

18. The provisions of Order XXII Rule 10 also need to be referred and they read as under :

"XXII Rule 10 ***Procedure in case of assignment before final order in suit****"*

(1) In other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved.

(2) The attachment of a decree pending an appeal therefrom shall be deemed to be an interest entitling the person who procured such attachment to the benefit of sub-rule (1)."

19. In the context of the above quoted provision of Order XXII Rule 10 the court may refer to a Three Judge Bench decision of the Supreme Court of India reported in **(2005) 1 SCC 536, Government of Orissa v. Ashok Transport Agency & ors.,** wherein it has been held .... *"9. Normally, in a case covered by Order 22 Rule 10 of*

the Code of Civil Procedure where rights are derived by an assignee or a successor-in-interest pending a litigation, it is for that assignee or transferee to come on record if it so chooses and to defend the suit. It is equally open to the assignee to trust its assignor to defend the suit properly, but with the consequence that any decree against the assignor will be binding on it and would be enforceable against it. Equally, in terms of Section 146 of the Code of Civil Procedure, a proceeding could be taken against any person claiming under the defendant or the judgment-debtor. Similarly, a person claiming under the defendant or the judgment-debtor could seek to challenge the decree or order that may be passed against the defendant, by way of appeal or otherwise, in the appropriate manner. But, it would not be open to it to challenge the decree as void or unenforceable in execution in the absence of any specific provision in that regard in the statute or order bringing about such a transfer or assignment."

20. In the case of Thomson Press India Ltd. (supra) Hon'ble Mr. Justice T.S. Thakur as he then was, while rendering his supplementing opinion held in the facts of the said case that the application which the appellant made was only under Order I Rule 10, C.P.C., but enabling provision of Order XXII Rule 10 C.P.C. could always be invoked if the facts situation so demanded.

21. The Supreme Court in the case of Amit Kumar Shaw & anr. V. Farida Khatoon & anr., (2005) 11 SCC 403, opined that under Order XXII Rule 10 no detailed inquiry at the stage of granting relief is contemplated. The court has only to be prima facie satisfied for exercising its discretion in granting relief for continuing the suit by or against the person on who the interest has devolved by assignment or devolution. The question about the existence and validity of the assignment and devolution can be considered at the final hearing of the proceedings.

22. It is also necessary to refer to the provisions of section 146 C.P.C. which read as under:

"146, C.P.C.: Save as otherwise provided by this Code or by any law for the time being in force, where any proceeding may be taken or application made by or against any person then the proceeding may be taken or the application may be made by or against any person claiming under him."

23. It is also relevant to refer to section 19 of the Specific Relief Act 1963, especially clause (b) thereof which reads as under :

"19. Relief against parties and persons claiming under them by subsequent title.--Except as otherwise provided by this Chapter, specific performance of a contract may be enforced against--

(a) either party thereto;

(b) any other person claiming under him by a title arising subsequently to the contract, <u>except a transferee for value who has paid his money in good faith and without notice of the original contract;</u>

(c) any person claiming under a title which, though prior to the contract and known to the plaintiff, might have been displaced by the defendant;

(d) when a company has entered into a contract and subsequently becomes amalgamated with another company, the new company which arises out of the amalgamation;

(e) when the promoters of a company have, before its incorporation, entered into a contract for the purpose of the company and such contract is warranted by the terms of the incorporation, the company: Provided that the company has accepted the contract and communicated such acceptance to the other party to the contract."

24. This clause was considered by the Supreme Court in the case of Thomson Press India Ltd. (supra) and with reference to clause (b) of section 19 it was observed ... *"From the bare reading of the aforesaid provision, it is manifest that a contract for specific performance may be enforced against the parties to the contract and the persons mentioned in the said section. Clause (b) of Section 19 makes it very clear that a suit for specific performance cannot be enforced against a person who is a transferee from the vendor for valuable consideration and without notice of the original contract which is sought to be enforced in the suit."*

25. In this context their Lordship referred to a decision of the Calcutta High Court in the case of **Kafiladdin v. Samiraddin, AIR 1931 Calcutta 67**, wherein the English law on the point was considered. It is relevant to quote para 39 to 40 of the decision in Thomson Press India Ltd. (supra) in this regard, which are as follows:

*"**39**. As discussed above, a decree for specific performance of a contract may be enforced against a person who claimed under the plaintiff (sic 9 defendant), and title acquired subsequent to the contract. There is no dispute that such transfer made in favour of the subsequent purchaser is subject to the rider provided under Section 52 of the Transfer of Property Act and the restraint order passed by the Court.*

***40**. The aforesaid question was considered by the Calcutta High Court in Kafiladdin v. Samiraddin20, where Their Lordships referred to the English law on this point and quoted one of the passages of the book authored by Dart, on Vendors and Purchasers', 8th Edn., Vol. 2, which reads as under: (Kafiladdin case)*

'Equity will enforce specific performance of the contract for sale against the vendor himself and against all persons claiming under him by a title arising subsequently to the contract except purchasers for valuable consideration who have paid their money and taken a conveyance without notice to the original contract.' "

26. The decision of the Supreme Court in Thomson Press India Ltd. was in respect of suit proceedings which were for specific performance of contract just as in this case.

27. In Thomson Press India Ltd. (supra) the question as to what would be the form of decree to be passed in a suit for specific performance, especially one in which the suit property has been transferred *pendent lite* came up for consideration and in this context the Supreme Court referred to a decision of the Calcutta High Court in the case of *Kafilladdin (supra)* as also another decision of the Supreme Court in the case of **Durga Prasad v. Deep Chand, AIR 1954 Supreme Court 75**, as also its decision in the case of **R.C. Chandiok v. Chunni Lal Sabbarwal, (1970) 3 SCC 140**, and discussing the same held as under:

"Discussing elaborately, the Court finally observed: (Kafladdin case)

"This statement of the law is exactly what is meant by the first two clauses of Section 27 of the Specific Relief Act. It is not necessary to refer to the English cases in which decrees have been passed against both the contracting party and the subsequent purchaser. It is enough to mention some of them: Daniels v. Davison [(1803-13), All ER Rep 432], Potter v. Sanders, [(1846) 6 Hare 1] and Lightfoot v. Heron [(160 ER 835). The question did not pertinently arise in any reported case in India; but decrees in cases of specific performance of contract have been passed in several cases in different forms. In Chunder Kant Roy v. Krishna Sunder Roy, ILR (1884) 10 Cal 710, the decree passed against the contracting party only was upheld. So it was in Kannan v. Krishnan ILR (1890) 13 Mad 324. In Himatlal Motilal v. Vasudev Ganesh Mhaskar ILR (1912) 36 Bom 446, the decree passed against the contracting defendant and the subsequent purchaser was approved. In Faki Ibrahim v. Faki Gulam Mohidin, AIR 1921 Bom 459, the decree passed against the subsequent purchaser only was adopted. In Gangaram v. Laxman Ganoba Shet Chaudole, ILR (1916) 40 Bom 498, the suit was by the subsequent purchaser and the decree was that he should convey the property to the person holding the prior agreement to sale. It would appear that the procedure adopted in passing decrees in such cases is not uniform. But it is proper that English procedure supported by the Specific Relief Act should be adopted. The apparent reasoning is that unless both the contracting party and the subsequent purchaser join in the conveyance it is possible that subsequently difficulties may arise with regard to the plaintiff's title."

41. The Supreme Court in Durga Prasad v. Deep Chand, AIR 1954 SC 75 referred to the aforementioned decision of the Calcutta High Court in Kafiladdin case and finally held: (Durga Prasad case)

"42. In our opinion, the proper form of decree is to direct specific performance of the contract between the vendor and the plaintiff and direct the subsequent transferee to join in the conveyance so as to pass on the title which resides in him to the plaintiff. He does not join in any special covenants made between the plaintiff and his vendors all he does is to pass on his title to the plaintiff. This was the course followed by the Calcutta High Court in Kafiladdin v. Samiraddin, and appears to be the English practice. (See Fry on Specific Ivrformance, 6th Ed., p. 90. para 207 and also Potter v. Sanders) We direct accordingly."

42. Again in R.C. Chandiok v. Chuni Lal Sabharwal this Court refened to their earlier decision and observed: (SCC p. 146, para 9)

"9. It is common ground that the plot in dispute has been transferred by the respondents and therefore the proper form of the decree would be the same as indicated at SCR p. 369 in Durga Prasad v. Deep Chand viz.

'to direct specific performance of the contract between the vendor and the plaintiff and direct the subsequent transferee to join in the conveyance so as to pass on the title which resides in him to the plaintiff. He does not join in any special covenants made between the plaintiff and his vendor; all he does is to pass on his title to the plaintiff (AIR p. 81, para 42)

We order accordingly. The decree of the courts below is hereby set aside and the appeal is allowed with costs in this Court and the High Court"

43. This Court again in Dwarka Prasad Singh v. Harikant Prosod Singh subscribed to its earlier view and held that in a suit for specific performance against a

person with notice of a prior agreement of sale is a necessary party.

44. Having regard to the law discussed hereinabove and in the facts and circumstances of the case and also for the ends of justice the appellant is to be added as party-defendant in the suit. The appeal is, accordingly, allowed and the impugned orders passed by the High Court are set aside.

45. Before parting with the order, it is clarified that the appellant after impleadment as party-defendant shall be permitted to take all such defences which are available to the vendor Sawhneys as the appellant derived title, if any, from the vendor on the basis of purchase of the suit property subsequent to the agreement with the plaintiff and during the pendency of the suit."

28. From the aforesaid it is evident as was held in Kafilladdin's case (supra) that unless both the contracting party and the subsequent purchaser join in the conveyance it is possible that subsequent difficulties may arise with regard to the plaintiff's title, that is why in *Durga Prasad (supra)* the Supreme Court held that the proper form of decree is to direct the specific performance of contract between the vendor and the plaintiff and direct the subsequent person to join in the conveyance so as to pass on the title which resides in him to the plaintiff. He does not join in any special covenants made between the plaintiff and his vendor; All he does is to pass on his title to the plaintiff.

29. Based on the aforesaid discussion the appellant's appeal in Thomson Press India Ltd. (supra) was allowed with the observations that it should be added as a party-defendant in the suit and orders of the High Court to the contrary were set aside, however, it was further held that the appellant after impleadment as party-defendant shall be permitted to take all such defences which are available to the vendors as the appellant derived title, if any, from the vendor on the basis of the purchase of the suit property subsequent to the Agreement with the plaintiff and during the pendency of the suit. In fact, it has also been held by the Supreme Court in the case of *Ashok Transport Agency (supra)* that such a transferee pendent lite who is impleaded in the suit as defendant cannot take a defence inconsistent with the defence already set up by the defendant in its written statement, i.e., the vendor from whom he has purchased the property during pendency of the suit.

30. Thus, the presence of such a transferee *pendent lite* is also necessary for proper resolution of the dispute as ultimately if the suit of the plaintiff is allowed, then the direction will be to this subsequent transferee to execute the sale-deed in favour of the plaintiff and this will avoid further complications, as observed by the Supreme Court hereinabove. Moreover, the Supreme Court also considered the aspect as to what happens if the original defendant looses interest in the litigation or colludes with the plaintiff, therefore, to protect the rights of the subsequent purchasee in this regard also it is necessary to implead him as a defendant in the suit. In fact, a transferee pendent lite has been held to be in a position somewhat similar to the position of an heir or legatee of a party who dies during the pendency of a suit or proceeding. Reference may be made in this regard to para-55 of the supplementing opinion rendered by Hon'ble Justice T.S. Thakur in the case of Thomos Press India

Ltd. (supra) wherein reliance has been placed upon a decision of the Supreme Court in the case of **Khem Chand Shankar Chaudhari v. Vishnu Hari Patil, (1983) 1 SCC 18**, and the decision of the Supreme Court in the case of **Amit Kumar Shaw (supra).**

31. We may also refer to the decision of the Supreme Court in the case of Amit Kumar Shaw (supra) which though not a case relating to a suit for specific performance of contract, nevertheless, considered the entitlement of a transferee *pendent lite* to be impleaded in terms of Order I Rule 10, Order XXII Rule 10 and section 146 of the C.P.C. In the said case the Supreme Court held as under :

"14. An alienee pendente lite is bound by the final decree that may be passed in the suit. Such an alienee can be brought on record both under this rule as also under Order 1 Rule 10. Since under the doctrine of lis pendens a decree passed in the suit during the pendency of which a transfer is made binds the transferee, his application to be brought on record should ordinarily be allowed.

15. Section 52 of the Transfer of Property Act is an expression of the principle "pending a litigation nothing new should be introduced". It provides that pendente lite, neither party to the litigation, in which any right to immovable property is in question, can alienate or otherwise deal with suchproperty so as to affect his appointment. This section is based on equity and good conscience and is intended to protect the parties to litigation against alienations by their opponent during the pendency of the suit. In order to constitute a lis pendens, the following elements qust be present:

1. There must be a suit or proceeding pending in a court of competent jurisdiction.

2. The suit or proceeding must not be collusive.

3. The litigation must be one in which right to immovable property directly and specifically in question.

4. There must be a transfer of or otherwise dealing with the property in dispute by any party to the litigation.

5. Such transfer must affect the rights of the other party that may ultimately accrue under the terms of the decree or order.

16. The doctrine of lis pendens applies only where the lis is pending before a court. Further pending the suit, the transferee is not entitled as of right to be made a party to the suit, though the court has a discretion to make him a party. But the transferee pendente lite can be added as a proper party if his interest in the subject-matter of the suit is substantial and not just peripheral. A transferee pendente lite to the extent he has acquired interest from the defendant is vitally interested in the litigation, where the transfer is of the entire interest of the defendant; the latter having no more interest in the property may not properly defend the suit. He may collude with the plaintiff. Hence, though the plaintiff is under no obligation to make a lis pendens transferee a party, under Order 22 Rule 10 an alience pendente lite may be joined as party. As already noticed, the court has discretion in the matter which must be judicially exercised and an alience would ordinarily be joined as a party to enable him to protect his interests. The court has held that a transferee pendente lite of an interest in immovable property is a representative-in-interest of the party from whom he has acquired that interest. He is entitled to be impleaded in the suit or other proceedings where his predecessor-

in-interest is made a party to the litigation; he is entitled to be heard in the matter on the merits of the case."

32. We may also in this context refer to the decision of the Hon'ble Supreme Court of India in the case of **Gurmit Singh Bhatia (supra)** upon which great reliance was placed by learned counsel for the revisionist. The said decision has considered the three Judge Bench decision in the case of **Kasturi v. Iyyamperumal and ors., (2005) 6 SCC 733**. The Supreme court in the case of Kasturi (supra) had the occasion to consider the question - Whether in a suit for specific performance of a contract for sale of a property instituted by a purchaser against the vendor, a stranger or a third party to the contract claiming to have an independent title or possession over the contracted property is entitled to be added as a party-defendant in the suit ? In the said case the person seeking impleadment was claiming adversely to the claim of the vendor, meaning thereby he was setting up a title independent of the parties to the suit, therefore, the Supreme Court declined his claim as it would enlarge the scope of the suit which was a suit for specific performance to one which would become a suit for title viz.-a-viz. the parties thereto, however, the Supreme Court held that in that very context in no uncertain terms that a person who had purchased the contracted property from the vendor was a necessary party. In this context the Supreme Court considered the scope of Order I Rule 10 C.P.C., specifically sub-Rule (2) of order I Rule 10, C.P.C., which empowers the court to add a person who ought to have been joined or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit. The court opined as under:

"7. In our view, a bare reading of this provision, namely, second part of Order 1 Rule 10 sub-rule (2) CPC would clearly show that the necessary parties in a suit for specific performance of a contract for sale are the parties to the contract or if they are dead, their legal representatives as also a person who had purchased the contracted property from the vendor. In equity as well as in law, the contract constitutes rights and also regulates the liabilities of the parties. A purchaser is a necessary party as he would be affected if he had purchased with or without notice of the contract, but a person who claims adversely to the claim of a vendor is, however, not a necessary party. From the above, it is now clear that two tests are to be satisfied for determining the f question who is a necessary party. Tests are (1) there must be a right to some relief against such party in respect of the controversies involved in the proceedings; (2) no effective decree can be passed in the absence of such party."

33. A three Judge Bench of this court in the case of Kasturi (supra) has very categorically held, as quoted hereinabove, that necessary parties in a suit for specific performance of contract for sale are the parties to the contract or if they are dead, their legal representatives **as also a person who had purchased the contracted party from the vendor.** It has gone on to hold that "**a purchaser is a necessary party, as he would be effected if he has purchased with or without notice of the contract**".

34. In this context it also considered the provisions of section 19 of the Specific

Relief Act which have already been quoted hereinabove and opined that this section is exhaustive on the question as to who are the parties against whom a contract for specific performance may be enforced. The Supreme Court in Kasturi (supra) very categorically observed in para-8 of the report - *"We may look to this problem from another angle. Section-19 of the Specific Relief Act 1963 provides relief against parties* ***and persons claiming under them by subsequent title.*** After considering section 19(a) to (e) of the Specific Relief Act 1963 the Supreme Court observed -

"9. We have carefully considered sub-sections (a) to (e) of Section 19 of the Act. From a careful examination of the aforesaid provisions of clauses (a) to (e) of the Specific Relief Act we are of the view that the persons seeking addition in the suit for specific performance of the contract for sale who were not claiming under the vendor but they were claiming adverse to the title of the vendor do not fall in any of the categories enumerated in sub-sections (a) to (e) of Section 19 of the Specific Relief Act."

35. Thus, a subsequent purchaser pendent lite is also covered under section 19, but not a person who is not claiming under the vendor, but are claiming against the title of the vendor. Clause (b) of section 19 has already been referred earlier. According to it, a *transferee pendente lite* who has purchased the property for value in good faith without notice of the original contract is an exception to the person against whom relief of specific performance can be sought. This, therefore, is an aspect which will have to be seen in the suit proceedings for which presence of the respondent nos. 3 and 4 is necessary, especially as, they will be bound by the decree passed therein.

36. Now as already stated in the facts of the said case as the applicant who was seeking impleadment was a stranger in the sense that he was claiming independent and adverse title to the parties to the suit, therefore, in that context the Supreme Court of India observed that the plaintiff was not under a compulsion to implead such a party he being *dominus litis*, therefore, observations in para-18 of the said decision have to be read accordingly. In Kasturi's case (supra) the applicants seeking impleadment was claiming title adverse to the parties to the suit, therefore, it was held that the plaintiff being dominus litis could not be compelled to implead him as there was no compulsion in law to implead such a person. This does not mean that a subsequent purchaser *pendent lite* who is claiming through one of the parties/vendors and has acquired an interest in the property would not be a necessary party. In fact, the decision in Kasturi (supra) very categorically states that he would be a necessary and proper party.

38. In *Gurmit Singh Bhatia (supra)* apart from the fact that there was an injunction restraining the original defendant from transferring the property, which is not the case here, it appears that the facts were similar to that of Kasturi, where a complete stranger was claiming title against parties to the suit, as, otherwise, in *Kasturi (supra)* a three Judge Bench has clearly held that a subsequent purchaser claiming through one of the parties to the suit, who is not claiming independent title, is a necessary party in a suit for specific performance, therefore, the decision in Gurmit Singh Bhatia does not help the cause of the revisionist herein in view of the Three Judge Bench decision in the case of Kasturi (supra), as, in this case the respondent nos. 3 and 4 herein are not

claiming any independent title adverse to the parties to the suit, i.e., the defendant nos. 1 and 2 (the vendors), but are claiming through them.

38. As already discussed, considering the form and nature of decree which is to be passed in a suit for specific performance wherein the transferee *pendent lite* is required to join in a conveyance/execution of sale-deed, as, the vendor-defendant is no longer its owner and it is the transferee pendente lite who shall execute the sale-deed/contract, the respondent nos. 3 and 4 are proper parties. Presence of respondent nos. 3 and 4 is also required in the suit for protection of their interest in the event of any collusion between the plaintiff and defendant nos. 1 and 2. This will avoid long drawn execution proceedings and multiplicity of litigation. Moreover, the respondent nos. 3 and 4 will be bound by such decree and will have right of appeal against it.

39. This apart, as their claim is of being *bona fide* purchasers for value without notice of Agreement-to-sell entered into between the plaintiff and defendant nos. 1 and 2, therefore, they are entitled to raise this plea in their defence in view of the exception contained in section 19(b) of the Specific Relief Act 1963 as quoted and discussed earlier, according to which, a decree for specific performance may be enforced against either party thereto; any person claiming under him by a title arising subsequently to the Contract **except a transferee for value who has paid his money in good faith and without notice of the original Contract**. Thus, respondent nos. 3 and 4 are necessary parties in the facts of this case. The Three Judge Bench in the case of Kasturi (supra) also supports the claim of the respondent nos. 3 and 4, as already discussed.

40. In the case at hand the court below has allowed the application for impleadment of respondent nos. 3 and 4 who claim that they are *bona fide* purchasers. Of course this court has also considered the provisions contained in the sale-deed wherein there was no disclosure by the vendor, i.e., defendant nos, 1 and 2 about pendency of the suit proceedings between the plaintiff and them. This of course is only for the purpose of impleadment proceedings.

41. Furthermore, learned counsel for the defendant no. 1 has opposed the application for impleadment of defendant nos. 3 and 4 before the court below and has also filed a suit for cancellation of the sale-deed dated 23.11.2016 all of which clearly point out at least at this stage that there is no collusion between the defendant nos. 1 and 2 on the one hand and defendant nos. 3 and 4 on the other.

42. It is also not a case where a temporary injunction was operating restraining the defendant nos. 1 and 2 from alienating the property and, in spite of it the defendant nos. 1 and 2 sold the property to defendant nos. 3 and 4. As already stated transfer *pendent lite* does not render the sale void, but only makes it subservient to the result of the suit.

43. On account of the interim order dated 31.10.2019 passed in this revision the suit proceedings have already remained stalled for more than years.

44. In view of the law which has been discussed hereinabove and considering the

scope of a revision under section 115, C.P.C. in the light of the decision in the case of ***Kesardeo Chhamaria (supra)*** it cannot be said that the court below has committed any jurisdictional error attracting clause (a) to (c) of section 115, C.P.C. nor that the order if it was made in favour of the revisionist would not have disposed off the proceedings for impleadment nor that the order, impugned herein, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it is made. As already noticed, in the facts of the case, the presence of the transferee pendent lite is necessary for complete and effective adjudication of the suit and issues involved therein and the court below has exercised its discretion in the matter, which does not require any interference under Article 115, C.P.C.

45. The fact that the sale-deed was executed on 23.11.2016 whereas the application for impleadment was filed on 5.7.2019 is not of much relevance in the facts of the case, in view of the discussion made hereinabove, especially as, suit proceedings have remained stalled for two years during pendency of the revision.

46. However, the order of the learned trial court is clarified to the extent that the defendant nos. 3 and 4 shall not be permitted to raise any defence inconsistent with the defence of defendant nos. 1 and 2 and only such defence would be available to them as are and would be available to the defendant nos. 1 and 2 from whom they have derived title and as is permissible under section 19(b) of the Act 1963. Subject to this clarification of the order impugned, no interference is called for in exercise of powers under section 115, C.P.C. The revision is accordingly **dismissed**.

47. Any observation made in this judgment is only for the purposes of impleadment proceedings and shall not have any bearing on the merits of the issues involved before the Trial Court including the claim of the respondent nos. 3 and 4 that they are *bona fide* purchasers.

(2022)01ILR A910
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.01.2022

BEFORE

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

Capital Case No. 11 of 2021
With
Reference No. 08 of 2021

Najeeruddin ...Appellant
Versus
State of U.P. ...Respondents

Counsel for the Appellant:
From Jail, Sri Nazrul Islam Jafri (Senior Adv.), A.C., Ms. Nasira Adil, Sri Mohd. Zubair

Counsel for the Respondents:
A.G.A., Sri Ashutosh Gupta, Sri Gyan Prakash Verma

Code of Criminal Procedure, 1973 - Section 386(b) (i) - Retrial- Section 313- The trial court had placed reliance on forensic report in respect of the DNA match between the incriminating articles (i.e. hair, blood-stained frock, clothes, etc) recovered from the scene of crime as well as at the instance of the appellant and the blood sample of the appellant. Importantly, the said forensic report has not been put to the appellant under section 313 CrPC inasmuch as it was obtained after the statement under section 313 CrPC was recorded. It is well settled that all incriminating circumstances appearing in the prosecution evidence must be put to the

accused while recording his statement under section 313 CrPC. According to section 313 (1) (b) CrPC, the stage of examination of the accused under section 313 (1) (b) comes when the witnesses of the prosecution have been examined and before the accused is called on for his defence. This implies that after the incriminating material is put to the accused, he gets a right to lead evidence in defence.

Even if incriminating material against the accused is received subsequent to the stage of recording the statement of the accused u/s 313 CrPC and the same is not being put to him, then the said lapse will vitiate the trial.

Criminal Law - Code of Criminal Procedure, 1973- Section 293 -Section 313 (1) (b)- No doubt, under section 293 CrPC, a forensic report from a Government scientific expert can be accepted in evidence without the requirement of formal proof, but, the accused, if he so chooses, has a right to challenge the report and lead evidence in rebuttal. The accused may also challenge the very foundation of the report by questioning the collection or recovery or seizure of the material in respect of which the report is obtained. To ensure that the accused gets opportunity to avail that right, section 313 (1) (b) CrPC exists in the Code. Not putting the forensic report to the appellant for sure has caused prejudice to the appellant as he could neither tender his explanation to it nor could get opportunity to lead evidence in rebuttal. The seized/ recovered material in respect of which report has been obtained have not been produced before the court and got marked as material exhibit. None such articles were produced before the court and identified by any of the prosecution witnesses as the articles recovered or seized from the scene of crime by the field unit team or by the police i.e. investigating officer at the instance of the accused of which seizure memorandum (Ex. Ka-25) was prepared. Importantly, the collection report prepared by the field unit team is not even exhibited. Once neither the seized/ recovered article, nor a portion of it, was produced in court, and the seizure having not been admitted, the forensic report in respect thereto, remained a waste paper.

Even though no formal proof of the report of a Govt. Scientific expert is required but the accused cannot be deprived of his right to question or challenge the said report at the stage of Section 313 CrPc as the said lapse will result in causing prejudice to the accused and a serious miscarriage of justice.

Constitution of India, 1950- Article 21- Article- 39-A- Code of Criminal Procedure, 1973- Section 273- Section 303- The prosecution as well as the defence should get an even chance to lead evidence to ensure that complete justice is done and truth prevails more so, when not much time has elapsed since the commission of the crime. A very serious charge was levelled by the accused-appellant in his application 37 Kha that he had not engaged any counsel and that all those witnesses were examined when he was unrepresented, the court ought to have enquired from those counsels in the presence of the accused whether they were engaged by the accused and whether they had sufficient opportunity to consult the accused to effectively prepare for cross-examination.

For a fair trial and delivery of justice the court has to ensure that not only the accused is represented by the pleader of his choice but also all evidence is taken in the presence of the accused or in the presence of his pleader and the same is put to him at the stage of Section 313 CrPc for effective rebuttal and preparation of his defence. (Para 17, 19, 20, 22, 25, 26)

Accordingly, Criminal Appeal allowed with direction of retrial. (E-3)

Judgements/ Case law relied upon:-

1. Nar Singh Vs. St. of Har. (2015) 1 SCC 496

2. Jitendra & anr. Vs. St. of M.P., (2004) 10 SCC 562

3. St. of Raj. Vs. Sahi Ram, (2019) 10 SCC 649

4. Zahira Habibulla H. Sheikh Vs. St. of Guj., (2004) 4 SCC 158

5. Anokhilal Vs. St. of M.P, (2019) 20 SCC 196

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

1. Najeeruddin (the appellant) has been convicted under Sections 302, 307, 376, 376-A, 376-AB, 377, 201 I.P.C. and Sections 5/6 of Protection of Children from Sexual Offences Act (for short Pocso Act), vide judgment and order dated 26th March, 2021 passed by Special Judge (Pocso Act), Azamgarh in Special Sessions Trial No.229 of 2019, and has been awarded following punishment:

(i) Under Section 302 I.P.C., death penalty with fine of Rs. 2 lacs;

(ii) Under Section 307 I.P.C., ten years R.I. with fine of Rs. 1 lac and a default sentence of additional six months R.I.;

(iii) Under Section 376 I.P.C., imprisonment for life with fine of Rs. 1 lac and a default sentence of additional six months;

(iv) Under Section 376-A I.P.C., imprisonment for life with fine of Rs. 1 lac and a default sentence of additional six months R.I.;

(v) Under Section 376-AB I.P.C., imprisonment for life with fine of Rs. 2 lacs and a default sentence of additional six months R.I.;

(vi) Under Section 377 I.P.C., ten years R.I. with fine of Rs. 1 lac and a default sentence of additional six months R.I.; and

(vii) Under Section 201 I.P.C., seven years R.I. with fine of Rs. 1 lac and a default sentence of additional three months R.I.

All sentences to run concurrently.

2. As for offence punishable under Section 302 I.P.C., capital sentence has been awarded, the court below has sent a reference for confirmation of death penalty.

3. The appellant has submitted his appeal from jail against the aforesaid judgment and order of conviction and sentence. The said appeal has been forwarded by the Superintendent (Jail), Azamgarh, vide letter dated July 5, 2021, which has been registered as Capital Cases No. 11 of 2021. The appellant has prayed that the judgment and order of conviction and sentence recorded by the trial court be set aside and that he be acquitted of the charges.

4. To represent the appellant, who could not engage a private counsel, by order dated 27.07.2021, Sri N.I. Jafri, learned senior counsel, was appointed as Amicus Curiae.

INTRODUCTORY FACTS IN A CHRONOLOGICAL ORDER

5. To have a clear understanding of the case, it would be useful to have a chronological narration of the facts giving rise to this appeal.

(i) On 25.11.2019 at 10:14 hours, the police station concerned receives an information that some untoward incident has occurred in the house of Deceased No. 1 (for short D-1) (identity of various victims including deceased is not being disclosed because they are victim of sexual

crime). The police team visits the spot and discovers D-1, his wife (Deceased No.2 - for short D-2) and infant son (Deceased No.3 - for short D-3), aged about 4 months, lying dead; and D-1's daughter (victim no.1- for short V-1 - PW2), aged about 8 years, and D-1's minor son (victim no.2 - for short V-2), aged about 6 years, lying injured. On the same day, Inquest in respect of D-1 is completed by 11:45 hours and inquest report (Exb. Ka-10), witnessed by five persons including the informant (PW-1), is prepared. Likewise, inquest in respect of D-2 and D-3 is also completed on the same day and inquest reports (Exb. Ka-15 and Exb. Ka-20, respectively) are prepared. PW-1 is one of the five witnesses to all the three inquest proceedings.

(ii) In the meantime, V-1 is taken to Primary Health Centre, Azamgarh where she is medically examined at 12:15 PM by PW-6, who prepares an injury report (Exb. Ka-4) noticing following external injuries:

(a) Lacerated wound 4 cm x 0.4 cm x bone deep on left side of head, 6 cm above left eyebrow;

(b) Lacerated wound 3 cm x 0.3 cm x bone deep on left side of forehead, 3 cm above lateral end of left eyebrow;

(c) Lacerated wound 2 cm x 0.3 cm x muscle deep, just below left eyebrow; and

(d) Lacerated wound 1 cm x 0.2 cm x muscle deep which is below left eye.

All injuries fresh in duration, caused by hard and blunt object and kept under observation. Patient was referred to District Hospital, Azamgarh for X-ray and expert opinion /management and needful.

(iii) V-2 was also examined by PW-6 on 25.11.2019 at 11:40 am of which injury report (Exb. Ka-3) is prepared noticing following injuries:

(a) Lacerated wound 5 cm x 1.2 cm x bone deep on the median plain and left side of (sic) of left forehead and left side of head, 3 cm above left eyebrow;

(b) Lacerated wound 1.5 cm x 0.3 cm x bone deep on right side of head, 5 cm above top of right pinna;

(c) Lacerated wound 1 cm x 0.2 cm x bone deep on right side of forehead, 1 cm above lateral end of right eyebrow; and

(d) Lacerated wound 1.5 cm x 0.2 cm x cartilage deep on left side of nose.

All injuries fresh in duration, caused by hard and blunt object and kept under observation. Patient was referred to District Hospital, Azamgarh for X-ray and expert opinion/needful treatment and management.

(iv) A Field Unit Team, at the request of Station House Officer (SHO), Mubarakpur and on the order of Superintendent of Police, Azamgarh, headed by Vijay Kumar (not examined), visited the spot, collected articles and prepared an inspection report, dated 25.11.2019 i.e. Paper No. 10 Ka (at page 39 of the paper book - not exhibited) and collected from the spot following articles:-

(a) Blood swab from the body of D-2;

(b) Blood swab from the body of D-1;

(c) Blood soaked piece of Pual (a mat made from grass straw) from front of the house;

(d) Blood soaked bra found on the spot;

(e) Blood soaked piece of blanket found on the spot;

(f) Blood stained vest (Baniyan) with seam found on the spot;

(g) Delux Nirodh (Condom wrapper) and scissor found on the spot;

(h) Finger prints lifted from the bed found on the spot; and

(i) Hair found in the hand of D-2.

(v) At 17:33 hours, on 25.11.2019, PW-1 submitted a written report (Exb. Ka-1) at PS Mubarakpur, District Azamgarh, which was registered as first information report (FIR) No. 0267 of 2019 under Section 302/307 I.P.C. In the FIR, it is alleged: that on 25.11.2019 at 9:30 am, the informant received an information that some incident has occurred at the house of his brother (D-1); that on getting the information, the informant went to the house of D-1, found the door of the house open, D-1, his wife (D-2) and D-1's infant son (D-3) lying dead and D-1's daughter (V-1) and D-1's elder son (V-2) seriously injured; that immediately he took the victims to the Government Hospital, Mubarakpur from where they were referred to Sadar Hospital, Azamgarh and from Sadar Hospital they were referred to Life Line Hospital, Azamgarh where both victims are under treatment. The FIR alleges that V-1 told the informant that Imtiyaz Nut, a resident of the village, has committed the crime.

(vi) In the evening of 25.11.2019, autopsy of the three bodies is carried out by PW-8.

(vi a) Autopsy report of D-3 (Exb. Ka-9), which was completed at about 9.00 pm, reveals a solitary ante-mortem injury of the following description:-

"Contusion 15 cm x 8 cm over right side of scalp, 5 cm posterior to right ear with underlying right parietal bone fracture."

Rigor Mortis was present in lower extremities.

Stomach content found empty; small intestine filled with gases; large intestine had faecal matter.

According to the opinion of the Doctor, death was caused about a day before due to coma as a result of ante-mortem head injury.

(vi b) Autopsy report of D-2 (Exb. Ka-8), which was completed by 8.20 pm, reveals following ante-mortem injuries:

(a) Lacerated wound 17 cm x 1 cm x bone deep over left side of scalp, 5 cm posterior to left ear pinna;

(b) Lacerated wound 1 cm x 0.5 cm x bone deep over right eyebrow on lateral aspect 7 cm interior to left tragus;

Underlying fracture of left temporal bone.

Rigor Mortis Present Both Extremities.

Stomach content found empty; small intestine filled with gases; large intestine had faecal matter.

Genital Organs: NAD; Vaginal wash for spermatozoa test in 50 ml vial and blood sample sealed.

According to the opinion of the doctor, death was caused about a day before due to coma as a result of ante-mortem head injury.

(vi c) Autopsy of D-1 (Exb. Ka-7), which was completed by 7.40 pm, reveals following ante-mortem injuries:

(a) Multiple lacerated wound over right side scalp in area 18 cm x 10 cm of lacerated wound are bone deep with underlying bone fracture, 5 cm posterior to left ear pinna, five in number;

(b) Multiple lacerated wound over left side of face in area of 16 cm x 14 cm with depressed bone fracture;

The skull disclosed left parietal bone fracture and fracture of left maxillary bone fracture.

Stomach had 100 gm semi-digested food; small intestine filled with gases; large intestine had faecal matter.

According to the opinion of the doctor, death could have occurred about a day before due to coma as a result of ante-mortem head injury.

(vii) On 26.11.2019, vide CD Parcha No. 2, the statement of suspect Imtiyaz Nut is recorded, who states that on the date and time of the incident he was in his own house with his family and that he knows nothing about the incident. The police in CD Parcha No.2, dated 26.11.2019, makes an entry that upon enquiry it was found that Imtiyaz Nut was in his house on the date and time of the incident. On this day i.e.26.11.2019, the police also prepares site plan (Exb. Ka-32) of the place of incident.

(viii) On 29.11.2019, vide CD Parcha No. 5, information is received by the police from an informer with regard to involvement of a person who weeps at the grave of all the three deceased (D-1, D-2 and D-3) in the night at Ibrahimpur road Kabristan and does not come out during day time.

(ix) On 30.11.2019, vide CD Parcha No. 6, the name of that person, who weeps at the grave of all the three deceased, is noted and put on record as that of Najeeruddin son Abdul Aziz Ansari (the appellant herein).

(x) On 01.12.2019, vide CD Parcha No. 7, the statement of V-1 is recorded under Section 161 Cr.P.C. She stated therein that in the night of 24.11.2019 when, after dinner, she and her family had slept. On hearing noise, she woke up and, in the light of a bulb lit in the room, she saw a bearded man, a resident of her village, whose name is Najeeruddin, who is also known as 'AOU PAU". She stated that that person killed her father with a brick and also killed her mother with the same brick and that after removing the clothes of his mother, raped her and when V-1 shouted and protested, he also hit her with brick and also hit her brother with brick and then he raped V-1. After doing that, he lifted V-1's mother's body and put her naked on the floor and again raped her. Thereafter, he started searching the Almirah where he found a photograph. Upon noticing the photograph, he asked V-1 to identify one of the persons in the photograph and when V-1 stated that the person in the photograph is her maternal uncle then he put a cloth on V-1's mother's body and scolded V-1 not to shout otherwise she would also be killed. After that V-1 sat there.

(xi) On 01.12.2019, statement of Salauddin (PW-5) was recorded under Section 161 Cr.P.C. He informed the police that on 01.12.2019, he was informed by Rehana (PW-3) and her son Hanzala (PW-4) that they were shown a video clip by Najeeruddin in which bodies of D-1 and D-2 were visible and their children were shown in an injured condition and someone was moving his hand over the breast of D-2.

(xii) On 01.12.2019, another statement of one Abu Sad (not examined) was recorded, who also confirmed what was stated by Rehana and her son to Salauddin (PW-5). On the basis of the aforesaid statement, on 01.12.2019, vide CD Parcha No. 7, the nomination of Imtiyaz Nut in the FIR was found incorrect and sections 376, 376-A I.P.C. and section 5/6 of Pocso Act were added; and Najeeruddin's name was recorded as a suspect.

(xiii) On 02.12.2019, vide CD Parcha No. 8, the police arrested Najeeruddin and on the basis of his confessional statement, recovery of blood stained shirt, lungi, vest, wrapped in a polythene was made of which site plan (Exb. Ka-31) was prepared; and a blood stained brick, salwar, duppatta,

chemise and a cut piece of frock is recovered from another place of which site plan (Ex. Ka-30) is prepared and a common recovery memo of both the recoveries (Exb. Ka-25) is prepared by Investigating Officer (I.O.) Akhilesh Kumar Mishra (PW-11), which is witnessed by PW-5 amongst others. This recovery memorandum (Ex. Ka-25) also records the confessional statement of the appellant to the effect that in the night of the incident, the appellant had urge to have sex. He purchased a potency (sex drive) enhancement pill and condom from a shop keeper (PW-9). Thereafter he forcibly gained entry into the house of the deceased and committed various crime. He confessed to have video-graphed the incident but stated that he had thrown the mobile in the river.

(xiv) On 02.12.2019 and 03.12.2019, search for the mobile was made but the same could not be found. Memorandums in respect of search made on 02.12.2019 and 03.12.2019 were prepared and produced as Exb. Ka-27 and Exb. Ka-28, respectively, and a site plan (Ex. Ka-29) where search was made was also prepared.

(xv) On 02.12.2019, internal medical examination of V-1 is carried out. Her hymen is found fresh torn with redness and tenderness. Redness and swelling was also noticed in the anus. For determination of age she is referred to CMO, Azamgarh. The internal examination report (Exb. Ka-5) was prepared by doctor Rashmi Sinha (PW-7).

(xvi) On 03.12.2019, statement of V-1 is recorded under Section 164 Cr.P.C. where she repeats what she stated under section 161 CrPC.

(xvii) On 03.12.2019, by radiological procedure, the age of V-1 is determined as 8 years old of which report (Ex Ka-35) is prepared on 5.12.2019.

(xviii) On 04.12.2019, PW-7 prepares supplementary report (Ex. Ka 6) that no spermatozoa is noticed in the vaginal smear obtained from V-1.

(xix) On 09.12.2019, vide CD Parcha No. 14, charge sheet is submitted against the appellant with a note that DNA and other forensic reports are awaited.

(xx) On 10.12.2019, the Court of Additional District and Sessions Judge/Special Judge (Pocso), Azamgarh takes cognisance on the charge-sheet dated 09.12.2019 for offences punishable under Sections 302, 307, 376, 376-A, 376-AB, 377, 201 I.P.C. and section 5/6 Pocso Act.

(xxi) On 11.12.2019, following order is passed by the Special Judge:

''दिनाँकः 11.12.2019

पुकार पर अभियुक्त नजीरूद्दीन जेल से उपस्थित। उसके विद्वान अधिवक्ता उपस्थित। सहायक जिला शासकीय अधिवक्ता फौजदारी व अभियुक्त के विद्वान अधिवक्ता को सुना।

सहायक जिला शासकीय अधिवक्ता फौजदारी द्वारा न्यायालय के समक्ष आरोप के समर्थन में प्रस्तुत किये जाने वाले साक्ष्यों का विवरण प्रस्तुत किया गया।

उभय पक्ष को सुनने तथा पत्रावली पर उपलब्ध प्रपत्रों के अवलोकन से अभियुक्त के विरूद्ध प्रथम दृष्टया धारा– 302, 307, 376, 376ए, 376 ए बी, 377, 201 भा0दं0सं0 एवं धारा– 5/6 पाक्सो अधिनियम का आरोप बनता है।

अतः अभियुक्त के विरूद्ध उक्त धाराओं के अन्तर्गत आरोप विरचित किया गया। अभियुक्त को आरोप पढ़ कर सुनाया व समझाया गया। अभियुक्त ने आरोप से इनकार किया एवं विचारण की याचना की। पत्रावली वास्ते साक्ष्य लंच बाद पेश हो।

दिनाँकः 11.12.2019
ह0 अपठनीय
(पारूल अत्री)
विशेष न्यायाधीश (पाक्सो एक्ट)/
अपर सत्र न्यायाधीश, कोर्ट नं0–5, आजमगढ़।''

(xxii) On the basis of the above order, against the appellant charges are framed as follows: under Section 302 I.P.C. for the murder of D-1, D-2 and D-3; under Section 307 for attempt of murder of V-1 and V-2;

under Section 376 I.P.C. for committing rape of D-2; under Section 376-AB I.P.C. for committing rape of V-1; under Section 376-A I.P.C. for committing rape and murder of D-2, under Section 377 for committing unnatural offence on V-1, under Section 201 I.P.C. for destroying the evidence available in the mobile of the entire incident; and under Section 5/6 Pocso Act for penetrative sexual assault on V-1. The appellant denied the charges and claimed for trial.

(xxiii) On 12.12.2019, statement of five witnesses, namely, PW-1, V-1 (PW-2), Rehana (PW-3), Hanzala Tauhir (PW-4), and Sallauddin (PW-5), were recorded. Thereafter, on 13.12.2019, the cross-examination of PW-5 was concluded and statement of doctor Abdul Aziz Ansari (PW-6), doctor Rashmi Sinha (PW-7), doctor Santosh Kumar (PW-8), Ramji (PW-9), Devendra Kumar Singh (PW-10); and Akhilesh Kumar Mishra (PW-11) were recorded. On 16.12.2019, the cross-examination of PW-11 was concluded and statement of doctor Manish Kumar Shah (the radiologist who conducted radiological tests to determine the age of V-1) was recorded. On 16.12.2019 itself, the statement of the appellant under Section 313 Cr.P.C. was recorded.

(xxiv) On 19.12.2019, the appellant filed an application 37 Kha for recall of witnesses PW-1 to PW-7 for fresh cross-examination. In this application 37 Kha, it was stated by the appellant that on the date when statement of PW-1 to PW-7 was being recorded, he had not engaged any counsel to represent him; that the police had obtained his signature on blank paper and vakalatnama and under fear of the police he signed as desired by the police and that he was not even aware that any advocate was representing. In the application, it was also stated that on 13.12.2019, he had engaged two advocates, namely, Haribansh Yadav and Sri Sarvajeet Yadav, to put forth his defence and that earlier the police got all the witnesses examined as per their own sweet will therefore, for proper cross-examination of those witnesses by the counsels engaged by him, those witnesses be recalled. On application 37 Kha, written objection was filed by the informant. In the written objection (paper no. 38 Kha), it was stated that the defence had engaged Sri Rabindra Nath Tiwari and Deepak Gupta, Advocates, who extensively cross-examined the witnesses and, thereafter, the statement of the accused, under Section 313 Cr.P.C., was also recorded therefore, the defence stand that no advocate was appointed is incorrect and baseless and that the application for recall of the witnesses is mala fide.

(xxv) On 04.01.2020, the trial court rejected the application 37 Kha and fixed a date for the defence evidence, if any. While rejecting the application 37 Kha, the trial court observed that there existed a vakalatnama, dated 11.12.2019, in favour of Rabindra Nath Tiwari and Deepak Gupta to represent the accused - appellant and that though the accused had submitted a fresh vakalatnama in favour of Haribansh Yadav and Sarvajeet Yadav but he had not withdrawn the earlier vakalatnama in favour of Rabindra Nath Tiwari and Deepak Gupta. The court also observed that the statement of PW-1 to PW-7 were recorded in the presence of the accused and the order-sheet also bears the signature of the accused; and further, the statement of PW-8, 9, 10, 11 and 12 were recorded in the presence of Haribansh Yadav, Sarvajeet Yadav, Rabindra Nath Tiwari and Deepak Gupta, Advocates and the accused Najeeruddin, then, had raised no objection

in respect of their appearance therefore, the application 37 Kha is liable to be rejected.

(xxvi) On 07.01.2020, the court gave last opportunity to the accused to lead defence evidence and fixed 16.01.2020. In between, on 10.01.2020, finger print expert report, as entered in the CD, was received, which was taken on record. On 16.01.2020, the matter was adjourned and, thereafter, it was adjourned for one reason or the other including COVID-19 pandemic.

(xxvi) The order sheet of the court below reflects that on 21.10.2020, an order was passed by the trial court. In that order it is mentioned that though the accused is present through video conferencing but no person in his defence is present and since report from the forensic laboratory has not yet been received, next date i.e. 02.11.2020 is being fixed. On 02.11.2020, the matter was again adjourned to 09.11.2020. On 09.11.2020, forensic report (Paper No.48 Ka) was obtained from U.P. Forensic Laboratory, Lucknow. The court gave last opportunity to the accused to lead defence evidence. While giving last opportunity, vide order dated 09.11.2020, the court fixed 10.11.2020 as the next date. Thereafter, the matter was adjourned from one date to the other for various reasons including absence of the Presiding Officer. Finally, on 12.03.2020, arguments on behalf of the prosecution were heard and 17.03.2021 was fixed for remaining arguments. On 17.03.2021, the arguments on behalf of prosecution were completed. On behalf of the accused adjournment was sought. Consequently, on 17.03.2021, 18.03.2021 was fixed for arguments on behalf of the accused. On 18.03.2021, the following order was passed:

"18.3.21

पत्रावली पेश हुई। अभियुक्त जेल से उपस्थित। पत्रावली वास्ते बहस नियत चली आ रही है। अभियुक्त की ओर से कोई स्थगन प्रा0पत्र भी नही। अभियोजन पक्ष द्वारा अपनी बहस की जा चुकी है। ऐसी स्थिति मे पत्रावली निर्णय हेतु नियत किया जाना उचित होगा।

आदेश

पत्रावली वास्ते निर्णय दिनांक 24.3.21 को नियत की जाती है। अभियुक्त की ओर से निर्णय के एक दिन पूर्व तक किसी भी कार्य दिवस मे अपनी लिखित अथवा मौखिक बहस प्रस्तुत करने के अवसर प्रदान किया जाता है।

ह0 अपठनीय

18-3-21**

(xxvii) On 23.03.2021, counsel for the defence appeared and argued in part. For the remaining arguments, 25.03.201 was fixed. On 25.03.2021, the remaining arguments on behalf of defence were advanced and 26.03.2021 was fixed for orders. On 26.03.2021, the impugned judgment was delivered.

6. We have heard Sri N.I. Jafri, learned senior counsel, as an Amicus Curiae, assisted by Ms. Nasira Adil and Mohd. Zubair, Advocates, for the appellant; Sri J.K. Upadhyay, learned A.G.A., for the State; and Sri Ashutosh Gupta and Sri Gyan Prakash Verma, for the informant.

PROSECUTION EVIDENCE

7. Before we proceed to appreciate the rival submissions, we must have a glimpse of the prosecution evidence. The prosecution evidence can be divided into following parts:-

(a) **Eye-witnesses account** rendered by V-1 (PW-2);

(b) **Recovery of incriminating material**, which can be classified into two categories:

(i) Recovery at the instance of the accused of which seizure memorandum Ex. Ka-25 was prepared by PW11. This related to:- (i) recovery of blood stained clothes,

etc of the accused wrapped in a polythene made from near a Neem tree near the place of residence of the accused; and (ii) recovery of brick (used for assault) and frock, etc of the deceased made from bushes in an Eucalyptus grove of some third party.

(ii) Recovery from the scene of crime, which again can be divided into two categories. One made by the I.O. and the other by the Field Unit Team. The I.O. recovered blood stained and plain earth from the scene of the crime of which recovery memo was prepared and exhibited as Exb. Ka-26. Whereas, the Field Unit Team collected blood swab from D-2's body, blood swab from D-1's body, blood soaked Pual (mat) from front of the deceaseds' house; blood soaked bra, cutting of blood soaked blanket, blood soaked vest, wrapper of condom and a scissor as also lifted finger prints from the bed and hair from the hand of D-2.

The recovery memo prepared by Field Unit Team dated 25.11.2019 has neither been proved nor has been exhibited.

(c) **Forensic evidence**. This can be divided into three categories: (i) Medical reports; (ii) Chemical analysis reports; and (iii) Finger print expert report

(i) Medical reports include autopsy reports of the three deceased which was marked as exhibits Ka-7, Ka-8 and Ka-9, proved by PW-8; External injury report of V-2 and V-1 marked as exhibits Ka-3 and Ka-4, respectively, proved by PW-6; Internal medical examination report of V-1, which was marked as Exb. Ka-5, proved by PW-7; Supplementary report in respect of non presence of spermatozoa in the vaginal smear of V-1, which was marked as Exb. Ka-6, proved by PW-7; and Age report of V-1, marked as Exb. Ka-35, submitted by the Chief Medical Officer, Azamgarh, which has been proved by PW-12;

(ii) Chemical Analysis Report dated 07.11.2020 (Paper No.48 Ka) submitted by Scientific Officer, Forensic Science Laboratory, Lucknow in respect of DNA matching of the blood found on various articles recovered either by the I.O. or by the Field Unit Team as aforesaid. But this forensic report dated 07.11.2020 was obtained after recording of the statement of the accused under Section 313 Cr.P.C. and was not put to the accused for seeking his explanation under Section 313 Cr.P.C.

(iii) Finger print expert report of the Director, Finger Print Bureau, U.P., Lucknow, dated 03.01.2020, Paper No.40 Ka/6 to 40 Ka/ 13. But this finger print report was obtained after recording the statement of the accused under Section 313 CrPC and was not put to the accused for seeking his explanation under section 313 CrPC.

(d) **Evidence of conduct of the accused**- The evidence relating to the conduct of the accused post commission of crime can broadly be classified into two categories: (a) pre-crime and (b) post crime. Pre-crime conduct of the accused with regard to purchase of sex drive enhancement pill and condom is sought to be proved by PW-9. Post crime conduct is in respect of: (i) showing video-clip of the incident to PW-3 and PW-4 and telling them that he knows the truth about the incident and that the police has yet not been able to know about the real criminal and that PW-3 and PW-4 should not behave like cowards; (ii) hiding during day-time and crying at the grave of the three deceased during night hours; and (iii) leading to recovery of incriminating articles mentioned above.

(e) Formal Evidence - Such as lodging of FIR; proof of various stages of investigation, etc.

SUBMISSIONS ON BEHALF OF THE APPELLANT

8. (A) Learned counsel for the appellant, at the outset, submitted that this is a case where a re-trial would be required for the following reasons:-

(i) The appellant got no time to engage and consult his lawyers to enable an effective cross-examination of the prosecution witnesses as also for recording of his statement under section 313 CrPC, which has vitiated the trial. In support whereof, he highlighted the following circumstances:

(a) On 13.12.2019, the appellant engaged lawyers of his choice, whereas before that, on 11.12.2019, charges were framed and, on 12.12.2019, five witnesses were examined. Thereafter, on 13.12.2019, Haribansh Yadav and Sarvajeet Yadav appeared for the appellant. On the same day i.e. 13.12.2019 cross-examination of PW-5 is undertaken and, thereafter, on the same day i.e. 13.12.2019, statement of six other prosecution witnesses, namely, PW-6, PW-7, PW-8, PW-9, PW-10 and PW-11 is recorded. Thereafter, on 16.12.2019 cross-examination of PW-11 is completed and statement of PW-12 is recorded. Such speed with which the trial proceeded gave no opportunity to the appellant to effectively consult his lawyer and brief them for an effective cross-examination.

(b) Similarly, on 16.12.2019 itself, when recording of statement of prosecution witnesses got over, no date was fixed to enable the appellant to effectively consult his lawyer and prepare for his examination under Section 313 Cr.P.C. and straight away the court proceeded to record statement under section 313 CrPC.

(c) On 19.12.2019, highlighting the above, the appellant submitted application 37 Kha for recall of witnesses PW-1 to PW-7, which was rejected by overlooking the following circumstances:-

(c 1) That vakalatnama dated 11.12.2019 allegedly executed by the appellant in favour of advocates Rabindra Nath Tripathi and Deepak Gupta was not accepted by Rabindra Nath Tripathi whereas the vakalatnama in favour of advocates Haribansh Yadav and Sarvajeet Yadav bears signature of both the said advocates as a token of acceptance of the power.

(c 2) There appears over writing on the date of acceptance of the Vakalatnama dated 11.12.2019 executed in favour of Rabindra Nath Tripathi and Deepak Gupta Advocate.

(c 3) No objection to the application 37 Kha was taken by the State against whom allegations were made whereas objection was taken only by the informant.

(c-4) When Rabindra Nath Tripathi had not accepted the vakalatnama then, in what capacity he represented the appellant is a serious issue.

(c-5) It is quite strange that statement of so many witnesses could be recorded at one go, on a single day, and the counsel made no request for a date to prepare for cross-examination because, ordinarily, a counsel needs to consult his client to prepare for cross-examination. Here, the allegations were so serious that if charges were proved, death penalty was one of the alternative punishments, hence, normal prudence would suggest that the counsel would like to consult his client to effectively cross-examine the witness and for such purpose seek a date. Such tearing hurry in getting the examination of

witnesses over; and, thereafter, examination, under section 313 CrPC, undertaken on the day when testimony of last two witnesses is recorded; and the counsel for defence not seeking a date for preparation, would suggest that there was something wrong and, therefore, the application 37 Kha required deeper scrutiny.

(ii) The prosecution produced no material object recovered either from the scene of the crime or at the instance of the applicant before the court and no link evidence was led to demonstrate that it was the seized object that was sent for forensic examination for obtaining reports in respect of finger prints or DNA profiling. Hence, the forensic reports (i.e. relating to finger prints and DNA matching) though, later, brought on record were not admissible and, otherwise also, those forensic reports were not put to the accused under section 313 CrPC hence would have to be eschewed from consideration. Yet, the trial court in its judgment placed reliance on those forensic reports as would be clear from paragraph 61 of its judgment, which vitiates the trial as well as the judgment. On this count also, a retrial would be necessary.

(B) On merits of the prosecution case, the learned counsel for the appellant submitted as follows:-

(i) The eye-witness account rendered by V-1 (PW-2) is not reliable. Sri Jafri urged that PW-2 is a child, who could easily be tutored, and, therefore, it would not be safe to base conviction on her testimony alone. More so, when the FIR lodged by PW-1, on the basis of information received from PW-2, was against one Imtiyaz Nut, who is an existing person, and it appears that the police tried to save him. Further, from the statement of PW-2 it appears that she recognised the perpetrator of the crime on the basis of his beard (nk<+h) and by referring him as "दाढ़ी वाले अंकल" though, during cross-examination, she, stated "दाढ़ी वाले अंकल में जिनका नाम बाद मे पता चला कि उनका नाम नजीरूद्दीन है," which means that she was not aware of appellant's name. But, if that was so, how could it be possible that she could disclose the name of the appellant in her statement recorded under Section 161 Cr.P.C. when, by that time, the appellant was not even arrested. This suggests that even before the appellant was arrested and identified by PW-2, or anything incriminating recovered from him, appellant's name was disclosed to the victim-PW-2. Thus, her testimony could be considered tutored. Further, PW-2 does not speak of preparing a video-clip. Hence, the testimony of PW-3 and PW-4 that they were shown video-clip falls to the ground.

(ii) In respect of recovery and the forensic evidence, it was submitted that the material object recovered has not been produced in court and there exists no link evidence to demonstrate as to which article was submitted for forensic examination hence the forensic reports are a waste paper. Moreover, the collection of incriminating material from the spot has not been proved by any member of the field unit team and even the I.O. has not proved as to what was recovered by the field unit team and, in any case, the material object recovered has not been produced during trial. Hence, the recovery is inconsequential. Further, those reports cannot be relied upon as they have not been put to the accused under section 313 CrPC.

(iii) In respect of testimony of PW-3 and PW-4, the learned counsel for the appellant submitted that, admittedly, the video clip was not recovered and, most

importantly, the investigating officer, during the course of cross- examination, stated that he did not try to ascertain the mobile number, which suggests, that no effort was made by the investigating agency to ascertain whether the appellant had a mobile and if he held a mobile, whether its CDR details, disclosed its location at the scene of crime. All of this, coupled with the fact that initially the accused was one Imtiyaz Nut, would suggest that the investigation is hiding true facts.

(iv) In respect of the evidence of PW-5 in respect of the accused hiding during day time and crying at the grave in the night hours, it has been submitted that nothing has been disclosed as to when PW-5 saw the appellant doing this. Moreover, this is an imaginary story set up by the I.O. on the basis of some information from an informer. This being pure hearsay evidence therefore, not admissible. Likewise, evidence of PW-9 regarding purchase of condom and sex drive enhancement pill is, firstly, false because PW-9 held no licence and, secondly, is inconsequential as there is no recovery of the bill or wrapper of that drug. In so far as recovery of wrapper of condom from the scene of crime is concerned that is inconsequential because that can be used by D-1 himself to ensure family planning.

(v) Lastly, Sri Jafri submitted that the ocular evidence of PW-2 regarding rape of D-2 is not supported by medical evidence, as no spermatozoa was discovered in the vaginal wash of D-2 and no injury on the genital area was noticed. It was also submitted that there is nothing to indicate anal intercourse with V-1 therefore, conviction under section 377 IPC is not at all justified.

Summarising his submissions, she Jafri submitted that this is a case where there is no worthwhile reliable evidence and the forensic reports in respect of DNA matching are not admissible in absence of proof of recovery and the link evidence, thus the appellant deserves to be acquitted.

SUBMISSIONS ON BEHALF OF THE STATE

9. Sri J.K. Upadhyay, learned A.G.A., submitted that the trial court gave adequate opportunity to the appellant to cross-examine the prosecution witnesses; that the appellant had engaged a private counsel on 11.12.2019 at the time when the charges were framed; that the private counsel represented the appellant when the statement of PW-1 to PW-5 were recorded and the counsel also cross-examined those witnesses as would be clear from the record therefore, the contention that the witnesses PW-1 to PW-7 be recalled because their examination occurred when there was no counsel representing the appellant is not sustainable. He further submitted that the testimony of PW-2 alone is sufficient to record conviction as she not only saw D-1 and D-2 being killed by the appellant but she also saw her mother being raped in front of her own eye and thereafter she was also raped by the appellant. Hence, she had every opportunity to recognise her offender. Even though PW-2 may be a child witness, the image of her offender would get imprinted in her memory and she can never forget. Moreover, she has identified the appellant at the dock during the course of her testimony and no questions could discredit her testimony and therefore, her statement alone is sufficient to uphold the conviction of the appellant.

10. Sri Upadhyay also submitted that the police witnesses and PW-5 have clearly proved the recovery of incriminating

material and the forensic report can be taken into consideration by virtue of the provisions of section 293 Cr.P.C. and therefore, merely because the forensic reports were received after recording of the statement of the appellant under Section 313 Cr.P.C., the judgment and order of the trial court cannot be set aside only on that ground.

11. In respect of non-recovery of mobile phone, Sri Upadhyay submitted that even if the mobile phone was not recovered, it will not wash away the testimony of PW-3 and PW-4 because the appellant, in his statement recorded under Section 313 Cr.P.C., did not categorically deny showing the video clip to PW-3 and PW-4. Rather, in his answer to question No.4, he stated that he had shown the video clip to Rehana of the day incident, which was prepared on Monday. Even the purchase of medicine from PW-9 is not denied, though the appellant in his answer to question No.10, recorded under Section 313 Cr.P.C., stated that he purchased some medicine for his back ache from PW-9.

12. Sri Upadhyay submitted that absence of injury to D-2 on her genital area will not rule out rape because being a married lady and mother of three children, she might not suffer injury on account of penetration. Similarly, absence of spermatozoa in the vaginal wash is of no consequence because, according to the prosecution story, a condom was used, which is corroborated by recovery of a condom wrapper from the spot.

13. Learned A.G.A. further submitted that in so far as naming of Imtiyaz Nut in the FIR is concerned that would not be of much significance because the informant (PW-1) in his statement had clarified that the victim had not named Imtiyaz Nut but had disclosed to him that it was a person who looked like Imtiyaz Nut, hence, this would not be fatal to the prosecution case.

14. Learned A.G.A. also submitted that since this is a case of gruesome rape and multiple murders as well as rape of a minor girl, an exhibition of extreme depravity by the offender, therefore, conviction must entail in death penalty. Hence, not only the appeal be dismissed but the reference for confirmation of the death penalty be accepted and the awarded punishment be confirmed.

ANALYSIS

15. Having noticed the rival submissions and having perused the record, before we proceed to analyse the merit of the prosecution evidence, we must first consider whether on the facts of the case a retrial would be required, if so, from what stage. Because, if a retrial is required, it would, then, be not appropriate for us to express an opinion with regard to the merit of the prosecution evidence as it may influence the trial court and thereby cause prejudice to both sides.

16. In the instant case, we find from paragraph 61 of the trial court judgment that the trial court had placed reliance on forensic report in respect of the DNA match between the incriminating articles (i.e. hair, blood-stained frock, clothes, etc) recovered from the scene of crime as well as at the instance of the appellant and the blood sample of the appellant. Importantly, the said forensic report has not been put to the appellant under section 313 CrPC inasmuch

as it was obtained after the statement under section 313 CrPC was recorded.

17. It is well settled that all incriminating circumstances appearing in the prosecution evidence must be put to the accused while recording his statement under section 313 CrPC. According to section 313 (1) (b) CrPC, the stage of examination of the accused under section 313 (1) (b) comes when the witnesses of the prosecution have been examined and before the accused is called on for his defence. This implies that after the incriminating material is put to the accused, he gets a right to lead evidence in defence. No doubt, under section 293 CrPC, a forensic report from a Government scientific expert can be accepted in evidence without the requirement of formal proof, but, the accused, if he so choses, has a right to challenge the report and lead evidence in rebuttal. The accused may also challenge the very foundation of the report by questioning the collection or recovery or seizure of the material in respect of which the report is obtained. To ensure that the accused gets opportunity to avail that right, section 313 (1) (b) CrPC exists in the Code.

18. In ***Nar Singh v. State of Haryana (2015) 1 SCC 496***, the Supreme Court, on the issue as to what are the various courses available to the appellate court where incriminating material appearing in the prosecution evidence has not been put to the accused, after considering various earlier decisions, in paragraph 30 of the judgment, summarised the law as under:-

"30.1.Whenever a plea of non-compliance with Section 313 Cr.P.C. is raised, it is within the powers of the appellate court to examine and further examine the convict or the counsel appearing for the accused and the said answers shall be taken into consideration for deciding the matter. If the accused is unable to offer the appellate court any reasonable explanation of such circumstance, the court may assume that the accused has no acceptable explanation to offer.

30.2. In the facts and circumstances of the case, if the appellate court comes to the conclusion that no prejudice was caused or no failure of justice was occasioned, the appellate court will hear and decide the matter upon merits.

30.3. If the appellate court is of the opinion that non-compliance with the provisions of Section 313 Cr.P.C. has occasioned or is likely to have occasioned prejudice to the accused, the appellate court may direct retrial from the stage of recording the statements of the accused from the point where the irregularity occurred, that is, from the stage of questioning the accused under Section 313 Cr.P.C. and the trial Judge may be directed to examine the accused afresh and defence witness, if any, and dispose of the matter afresh.

30.4. The appellate court may decline to remit the matter to the trial court for retrial on account of long time already spent in the trial of the case and the period of sentence already undergone by the convict and in the facts and circumstances of the case, may decide the appeal on its own merits, keeping in view the prejudice caused to the accused."
(Emphasis Supplied)

19. In the instant case, not putting the forensic report to the appellant for sure has caused prejudice to the appellant as he could neither tender his explanation to it nor could get opportunity to lead evidence in rebuttal. Hence, paragraph 30.3 of the

judgment in ***Nar Singh's case (supra)*** gets attracted. Therefore, on this ground alone, the matter would have to be remitted back.

20. Not only that, there appears another important lapse on the part of the prosecution, which is, that the seized/ recovered material in respect of which report has been obtained have not been produced before the court and got marked as material exhibit. No doubt, paragraph 61 of the impugned judgment refers to the articles recovered as material source for the forensic report but, upon scanning the entire prosecution evidence with the help of learned AGA, we could not find that any such articles were produced before the court and identified by any of the prosecution witnesses as the articles recovered or seized from the scene of crime by the field unit team or by the police i.e. investigating officer at the instance of the accused of which seizure memorandum (Ex. Ka-25) was prepared. Importantly, the collection report prepared by the field unit team is not even exhibited.

21. At this stage, we may notice the decision of the Supreme Court in ***Jitendra and Another Versus State of M.P., (2004) 10 SCC 562***, wherein the prosecution placed reliance on a Chemical Examiner report to show that the articles seized were Charas and Ganja i.e. narcotics. Although the High Court noticed that the Charas and Ganja alleged to have been seized from the custody of the accused had neither been produced in the court, nor marked as articles, but it brushed aside the lapse by observing that it would not vitiate the conviction as it had been proved that the samples were sent to the Chemical Examiner in a properly sealed condition and those were found to be Charas and Ganja. The High Court relied on section 465 CrPC to hold that non-production of the material object was a mere procedural irregularity and did not cause prejudice to the accused. Negativing the view taken by the High Court, the Supreme Court, in paragraph 6 of the judgment, held as follows:

"In our view, the view taken by the High Court is unsustainable. In the trial it was necessary for the prosecution to establish by cogent evidence that the alleged quantities of charas and ganja were seized from the possession of the accused. The best evidence would have been the seized materials which ought to have been produced during the trial and marked as material objects. There is no explanation for this failure to produce them. Mere oral evidence as to their features and production of panchnama does not discharge the heavy burden which lies on the prosecution, particularly where the offences punishable with a stringent sentence...."

The above view has been consistently followed by the Supreme Court in ***Ashok @ Dangra Jaiswal v. State of Madhya Pradesh, (2011) 5 SCC 123; Gorakh Nath Prasad V. State of Bihar, (2018) 2 SCC 305; Vijay Jain V. State of Madhya Pradesh, (2013) 14 SCC 527***. Though, later, in State of ***Rajasthan V. Sahi Ram, (2019) 10 SCC 649***, the Supreme Court, paragraph 18 of its judgment, held that "*if the seizure of the material is otherwise proved on record and is not even doubted or disputed, the entire contraband material need not be placed before the court. If the seizure is otherwise not in doubt, there is no requirement that the entire material ought to be produced before the court. At times the material could be so bulky.... that it may not be possible and feasible to*

produce the entire bulk before the court. If the seizure is otherwise proved, what is required to be proved is the fact that the samples taken from and out of the contraband material were kept intact, that when samples were submitted for forensic examination the seals were intact,...."

22. In the instant case, we notice from the statement of the appellant recorded under section 313 CrPC that though the recovery/ seizure memorandums were put to him by way of question no.12 but the appellant denied the same. The articles recovered or any portion of it entered in the seizure memo (Ex. Ka-25) were not produced and marked material exhibits. In so far as the recovery memorandum alleged to have been prepared by the field unit team in respect of material recovered from the scene of crime is concerned that has not been exhibited and, on the record, despite assistance of the learned AGA, we could find no statement of any of the prosecution witnesses or of any member of the field unit team that lifted articles from the scene of crime. In fact, Sri Vijay Kumar, a member of the field unit team, who prepared the report has not been examined. Accordingly, once neither the seized/ recovered article, nor a portion of it, was produced in court, and the seizure having not been admitted, the forensic report in respect thereto, remained a waste paper. This is a very serious lapse on the part of prosecution and calls for disciplinary action against the person responsible. Unfortunately, even the court below overlooked the mistake. Similarly, though there appears a finger print expert report on record in respect of finger prints lifted from the bed by the field unit team but, neither the lifting of finger prints have been proved nor the finger print expert report has been put to the accused.

23. Now, the question that arises is should the prosecution get an opportunity to prove all those efforts, particularly, when the matter is in respect of extremely grave offence. In ***Zahira Habibulla H. Sheikh V. State of Gujarat, (2004) 4 SCC 158***, the Supreme Court observed:

"A criminal trial is a judicial examination of the issues in the case and its purpose is to arrive at a judgment on an issue as to a fact or relevant facts which may lead to discovery of the fact in issue and obtain proof of such facts at which the prosecution and the accused have arrived by their pleadings; the controlling question being the guilt or innocence of the accused. Since the object is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not a bout over technicalities, and must be conducted under such rules as will protect the innocent, and punish the guilty....

Failure to accord fair hearing either to the accused or the prosecution violates even minimum standards of due process of law. It is inherent in the concept of due process of law, that condemnation should be rendered only after the trial in which the hearing is a real one, not sham or a mere farce and pretence. Since the fair hearing requires an opportunity to preserve the process, it may be vitiated and violated by an over hasty, stage-managed, tailored and partisan trial.

The fair trial for a criminal offence consists not only in technical observance of the frame and forms of law, but also in recognition and just application of its principles in substance, to find out the truth and prevent miscarriage of justice."

24. In ***Anokhilal v. State of Madhya Pradesh, (2019) 20 SCC 196***, the apex

court had occasion to examine a somewhat similar matter as the present case. There also a minor girl child was kidnapped, raped and murdered. In that case, accused was represented by an Amicus Curiae. The Amicus Curiae was appointed on the same day when the charges were framed and, within next seven days, after charges were framed, all the thirteen prosecution witnesses were examined and before the DNA report could be available, the final arguments were heard and the matter was adjourned for placing on record the DNA report and for remaining final arguments. Upon conviction by the trial court and dismissal of appeal by the High Court, when the matter came before the Supreme Court, upon a conspectus of various authorities on the issue of fair and expeditious trial, in paragraph 20 of its judgment, the Apex Court summarised the legal principles on the issue as follows:

"20. The following principles, therefore, emerge from the decisions referred to hereinbove:-

20.1. Article 39A inserted by the 42nd amendment to the Constitution, effected in the year 1977, provides for free legal aid to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. The statutory regime put in place including the enactment of the Legal Services Authorities Act, 1987 is designed to achieve the mandate of Article 39-A.

20.2. It has been well accepted that Right to Free Legal Services is an essential ingredient of "reasonable, fair and just' procedure for a person accused of an offence and it must be held implicit in the right guaranteed by Article 21. The extract from the decision of this Court in Best Bakery case (as quoted in the decision in Mohd. Hussain) emphasises that the object of criminal trial is to search for the truth and the trial is not a bout over technicalities and must be conducted in such manner as will protect the innocent and punish the guilty.

20.3. Even before insertion of Article 39-A in the Constitution, the decision of this Court in Bashira put the matter beyond any doubt and held that the time granted to the Amicus Curiae in that matter to prepare for the defense was completely insufficient and that the award of sentence of death resulted in deprivation of the life of the accused and was in breach of the procedure established by law.

20.4. The portion quoted in Bashira from the judgment of the Madras High Court authored by Subba Rao, J., the then Chief Justice of the High Court, stated with clarity that mere formal compliance of the rule under which sufficient time had to be given to the counsel to prepare for the defense would not carry out the object underlying the rule. It *was further stated that the opportunity must be real where the counsel is given sufficient and adequate time to prepare.*

20.5. In Bashira as well as in Ambadas, making substantial progress in the matter on the very day after a counsel was engaged as Amicus Curiae, was not accepted by this Court as compliance of "sufficient opportunity' to the counsel."

In ***Anokhilal's case (supra),*** the relevant facts of that case are noticed in paragraphs 21 to 24 of the judgment, which are extracted below:-

"21. In the present case, the Amicus Curiae, was appointed on 19.02.2013, and on the same date, the counsel was called upon to defend the accused at the stage of

framing of charges. One can say with certainty that the Amicus Curiae did not have sufficient time to go through even the basic documents, nor the advantage of any discussion or interaction with the accused, and time to reflect over the matter. Thus, even before the Amicus Curiae could come to grips of the matter, the charges were framed.

22. The provisions concerned viz. Sections 227 and 228 of the Code contemplate framing of charge upon consideration of the record of the case and the documents submitted therewith, and after "hearing the submissions of the accused and the prosecution in that behalf'. If the hearing for the purposes of these provisions is to be meaningful, and not just a routine affair, the right under the said provisions stood denied to the appellant.

23. In our considered view, the Trial Court on its own, ought to have adjourned the matter for some time so that the Amicus Curiae could have had the advantage of sufficient time to prepare the matter. The approach adopted by the Trial Court, in our view, may have expedited the conduct of trial, but did not further the cause of justice. Not only were the charges framed the same day as stated above, but the trial itself was concluded within a fortnight thereafter. In the process, the assistance that the appellant was entitled to in the form of legal aid, could not be real and meaningful.

24. There are other issues which also arise in the matter namely that the examination of 13 witnesses within seven days, the examination of the accused under the provisions of the Section 313 of the Code even before the complete evidence was led by the prosecution, and not waiting for the FSL and DNA reports in the present case. DNA report definitely formed the foundation of discussion by the High Court. However, the record shows that the DNA report was received almost at the fag end of the matter, and after such receipt, though technically an opportunity was given to the accused, the issue on the point was concluded the very same day. The concluding paragraphs of the judgment of the Trial Court show that the entire trial was completed in less than one month with the assistance of the prosecution as well as the defense, but, such expeditious disposal definitely left glaring gaps."

In the contextual background of the facts noticed above, the Apex Court, in paragraphs 26 to 29 of its judgment, held as follows:-

"26. Expeditious disposal is undoubtedly required in criminal matters and that would naturally be part of guarantee of fair trial. However, the attempts to expedite the process should not be at the expense of the basic elements of fairness and the opportunity to the accused, on which postulates, the entire criminal administration of justice is founded. In the pursuit for expeditious disposal, the cause of justice must never be allowed to suffer or be sacrificed. What is paramount is the cause of justice and keeping the basic ingredients which secure that as a core idea and ideal, the process may be expedited, but fast tracking of process must never ever result in burying the cause of justice.

27. In the circumstances, going by the principles laid down in Bashira, we accept the submission made by Mr. Luthra, the learned Amicus Curiae and hold that the learned counsel appointed through Legal Services to represent the appellant in the present case ought to have been afforded sufficient opportunity to study the matter and the infraction in that behalf resulted in miscarriage of justice. In light of the

conclusion that we have arrived at, there is no necessity to consider other submissions advanced by Mr. Luthra, the learned Amicus Curiae.

28. All that we can say by way of caution is that in matters where death sentence could be one of the alternative punishments, the courts must be completely vigilant and see that full opportunity at every stage is afforded to the accused.

29. We, therefore, have no hesitation in setting aside the judgments of conviction and orders of sentence passed by the Trial Court and the High Court against the appellant and directing de novo consideration. It shall be open to the learned counsel representing the appellant in the Trial Court to make any submissions touching upon the issues (i) whether the charges framed by the Trial Court are required to be amended or not; (ii) whether any of the prosecution witnesses need to be recalled for further cross-examination; and (iii) whether any expert evidence is required to be led in response to the FSL report and DNA report. The matter shall, thereafter, be considered on the basis of available material on record in accordance with law." (Emphasis Supplied)

After holding as above, before parting with the case, the Apex Court, in paragraph 31, also laid down certain guidelines with regard to appointment of Amicus Curiae for representing the accused in serious matters. The relevant guidelines as contained in paragraph 31 of the judgment are extracted below:-

"31. Before we part, we must lay down certain norms so that the infirmities that we have noticed in the present matter are not repeated:-

31.1 In all cases where there is a possibility of life sentence or death sentence, learned Advocates who have put in minimum of 10 years practice at the Bar alone be considered to be appointed as Amicus Curiae or through legal services to represent an accused.

31.2 In all matters dealt with by the High Court concerning confirmation of death sentence, Senior Advocates of the Court must first be considered to be appointed as Amicus Curiae.

31.3 Whenever any learned counsel is appointed as Amicus Curiae, some reasonable time may be provided to enable the counsel to prepare the matter. There cannot be any hard and fast rule in that behalf. However, a minimum of seven days' time may normally be considered to be appropriate and adequate.

31.4 Any learned counsel, who is appointed as Amicus Curiae on behalf of the accused must normally be granted to have meetings and discussion with the concerned accused. Such interactions may prove to be helpful as was noticed in Imtiyaz Ramzan Khan."

25. From the decisions noticed above, what is clear is, that both prosecution as well as defence must have fair opportunity in the trial. The objective of the trial is to come to the truth. Neither an innocent be punished nor guilty to go scot-free. Sufficient time is to be given to both sides to have their say and technicalities must not come in the way. In the light of above, we are of the view that the prosecution as well as the defence should get an even chance to lead evidence to ensure that complete justice is done and truth prevails more so, when not much time has elapsed since the commission of the crime. This we say so also for the reason that in the instant case,

statement of as many as twelve witnesses were recorded in three days i.e. 12.12.2019, 13.12.2019 and 16.12.2019, spread over five days. Importantly, the statement under Section 313 Cr.P.C. was also recorded on 16.12.2019, that is the date when the statement of last two witnesses, namely, PW-11 and PW-12 was recorded. Most importantly, by that time, the DNA report was not even available and, interestingly, the Court was made aware that the DNA report was not available though has been sought for. Likewise, finger print report was also not available when the statement under Section 313 Cr.P.C. was recorded. Noticeably, all these reports were received later, but were not put to the accused to seek his explanation under Section 313 Cr.P.C. Yet, the trial court placed reliance on the forensic reports as would be clear from paragraph 61 of its judgment. Above all, while doing so, the trial court did not even take into consideration as to whether the collection of the incriminating material by the Field Unit Team was proved and whether the seized material was produced as a material object and made material exhibit, if not, then what would be its consequence. Noticeably, the Field Unit Team report dated 25.11.2019 regarding collection of various material from the scene of crime is not exhibited. In fact, the person, namely, Vijay Kumar, who prepared the report was not examined as a prosecution witness. Yet, the DNA matching report has been taken into consideration as a corroboratory material to record conviction. In our view, all of this has resulted in serious miscarriage of justice and, therefore, the matter requires a re-trial.

26. In addition to above, we notice from the record that while rejecting application 37 Kha i.e. the application, dated 19.12.2019, moved on behalf of the appellant to recall PW-1 to PW-7, the trial court over looked that the earlier Vakalatnama dated 11.12.2019 though was in favour of two counsels, namely, Ravindra Nath Tripathi and Deepak Gupta, but it was accepted by D.K. Gupta alone. Further, there appeared overwriting in the date of acceptance of the Vakalatnama by D.K. Gupta. May be this was a clerical mistake, but since a very serious charge was levelled by the accused-appellant in his application 37 Kha that he had not engaged any counsel and that all those witnesses were examined when he was unrepresented, the court ought to have enquired from those counsels in the presence of the accused whether they were engaged by the accused and whether they had sufficient opportunity to consult the accused to effectively prepare for cross-examination. Notably, as many as five witnesses were examined on 12.12.2019; and six witnesses were examined on 13.12.2019. Though, we do not wish to express our opinion as to whether those witnesses are to be recalled but, as we have already taken a view that the matter would have to be remitted for a re-trial, we consider it appropriate to leave it open to the accused-appellant to apply for recall of witnesses, which, if made, shall be considered on its own merit and in accordance with law, without being prejudiced by earlier rejection of application 37 Kha. Similarly, we leave it open to the prosecution either to recall and re-examine its witnesses, or to produce fresh witness, to prove collection/seizure of incriminating articles as well as produce the same as material objects.

27. For all the reasons recorded above, we reject the reference for confirmation of death penalty and set aside

the judgment and order of conviction and punishment /sentence passed by the court below with direction to the trial court for a de novo consideration from the stage of examination of the appellant under Section 313 Cr.P.C in the light of the observations made above. This shall be without prejudice to the right of the prosecution to call/recall a witness or witnesses to prove the recovery made from the scene of the crime by the Field Unit Team as also to produce the items recovered by Field Unit Team as well as the Investigating Officer so as to connect/ link the forensic reports with the items seized / recovered. Likewise, it shall also be open for the appellant to apply for recall of any of the prosecution witness or witnesses or to produce expert report in rebuttal, if so advised. If any such recall application is filed the same shall be considered on merit without being prejudiced by earlier rejection of application 37 Kha. The matter shall, thereafter, be decided on the basis of available material on record, in accordance with law. It is expected that the trial shall be completed expeditiously and that all parties shall cooperate in that effort.

28. As we have directed for a re-trial, we do not deem it appropriate to express our opinion on the merit of the prosecution case. Rather, we make it clear that we have not expressed any opinion on the merit of the prosecution case as also whether on the evidence already on record, conviction of the appellant could be sustained or not.

29. The appeal stands **allowed** to the extent indicated above.

30. It may be clarified that as we are directing for a re-trial, our order, by itself, should not be interpreted as a ground to release the appellant on bail and, therefore, we clarify that the appellant shall be treated as an under-trial prisoner till his release, either on bail or otherwise.

31. Let this order be certified and communicated to the court below and the lower court record be also sent to the trial court for compliance.

(2022)01ILR A931
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 25.01.2022

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Crl. Appl. No. 638 of 2021

Annu Tandon & Ors . ...Appellants
Versus
State ...Respondent

Counsel for the Appellants:
Rohit Tripathi, Syed Zulfiqar Husain Naqv

Counsel for the Respondent:
Mrs. Suniti Sachan

Criminal Law - Code of Criminal Procedure, 1973- Section 389- Suspension of sentence- As the appellants no. 1, 2 and 3 have not come up with any specific consequence which they are likely to face due to their conviction, their prayer for suspension of conviction and sentence appears to be barred by the law laid down by the Apex Court in the case of *Rama Narang.*

Settled law that the person seeking stay or suspension of the sentence has to state the specific consequences that he is likely to face due to his conviction, in absence of which the order staying the suspension of sentence cannot be granted.

Criminal Law - Code of Criminal Procedure, 1973- Section 389- Suspension of sentence- None of the prosecution witnesses has been able to establish that the appellant no. 4 obstructed or caused to obstruct the train and his conviction and sentence, *prima facie*, appears to be without any specific evidence against him.

While considering the suspension/ stay of sentence only the broad features of the case which are prima facie in favour of the accused are to be seen.

Criminal Law - Code of Criminal Procedure, 1973- Section 389- Suspension of sentence - Representation of the People Act, 1951- Section 8 (3) - The appellant no. 4 has specifically stated that he is aspiring to contest for the post of Member of Legislative Assembly in Uttar Pradesh- It is clear that unless the conviction and sentence of the appellant no. 4 is stayed, he will not be able to contest the election as he will be disqualified under Section 8 (3) of the Representation of the People Act, 1951 and he would suffer irreparable loss and injury.

Where the specific consequences likely to be faced by the accused as a result of his conviction are stated and the broad features of the case are prima facie in favour of the accused, then it would be appropriate to stay/ suspend the sentence. (Para 24, 29, 30, 32, 37)

Application accordingly disposed of. (E-3)

Judgements/ Case law relied upon/ cited :-

1. Navjot Singh Sidhu Vs St. of Punj. & anr; (2007) 2 SCC 574 (relied)

2. Ravikant S. Patil Vs Sarvabhouma S. Bagali; (2007) 1 SCC 673 (relied)

3. Mazdoor Kisan Shakti Sangathan Vs U.O.I & anr; (2018) 17 SCC 324 (cited)

4. Amit Sahni (Shaheen Bagh, In Re) Vs Commr. of Police & ors; (2020) 10 SCC 439 (cited)

5. Rama Narang Vs Ramesh Narang; (1995) 2 SCC 513 (cited)

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

(Crl. Misc. Application No. 48908 of 2021 - Application under Section 389 Cr.P.C.)

1. By means of this application under Section 389 of the Code of Criminal Procedure, 1973, the appellants have prayed that the order of their conviction and sentence by means of the judgment dated 18.03.2021 passed by the Special Judge, MP/MLA/Additional Sessions, Judge, Court No. 19, Lucknow in Criminal Case No. 578 of 2020 arising out of case Crime No. 243 of 2017, under Section 174 (a) of the Railways Act, 1989, Police Station RPF Post Unnao be stayed till disposal of this appeal.

2. Heard Ms. Kamini Jaiswal, learned Senior Advocate assisted by Mr. Rohit Tripahti, Advocate, learned counsel for the appellants as well as Mrs. Suniti Sachan, Advocate learned counsel for the respondent - State through Railway Protection Force and perused the record.

3. By means of the judgment dated 18.03.2021 passed by the learned Special Judge, MP/MLA/Additional Sessions Judge, Court No. 19, Lucknow in Criminal Case No. 578 of 2020, all the appellants have been convicted of committing an offence under Section 174 (a) of the Railways Act, 1989 and on the same day an order was passed imposing a punishment of two years simple imprisonment and they were directed to pay to the Railway Administration a sum of Rs. 25,000/- each towards damages and expenses, failing which they will have to undergo simple

imprisonment for additional period of one month.

4. Against the aforesaid order dated 18.03.2021, the appellants have filed the instant Criminal Appeal under Section 374 (2) Cr.P.C. which was admitted by means of an order dated 25.03.2021.

5. On 25.03.2021, this Court has admitted the appeal by the following order: -

"The present appeal under Section 374(2) of the Cr.P.C. is moved against the conviction order couples with order of sentence dated 18.3.2021 passed by Special Judge, M.P./M.L.A./Additional Sessions Judge, Court No.19, Lucknow in Sessions Case No.578/2020 (State Vs. Annu Tondon & Ors.) arising out of Case Crime No.243/2017 under Section 174A, Railway Act, registered in Police Station- RPF post Unnao, whereby the trial court has convicted the appellant nos.1 to 4 namely Annu Tondon, Surya Narayan Yadav, Amit Shukla and Ankit Prihar in aforesaid offence sentencing simple imprisonment for two years and the fine under Section 357 and 359 of the Cr.P.C. alongwith the cost amounting to Rs.25,000/- each as well on failure an additional simple imprisonment of one month.

Since, office has reported no defect and the appeal is filed within time, relief is statutory, therefore, appeal is admitted. "

6. Regarding the instant application under Section 389 (1) Cr.P.C., the Court has passed the following order: -

"An application under Section 389 of the Cr.P.C. bearing C.M.A. No. 48908 of 2021 also presented for the suspension of punishment.

Learned counsel for the respondent may file objection, if any, within ten days, providing copy thereof to learned counsel for the appellants.

List on 8.4.2021 as requested by learned counsel for the appellants for arguments over the application under Section 389 Cr.P.C. "

7. Thereafter, the case was listed on 23.07.2021, on which date, the learned counsel for the respondent sought further time to file the objection against the application under Section 389 Cr.P.C. which was granted. Since then the case has been listed on numerous occasions but but till date no objection has been filed against the aforesaid application.

8. Ms. Kamini Jaiswal has submitted that the proceedings were initiated by a report dated 12.06.2017 lodged by the Railway Protection Force personnel stating that when Train No. 18191 was entering Unnao Railway Station on 12.06.2017, about 150 to 200 persons carrying the flag of a political party stood up on the line no. 2 near Hardoi ROB and started raising slogans in support of their demands due to which the Driver of Train No. 18191 had stopped the Train. Thereafter, some persons boarded on the engine. Upon enquiry, it transpired that the demonstration was being led by Annu Tandon - former Member of Parliament (appellant no. 1), Surya Narayan Yadav - District President, District Congress Committee (appellant no. 2) and Amit Shukla - City President, City Congress Committee (appellant no. 3). Due to this demonstration, railway movement was obstructed and Train No. 18191 got delayed by 12 minutes. This act is covered by Section 174 (a) of the Railways Act, 1989.

9. Ms. Kamini Jaiswal has submitted that the learned Trial Court has passed the order of conviction and sentence on the basis of a patently wrong finding that from an analysis of the witnesses produced by the prosecution, it appears that the prosecution has established the presence of the accused-persons at the time and place of occurrence and it has also been established that the witnesses have witnessed the incident themselves. The finding of the Court below that there is no such statement in the statements of the witnesses from which the prosecution version may appear to be doubtful is perverse as none of the witnesses has given any such statement as may establish commission of an offence under Section 174 (a) of the Railways Act, 1989 by any of the appellants. She has taken the Court through the statements of witnesses, copies whereof have been filed with the affidavit filed in support of the application under Section 389 Cr.P.C.

10. The Station Master (PW-1) has stated that unknown persons making demonstration had stopped the train due to which the rail traffic got obstructed. In his cross-examination, he stated that he does not recognize any of the persons making demonstration and he did not go to the place of demonstration because he could not leave his office.

11. PW-2 who is a Constable of the Railway Protection Force has stated that about 150 to 200 persons had stopped the train and some of them had boarded on the engine of the train. The demonstration was being led by Annu Tandon, Surya Narayan Yadav and Amit Shukla - the appellants no. 1, 2 & 3 respectively, and they were demanding that the City Magistrate should come at the spot, to whom they wanted to give a representation addressed to the President of India. The personnel of the Railway Protection Force did not use force and for this reason train's operation was obstructed from 11:38 to 11:50. In his cross-examination, he stated that he does not know as to from which direction the train was coming, he had a mobile phone but he did not take any photograph of the persons making demonstration.

12. PW-3 who is the Guard of the train has stated that the train stopped before reaching the platform and when he enquired its reason from the Driver of the train, he informed that some persons were carrying out a demonstration and some of them are standing on the railway track and engine, and for this reason the train cannot move. In his cross-examination, he has stated that he did not get off the train and got to see it by himself. He was informed by the Driver that some persons making demonstration were sitting on the railway track and for this reason he had to stop the train. However, he has also not stated anything about the identity of the appellants.

13. PW-4 who is the Inspector-in-Charge of RPF has stated that some persons making demonstration had stopped the train at the entry point of the Station Platform and in the leadership of Annu Tandon, Suryan Narayan Yadav and Amit Shukla - the appellants no. 1, 2 and 3 respectively, and they were demanding to call the City Magistrate so that they may give a representation to him. He has stated that some persons had boarded on the engine and some were standing on the track. In his cross-examination, he has stated that a representation was handed over which was signed by Surya Narayan Yadav (appellant no. 2), Annu Tandon (appellant no. 1) and

Amit Shukla (appellant no. 3). He did not recognize any of them, he had only seen the photograph of Annu Tandon.

14. PW-5 who is the engine driver has also not made any statement regarding the identity of the appellants and he has said that he does not know regarding the persons making demonstration.

15. Ms. Kamini Jaiswal has also placed the statements of all the appellants recorded under Section 313 Cr.P.C. where all of whom had denied the allegation of stopping the train and have stated that they did not play any role in stopping the train and the demonstration was going on in an open area besides the track.

16. The submission of Ms. Kamini Jaiswal is that there being no evidence establishing that the appellants were present at the time and place of occurrence and to establish that they have committed an offence under Section 174 (a) of the Railways Act, 1989, the judgment under appeal is unsustainable and there is strong likelihood that the appellants will succeed and the judgment & order dated 18.03.2021 convicting and punishing them will be set-aside.

17. Regarding the scope of Section 389 (1) Cr.P.C., Ms. Kamini Jaiswal has placed reliance on the judgments of the Apex Court in the cases of ***Navjot Singh Sidhu vs. State of Punjab and another; (2007) 2 SCC 574 and Ravikant S. Patil vs. Sarvabhouma S. Bagali; (2007) 1 SCC 673***. She has further submitted that the alleged offending act was done as a part of a demonstration and protest being carried out, which is a fundamental right under the Constitution, as has been held by the Apex Court in the cases of ***Mazdoor Kisan Shakti Sangathan vs. Union of India and another; (2018) 17 SCC 324 and Amit Sahni (Shaheen Bagh, In Re) vs. Commissioner of Police and others; (2020) 10 SCC 439*** and the allegations do not include the charge of any corruption or any misconduct involving moral turpitude.

18. Mrs. Suniti Sachan, learned counsel appearing for the respondent, on the other hand, has submitted that for suspension of conviction, there must be a reasonable possibility of acquittal in the appeal but in this case the appellants have been identified by the witnesses. In this regard, she has drawn attention of the Court to para 9 of the judgment of the learned Trial Court in which the statement of PW-2 has been referred to, who has taken the names of the appellants no. 1, 2 and 3. She has further submitted that the appellants are political persons and there is every likelihood that they will indulge in similar activities again. Their act created trouble for the railways and its passenger and it held up the entire system of railways and created disturbance in the entire rail network. Therefore, the application under Section 389 Cr.P.C. is liable to be rejected.

19. I have considered the submissions made by the parties' counsel and gone thorough the record.

20. In ***Rama Narang vs. Ramesh Narang; (1995) 2 SCC 513***, the Apex Court was pleased to explain the scope of Section 389 (1) Cr.P.C. in the following words "In certain situations the order of conviction can be executable, in the sense, it may incur a disqualification as in the instant case. In such a case the power under Section 389(1) of the Code could be invoked. In such situations the

attention of the Appellate Court must be specifically invited to the consequence that is likely to fall to enable it to apply its mind to the issue since under Section 389(1) it is under an obligation to support its order 'for reasons to be recorded by it in writing'. If the attention of the Court is not invited to the specific consequence which is likely to fall upon conviction how can it be expected to assign reasons relevant thereto? No one can be allowed to play hide and seek with the Court; he cannot suppress the precise purpose for which he seeks suspension of the conviction and obtain a general order of stay and then contend that the disqualification has ceased to operate." The Apex Court was further pleased to hold that "In a fit case if the High Court feels satisfied that the order of conviction needs to be suspended or stayed so that the convicted persons does not suffer from a certain disqualification provided for in any other statute, it may exercise the power because otherwise the damage done cannot be undone."

21. In ***Ravikant S. Patil*** *(supra),* relied by the learned counsel for the appellants, the Apex Court relied upon the judgment in ***Rama Narang*** *(supra)* and was pleased to clarify it further in the following words:

"It deserves to be clarified that an order granting stay of conviction is not the rule but is an exception to be resorted to in rare cases depending upon the facts of a case. Where the execution of the sentence is stayed, the conviction continues to operate. But where the conviction itself is stayed, the effect is that the conviction will not be operative from the date of stay. An order of stay, of course, does not render the conviction non-existent, but only non-operative."

22. In ***Ravikant S. Patil (supra)***, the Apex Court relied upon an earlier decision in the case of K.C. Sareen Vs. CBI; (2001) 6 SCC 584 in which it was held that "although the power to suspend an order of conviction, apart from the order of sentence, is not alien to Section 389 (1) of the Code, its exercise should be limited to very exceptional cases". It was further held that "merely because the convicted person files an appeal to challenge his conviction, the Court should not suspend the operation of the conviction and the Court has a duty to look at all aspects including the ramifications of keeping such conviction in abeyance".

23. In ***Navjot Singh Sidhu*** (supra), the Apex Court was pleased to discuss the law laid down in its previous decisions and to summarize it as follows: -

"thus, the legal position is clear that the appellate Court can suspend or grant stay of order of conviction, but the person seeking stay of the conviction should specifically draw the attention of the appellate Court to the consequences that may arise if the conviction is not stayed. Unless the attention of the Court is drawn to the specific consequences that would follow on account of the conviction, the person convicted cannot obtain an order of stay of conviction. Further, grant of stay of conviction can be resorted to in rare cases depending upon the special facts of the case."

24. After referring to the law on this subject, the Apex Court proceeded to examine the evidence led during the trial of that case, though it expressly stated that for the purpose of decision of the prayer for staying or suspending the order or conviction, it is not necessary to minutely examine the merits of the case and after pointing out the broad features of the case

which touched upon the culpability of the accused. These broad features were, prima facie, found to be in favour of the accused. In this backdrop, the Apex Court held that in the event prayer made by the appellant is not granted, he would suffer irreparable injury as he would not be able to contest for the seat which he held and has fallen vacant only on account of his voluntary resignation which he did on purely moral grounds. Having regard to the facts and circumstances of the case, the Apex Court suspended the order of conviction in that case.

25. In the light of the aforesaid legal pronouncements, I proceed to examine the application under Section 389 (1) Cr.P.C. filed by the appellants.

26. Section 389 (1) Cr.P.C., for convenience is being reproduced here:

"389. Suspension of sentence pending the appeal; release of appellant on bail*. (1) Pending any appeal by a convicted person, the Appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail, or on his own bond."*

27. In the affidavit filed in support of the application under Section 389 Cr.P.C. by the appellant no. 4, inter alia, it has been stated that the prosecution case is based on an incident of peaceful dharna pradarshan/demonstration that took place on 12.06.2017 in an open area near Unnao Railway Station. The train was stopped by the Driver as a precautionary measure without there being any hindrance created by any person participating in the demonstration. The appellants have no criminal history. The appellant no. 4 has contested the Legislative Assembly elections in the year 2012 and 2017 and is aspiring to contest for the post of Member of Legislative Assembly in Uttar Pradesh which is due to be held in February, 2022. Contesting of election is very genuine reason for staying the conviction.

28. As no objection has been filed against the application in spite of grant of repeated opportunity, the aforesaid averments remain uncontroverted.

29. The stay of conviction has been sought on the ground that the appellant no. 4 wants to contest the upcoming Assembly elections. However, there is no such specific averment regarding other appellants and there there is only a general averment that since the appellants are social workers and politicians and aspirants for various public offices through the process of election, they stand debarred from contesting election or holding any public office in view of the quantum of sentence that has been imposed in the present matter.

30. As the appellants no. 1, 2 and 3 have not come up with any specific consequence which they are likely to fact due to their conviction, their prayer for suspension of conviction and sentence appears to be barred by the law laid down by the Apex Court in the case of ***Rama Narang*** (supra) that *"No one can be allowed to play hide and seek with the Court; he cannot suppress the precise purpose for which he seeks suspension of the conviction and obtain a general order of stay and then contend that the disqualification has ceased to operate."* For

the aforesaid reason, the prayer for suspension of conviction and sentence in respect of the appellants no. 1, 2 and 3 cannot be entertained.

31. Since the appellant no. 4 has specifically stated that he is aspiring to contest for the post of Member of Legislative Assembly in Uttar Pradesh which is due to be held in February, 2022, I proceed to examine the prayer in respect of appellant no. 4.

32. Section 8 (3) of the Representation of the People Act, 1951 provides that a person convicted of any offence and sentenced to imprisonment for not less than two years other than any offence referred to in sub-section (1) or sub-section (2) shall be disqualified from the date of such conviction and shall continue to be disqualified for a further period of six years since his release. Therefore, it is clear that unless the conviction and sentence of the appellant no. 4 is stayed, he will not be able to contest the election as he will be disqualified under Section 8 (3) of the Representation of the People Act, 1951 and he would suffer irreparable loss and injury.

33. For granting the prayer for suspension, this Court has to examine as to whether the appellants have got a strong chance of success in the appeal.

34. Ms. Kamini Jaiswal has submitted that the appellants have wrongly been convicted and sentenced for an offence under Section 174 (a) of the Railways Act, 1989.

35. Section 174 of the Railways Act, 1989 provides as follows:

"174. Obstructing running of train, etc.--If any railway servant (whether on duty or otherwise) or any other person obstructs or causes to be obstructed or attempts to obstruct any train or other rolling stock upon a railway,--

(a) by squatting or picketing or during any Rail roko agitation or bandh; or

(b) by keeping without authority any rolling stock on the railway; or

(c) by tampering with, disconnecting or interfering in any other manner with its hose pipe or tampering with signal gear or otherwise, he shall be punishable with imprisonment for a term which may extend to two years, or with fine which may extend to two thousand rupees, or with both."

36. Ms. Jaiswal has submitted that there was no evidence to establish the presence of the appellants at the time and place of occurrence and the learned Trial Court has wrongly held that the prosecution has established the presence of all the accused persons at the time and place of occurrence.

37. Considering the aforesaid submissions and examining the statements of witnesses in the light of the law laid down by the Apex Court, *prima facie*, I am of the view that none of the prosecution witnesses has been able to establish that the appellant no. 4 obstructed or caused to obstruct the train and his conviction and sentence, *prima facie*, appears to be without any specific evidence against him. Moreover, he has been convicted of an offence arising out of the incidents occurring during a dharna/demonstration by a political party, which do not involve any allegation of corruption or any offence involving moral turpitude and unless the conviction and sentence of the appellant no. 4 is suspended, he will not be able to put

forth his candidature in the upcoming Assembly elections in view of the bar contained in Section 8 (3) of the Representation of the People Act, 1951, which would cause such an injury to the appellant no. 4, as cannot be compensated in case he succeeds in this appeal.

38. It would, therefore, be expedient in the interest of justice that the conviction and sentence in respect of the appellant no. 4 be kept under suspension during pendency of the appeal.

39 . Keeping in view the entire facts ad circumstances of the case in light of the law laid down by the Hon'ble Supreme Court, the case of the appellant no. 4 appears to be an exceptional case warranting exercise of powers conferred on this Court under Section 389 (1) Cr.P.C.

Order

40. The prayer for suspension of conviction and sentence in respect of appellants no. 1 (Annu Tandon), appellant no. 2 (Surya Narayan Yadav) and appellant no. 3 (Amit Shukla) is hereby rejected.

41. The conviction and sentence of appellant no. 4, namely, Ankit Parihar, son of Sri Veer Pratap Singh passed by the Special Judge, MP/MLA/Additional Sessions, Court No. 19, Lucknow in Criminal Case No. 578 of 2020 arising out of case Crime No. 243 of 2017, under Section 174 (a) of the Railways Act, 1989, Police Station RPF Post Unnao is hereby suspended during pendency of the appeal.

42. The application is ***disposed of.***

Case :- CRIMINAL APPEAL No. - 638 of 2021

Appellant :- Annu Tandon And 3 Ors.

Respondent :- State Through Railway Protection Force

Counsel for Appellant :- Rohit Tripathi,Syed Zulfiqar Husain Naqv

Counsel for Respondent :- Mrs.Suniti Sachan

Hon'ble Subhash Vidyarthi,J.

List the appeal in the next cause list.

The interim order previously granted in favour of the appellants shall continue to operate till the next date of listing.

(2022)01ILR A939
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.11.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE SAUMITRA DAYAL SINGH, J.

Jail Appeal No. 4722 of 2015

Ramroop ...Appellant

Versus

State ...Respondent

Counsel for the Appellant:
From Jail, Alka Srivastava, Sri Kailash Prakash Pathak, Sri Kamta Prasad, Sri Suresh Chandra Pandey, Sri S.K. Srivastava, Sri Vishnu Shankar Mishra

Counsel for the Respondents:
A.G.A.

Criminal Law - Indian Evidence Act,1872 - Section 32- Dying Declaration- It is a fact that the deceased died due to burn injuries and, therefore, we concur with the learned Judge that the death was a homicidal death. Death is because of the

burn injuries and she had sustained 100% burn. The dying declaration in its form will not permit us to take a different view except sentencing. The deceased died on the next date out of burn injuries. This is corroborated with her dying declaration which is admissible under Section 34 (*sic 32*) of the Evidence Act - The witnesses of fact have turned hostile rather they have not supported the case of the prosecution - The medical evidence has been believed by the learned Judge.

Where the dying declaration has a ring of truth and inspires the confidence of the court, then there is no need for further corroboration and conviction can be secured on the basis of the dying declaration alone.

Criminal Law- Indian Evidence Act,1872 - Section 32- Dying Declaration- Homicidal death- 100% burn injuries- So far as the question of thumb impression is concerned, the same depends upon facts, as regards whether the skin of the thumb that was placed upon the dying declaration was also burnt. Even in case of such burns in the body, the skin of a small part of the body, i.e. of the thumb, may remain intact. Therefore, it is a question of fact regarding whether the skin of the thumb had in fact been completely burnt, and if not, whether the ridges and curves had remained intact. It is a fact that the deceased died due to burn injuries and, therefore, we concur with the learned Judge that the death was a homicidal death. Death is because of the burn injuries and she had sustained 100% burn. The dying declaration in its form will not permit us to take a different view except sentencing.

The fact that the deceased sustained 100% burn injuries would not be sufficient to discard the dying declaration where the dying declaration is trustworthy and reliable. Whether the deceased could have given the dying declaration after suffering 100% burn injuries depends on the facts of the case and no straightjacket formula can be laid down.

Proportionate punishment- Accused was major at the time of commission of offence, he is the son of the deceased. There was altercation and, the occurrence of incident had taken place at about 9.00 a.m. in house. 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. At the same time, undue harshness should also be avoided keeping in view the reformative approach underlying in our criminal justice system. 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. It appears from perusal of impugned judgment that sentence awarded by learned trial court for life term is very harsh keeping in view the entirety of facts and circumstances of the case and gravity of offence. The punishment of seven years with remissions while maintaining fine and default sentence will be adequate to the son who must by now repented in life.

Under the facts of the case, where the offence occurred due to a sudden altercation, hence keeping in mind the judicial trend of reformative approach, punishment of imprisonment for life found to be disproportionate and unduly harsh. Sentence modified accordingly to seven years.

Criminal Appeal partly allowed. (E-3)

Judgements/ Case law relied upon:-

1. St. of M.P Vs Dal Singh & ors (2013) 14 SCC 159

2. Mafabhai Nagarbhai Raval Vs St. of Guj. AIR 1992 SC 2186

3. Rambai Vs St. of Chhatis. (2002) 8 SCC 83

4. Laxman Vs St. of Maha. : AIR 2002 SC 2973

5. Koli Chunilal Savji Vs St. of Guj. AIR 1999 SC 3695

6. Babu Ram & ors. Vs St. of Punj. AIR 1998 SC 2808

7. Laxmi Vs Om Prakash & Ors. AIR 2001 SC 2383

8. Govindappa & ors. Vs St. of Kar. (2010) 6 SCC 533

9. St. of Pun. Vs Gian Kaur & Anr. AIR 1998 SC 2809

10. St. of M.P Vs Dal Singh & Ors. : (2013) 14 SCC 159

11. Gujarat Vs Bhalchandra Laxmishankar Dave, 2021 (0) AIJEL-SC 66983

12. Guru Dutt Pathak Vs St. of U.P, LAW(SC) 2021 5 5

13. Manoj Mishra @ Chhotkau Vs The St. of U.P (Crl. Apl. No.1167 of 2021) dec. on 8th Oct, 2021

14. Mohd. Giasuddin Vs St. of AP, [AIR 1977 SC 1926],

15. Deo Narain Mandal Vs St. of UP [(2004) 7 SCC 257]

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

17. Pardeshiram Vs St. of M.P., (2021) 3 SCC 825

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J. & Hon'ble Saumitra Dayal Singh, J.)

1. Heard Shri Kamta Prasad, learned counsel for the appellant; Shri Arvind Kumar, learned AGA for State; and perused the record.

2. By way of this appeal, the appellant- Ramroop has challenged the Judgment and order dated 01.04.2015 passed by court of Additional Sessions Judge, Hamirpur in Session Trial No.05 of 2014 arising out of Case Crime No.1444 of 2013 wherein accused was tried for commission of offence under Sections 304 (I) and 506 Indian Penal Code (hereinafter referred to as, 'IPC'), Police Station-Sumerpur, District Hamirpur. The learned Sessions Judge convicted the accused for life imprisonment for commission of offence under Section 304 part I IPC and with fine of Rs.10,000/-. In default of payment of fine, the accused shall undergo rigorous imprisonment for 6 months. He was not convicted under Section 506 IPC.

3. The brief facts as per prosecution case are that written report which is Ex.Ka.1 and which corroborates the dying declaration made on 28.9.2013 reads as follows:-

"That on 28.9.2013 at about 9.00 a.m. when the accused Ramroop, elder son of the deceased and elder son of the person who got the First Information Report registered, was demanding money for buying liquor. The mother refused to give him money for buying liquor. The accused became angry and poured kerosene on her (deceased) and set her(deceased) ablaze. The mother who was engulfed was taken to the hospital immediately after putting a quilt on her body by the complainant and his brother as well as Muhal and when the accused was told he threatened to kill them. That is how the report was given on 5.10.2013 there is a delay of six days but during this period, the dying declaration was recorded on 28.9.2013 of deceased at 2.40 p.m. wherein also she narrated the same facts. The Police investigation had already started. Her post mortem report was done as she died on 29.9.2013 at 3.50 p.m..

The injuries according to the doctors was superficially to deep burn all over the body. The cause of death was due to the burn injures. The prosecution laid the charge sheet against the accused. The dying declaration of the deceased which is Ex.Ka-2 also requires to be looked into wherein she has mentioned that her husband and borther-in-law brought her to the Hospital. She has grievanced against her son and his wife. This dying declaration is dictated on 28.9.2013.

4. The charge sheet was laid before the court of Magistrate and the learned Judge committed the case to the court of session as it was triable by the court of session.

5. The prosecution examined nine witnesses so as to bring home the charge framed against the accused as enumerated:

1.	Nanki	PW1
2.	Ashok Kumar	PW2
3.	Mahghu	PW3
4.	Ram Kesh	PW4
5.	Dr. Manish Kumar	PW5
6.	Musa Ram Pal	PW6
7.	Dr. R.K. Katiyar	PW7

6. In support of ocular version following documents were produced to bring home the charge:-

1	First Information Report	Ex.Ka.11
2	Written Report	Ex.Ka.1
3	Dying Declaration	Ex.Ka.2
4	Post Mortem Report	Ex.Ka.3
5	Panchayatnama	Ex.Ka.5
6	Charge Sheet Mool	Ex.Ka.10
7	Site Plan with Index	Ex.Ka.4

7. Learned counsel for the appellant has urged that once the Court came to the conclusion that it was a case of 304 part I, the infliction of incarceration for life requires interference. It is submitted that only interested witnesses have been examined. It is submitted that PW-5 and PW-7 are Doctors. PW-8 and PW-9 are Police Officers and, therefore, the evidence against the appellant is not convincing that he has committed the offence or he had set his mother ablase and in the dying declaration she had named both he and his wife, whereas the discrepancy in the FIR while naming him alone and not his wife.

8. Shri Arvind Kumar, learned AGA has vehemently submitted that punishment for incarceration of life imprisonment under Section 304 part I is just and proper. It is contented that the accused set his own mother ablaze and threatened the complainant with dire consequences which shows his mental status and, therefore, it is requested that this Court may not interfere in the punishment as it is submitted that the burn injuries was caused by the accused as proved by ocular version and the dying declaration.

9. While hearing the learned counsels for the parties, we have minutely perused the judgment and the evidence. We have threadbare read the same. The deceased died on the next date out of burn injuries. This is corroborated with her dying declaration which is admissible under Section 34 of the Evidence Act. PW-3 has also accepted that the accused used to consume liquor but he was not a bad person. The witnesses of fact have turned hostile rather they have not supported the case of the prosecution. PW-1 has come up with the theory that accused had left the home as there was a dispute regarding the

property and it was the deceased who had ablaze herself by committing self emollition. PW-2 Ashok Kumar has also stated that Ramroop was in a habit of drinking but he had not seen the appellant set his mother ablaze. He had not seen the appellant demand money from the deceased. The medical evidence has been believed by the learned Judge.

10. The Hon'ble Supreme Court in the case of **State of Madhya Pradesh Vs. Dal Singh and others (2013) 14 SCC 159** in paras 14 to 22 has observed as under:-

"Whether 100 per cent burnt person can make a dying declaration or put a thumb impression:

14. In **Mafabhai Nagarbhai Raval v. State of Gujarat AIR 1992 SC 2186**, this Court dealt with a case wherein a question arose with respect to whether a person suffering from 99 per cent burn injuries could be deemed capable enough for the purpose of making a dying declaration. The learned trial Judge thought that the same was not at all possible, as the victim had gone into shock after receiving such high degree burns. He had consequently opined, that the moment the deceased had seen the flame, she was likely to have sustained mental shock. Development of such shock from the very beginning, was the ground on which the Trial Court had disbelieved the medical evidence available. This Court then held, that the doctor who had conducted her post-mortem was a competent person, and had deposed in this respect. Therefore, unless there existed some inherent and apparent defect, the court could not have substitute its opinion for that of the doctor's. Hence, in light of the facts of the case, the dying declarations made, were found by this Court to be worthy of reliance, as the same had been made truthfully and voluntarily. There was no evidence on record to suggest that the victim had provided a tutored version, and the argument of the defence stating that the condition of the deceased was so serious that she could not have made such a statement was not accepted, and the dying declarations were relied upon. A similar view has been re-iterated by this Court in **Rambai v. State of Chhatisgarh (2002) 8 SCC 83**.

15. In **Laxman v. State of Maharashtra : AIR 2002 SC 2973**, this Court held, that a dying declaration can either be oral or in writing, and that any adequate method of communication, whether the use of words, signs or otherwise will suffice, provided that the indication is positive and definite. There is no requirement of law stating that a dying declaration must necessarily be made before a Magistrate, and when such statement is recorded by a Magistrate, there is no specified statutory form for such recording. Consequently, the evidentiary value or weight that has to be attached to such a statement, necessarily depends on the facts and circumstances of each individual case. What is essentially required, is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind, and where the same is proved by the testimony of the Magistrate, to the extent that the declarant was in fact fit to make the statements, then even without examination by the doctor, the said declaration can be relied and acted upon, provided that the court ultimately holds the same to be voluntary and definite. Certification by a doctor is essentially a rule of caution, and

therefore, the voluntary and truthful nature of the declaration can also be established otherwise.

16. In **Koli Chunilal Savji v. State of Gujarat AIR 1999 SC 3695**, this Court held, that the ultimate test is whether a dying declaration can be held to be truthfully and voluntarily given, and if before recording such dying declaration, the officer concerned has ensured that the declarant was in fact, in a fit condition to make the statement in question, then if both these aforementioned conditions are satisfactorily met, the declaration should be relied upon. (See also: **Babu Ram and Ors. v. State of Punjab AIR 1998 SC 2808**).

17. In **Laxmi v. Om Prakash and Ors. AIR 2001 SC 2383**, this Court held, that if the court finds that the capacity of the maker of the statement to narrate the facts was impaired, or if the court entertains grave doubts regarding whether the deceased was in a fit physical and mental state to make such a statement, then the court may, in the absence of corroborating evidence lending assurance to the contents of the declaration, refuse to act upon it.

18. In **Govindappa and Ors. v. State of Karnataka (2010) 6 SCC 533**, it was argued that the Executive Magistrate, while recording the dying declaration did not get any certificate from the medical officer regarding the condition of the deceased. This Court then held, that such a circumstance itself is not sufficient to discard the dying declaration. Certification by a doctor regarding the fit state of mind of the deceased, for the purpose of giving a dying declaration, is essentially a rule of caution and therefore, the voluntary and truthful nature of such a declaration, may also be established otherwise. Such a dying declaration must be recorded on the basis that normally, a person on the verge of death would not implicate somebody falsely. Thus, a dying declaration must be given due weight in evidence.

19. In **State of Punjab v. Gian Kaur and Anr. AIR 1998 SC 2809**, an issue arose regarding the acceptability in evidence, of the thumb impression of Rita, the deceased, that appeared on the dying declaration, as the trial court had found that there were clear ridges and curves, and the doctor was unable to explain how such ridges and curves could in fact be present, when the skin of the thumb had been completely burnt. The court gave the situation the benefit of doubt.

20. The law on the issue can be summarised to the effect that law does not provde who can record a dying declaration, nor is there any prescribed form, format, or procedure for the same. The person who records a dying declaration must be satisfied that the maker is in a fit state of mind and is capable of making such a statement. Moreover, the requirement of a certificate provided by a Doctor in respect of such state of the deceased, is not essential in every case.

21. Undoubtedly, the subject of the evidentiary value and acceptability of a dying declaration, must be approached with caution for the reason that the maker of such a statement cannot be subjected to cross-examination. However, the court may not look for corroboration of a dying declaration, unless the declaration suffers from any infirmity.

22. So far as the question of thumb impression is concerned, the same depends upon facts, as regards whether the skin of the thumb that was placed upon the dying declaration was also burnt. Even in case of such burns in the body, the skin of a small part of the body, i.e. of the thumb, may remain intact. Therefore, it is a question of

fact regarding whether the skin of the thumb had in fact been completely burnt, and if not, whether the ridges and curves had remained intact.

11. In case of Vijay Pal (Supra) in paragraphs 23 and 24 the Hon'ble Apex Court has relied upon the judgment in the case of **Mafabhai Nagarbhai Raval (Supra) and Dal Singh** has observed as under:-

"23. It is contended by the learned Counsel for the Appellant when the deceased sustained 100% burn injuries, she could not have made any statement to her brother. In this regard, we may profitably refer to the decision in **Mafabhai Nagarbhai Raval v. State of Gujarat (1992) 4 SCC 69** wherein it has been held a person suffering 99% burn injuries could be deemed capable enough for the purpose of making a dying declaration. The Court in the said case opined that unless there existed some inherent and apparent defect, the trial Court should not have substituted its opinion for that of the doctor. In the light of the facts of the case, the dying declaration was found to be worthy of reliance.

24. In **State of Madhya Pradesh v. Dal Singh and Ors. : (2013) 14 SCC 159**, a two-Judge Bench placed reliance on the dying declaration of the deceased who had suffered 100% burn injuries on the ground that the dying declaration was found to be credible."

12. It is a fact that the deceased died due to burn injuries and, therefore, we concur with the learned Judge that the death was a homicidal death. Death is because of the burn injuries and she had sustained 100% burn . The dying declaration in its form will not permit us to take a different view except sentencing.

13. The recent decision of the Apex Court in the case of State of **Gujarat v. Bhalchandra Laxmishankar Dave, 2021 (0) AIJEL-SC 66983**, decided on 2nd February, 2021 wherein the Apex Court has held that while dealing with the matter relating to conviction, the Court should discuss the decision of the trial court and also the judgment in **Guru Dutt Pathak v. State of Uttar Pradesh, LAW(SC) 2021 5 5**, decided on 5th May, 2021. All the principles laid down in these latest decisions, oblige us to consider the evidence afresh as discussed by learned Sessions Judge.

14. Factual scenario goes to show that the accused has been named in the FIR. It is not proved that there was any enmity between the mother (deceased) and the accused, though there is some doubt. Learned counsel for the appellant contended that he would press for commutation of sentence from life to a lesser sentence in view of latest decision of the Apex Court in catena of decisions foremost would be a very recent judgment of Hon'ble Supreme Court titled as **Manoj Mishra @ Chhotkau Vs. The State of Uttar Pradesh (Criminal Appeal No.1167 of 2021**) decided on 8th October, 2021 is also considered by us.

15. It would now be necessary for this Court to discuss the role of the accused and the manner in which, the incident occurred the injuries are found; (a) the accused is in jail since more than 7 years; (b) the incident appears to have occurred on spur of the moment, it is very clear that the death of victim occurred at the hands of the sole accused.

16. While considering the deposition of eye witnesses, entire evidence considered the injuries are not superficial, but as such which shows that the intention of the accused as culled out from the record does not show that the accused had intention to do away with his mother, therefore, altercation between the same.

17. The accused was major at the time of commission of offence, he is the son of the deceased. There was altercation and, the occurrence of incident had taken place at about 9.00 a.m. in house.

18. In that view of the matter, we concur with the learned sessions Judge held that the accused was author of the crime. We further concur with the learned Judge on the finding of fact that deceased who was was aged about 50 years and the injury caused was sufficient to cause the death.

19. This takes us to the issue of whether the offence would be punishable under Section 304 part I or part II of the I.P.C.

20. 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."

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

22. 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.

23. 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.

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

25. We are even supported in our decision by the judgment of the Apex Court reported in ***Pardeshiram v. State of M.P***., (2021) 3 SCC 825, where in considering the period of custody undergone, relationship between the appellant and the deceased and the background in which the injuries were caused, sentence directed to be reduced to period already undergone.

26. While going through the record, we are convinced that the punishment of life imprisonment requires to be substituted. The punishment of seven years with remissions while maintaining fine and default sentence will be adequate to the son who must by now repented in life.

27. Appeal is **partly allowed** accordingly.

28. Record and proceedings be sent back to the trial court.

29. This court is thankful to learned counsel for the parties for ably assisting this Court in getting this matter disposed off.

30. Learned Amicus Curiae appointed by Legal Services Committee, who shall be paid all his dues as are admissible.

(2022)01ILR A948
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.12.2021

BEFORE

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

Government Appeal No. 82 of 1987

State of U.P. ...Appellant
Versus
Navaratan Lal & Ors. ...Respondents

Counsel for the Appellant:
A.G.A.

Counsel for the Respondents:
Sri Kameshwar Singh

Criminal Law – Indian Penal Code, 1860 – Section 147,342, 323, 506, 498-A, 307, 376/511,306 & 406 - Accused respondents acquitted of all charges u/s 147,342, 323, 506, 498-A, 307, 376/511,306 & 406 IPC by learned trial court-Appeal- Learned trial court has examined the St.ments of Pws-and rightly concluded in acquittal-sole evidence of victim does not find any corroboration by any independent or impartial witness-rightly concluded that charges leveled are not proved.

Appeal dismissed. (E-9)

List of Cases cited:

1. M.S. Narayana Menon @ Mani Vs St. of Kerala & anr., (2006) 6 S.C.C. 39

2. Chandrappa Vs St. of Karn., reported in (2007) 4 S.C.C. 415

3. St. of Goa Vs Sanjay Thakran & anr., reported in (2007) 3 S.C.C. 75

4. St. of U.P. Vs Ram Veer Singh & ors.s, 2007 A.I.R. S.C.W. 5553

5. Girja Prasad (Dead) by L.R.s Vs St. of MP, 2007 A.I.R. S.C.W. 5589

6. Luna Ram Vs Bhupat Singh & ors., reported in (2009) SCC 749

7. Mookkiah & anr. Vs St. Representatives by the Inspector of Police, Tamil Nadu, reported in AIR 2013 SC 321

8. St. of Karnataka Vs Hemareddy, AIR 1981, SC 1417

9. Shivasharanappa & ors. Vs St. of Karnataka, JT 2013 (7) SC 66

10. St. of Punjab Vs Madan Mohan Lal Verma, (2013) 14 SCC 153

11. Jayaswamy Vs St. of Karn., (2018) 7 SCC 219

12. Shailendra Rajdev Pasvan Vs St. of Gujarat, (2020) 14 SC 750

13. Samsul Haque Vs St. of Assam, (2019) 18 SCC 161

(Delivered by Hon’ble Ajai Tyagi, J.)

1. This appeal under Section 378 (3) of Criminal Procedure Code (in short 'Cr.P.C.'), at the behest of the State, has been preferred against the judgment and order dated 29.9.1986, passed by learned Special & Additional Sessions Judge, Banda in Sessions Trial No.522 of 1985 (State vs. Navratan Lal and others) arising out of Case Crime No.1229 of 1985 under

Secions 147, 342, 323, 506, 498-A, 307, 376/511, 306 & 406 Indian Penal Code (in short 'IPC') along with Section3/4 Dowry Prohibition Act, 1961, Police Station-Kotwali, District-Banda, whereby the learned trial-court acquitted all the accused-respondents of all charges.

2. The brief facts of this case are that a First Information Report was lodged at Kotwali, District-Banda by complainant/ victim with the averments that she was married with Kallu Gupta S/o Navratan Lal before three years ago and the accused persons were not happy with the dowry given in the marriage and they did not want to keep her in their house. After marriage, she lived in her parental house for near about two years and thereafter under pressure of relatives, she was taken to matrimonial home by her husband, but all the accused persons used to torture her for want of additional dowry. On 29.8.1985 at about 6 o'clock in the morning, they all conspired to kill her by pouring kerosene-oil on her and started beating her. Anyhow, she ran away from there and went to the house of her cousin (brother).

3. On the basis of aforesaid report, a Case Crime bearing No.1229 of 1985 was registered at Kotwali, Banda, against all the accused-respondents for aforementioned offences.

4. Investigation of the case was taken up by Investigating Officer, who visited the spot and prepared the site-plan. Medical examination of victim was conducted and her statement under Section 164 Cr.P.C. was recorded by competent Magistrate. After completing the investigation, Investigating Officer has submitted charge-sheet against the accused persons. The case being exclusively triable by court of session was committed for trial to the court of session by competent Magistrate.

5. Learned trial-court framed charges against accused persons under Section 147, 342 read with Section 149, 307 read with Section 149 and Section 498-A read with Section 149 IPC. Additional charge under Section 376 read with Section 511 IPC was framed against Navratan Lal. Accused persons denied charges and claimed to be tried.

6. To bring home the charges, the prosecution produced following witnesses, namely:

1.	Victim	PW1
2.	Laxman Prasad	PW2
3.	Dr. Ashok Upadhyay	PW3
4.	Hawaldar Singh	PW4

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

1.	Written Report	Ex.ka1
2.	F.I.R.	Ex.ka3
3.	Injury Report	Ex.ka2
4.	Site-plan	Ex.ka5

8. After completing prosecution evidence, accused persons were examined under Section 313 Cr.P.C. One witness, namely, Prem Bihari (DW1) was examined by accused persons in defence.

9. We have heard Shri N.K.Srivastava, learned AGA for the State-appellant and perused the record.

10. Before we embark on testimony and the judgment of the Court below, the contours for interfering in Criminal Appeals where accused has been held to be non guilty would require to be discussed.

11. The principles, which would govern and regulate the hearing of an appeal by this Court against an order of acquittal, passed by the trial Court, have been very succinctly explained by the Apex Court in catena of decisions. In the case of ***M.S. Narayana Menon @ Mani vs. State of Kerala and another***, *(2006) 6 S.C.C. 39*, the Apex Court has narrated the powers of the High Court in appeal against the order of acquittal. In para 54 of the decision, the Apex Court has observed as under:

"54. In any event the High Court entertained an appeal treating to be an appeal against acquittal, it was in fact exercising the revisional jurisdiction. Even while exercising an appellate power against a judgment of acquittal, the High Court should have borne in mind the well settled principles of law that where two view are possible, the appellate Court should not interfere with the finding of acquittal recorded by the Court below."

12. Further, in the case of ***Chandrappa vs. State of Karnataka***, reported in *(2007)* 4 S.C.C. 415, the Apex Court laid down the following principles;

"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate Court while dealing with an appeal against an order of acquittal emerge:

[1] An appellate Court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded.

[2] The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

[3] Various expressions, such as,"substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtain extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasis the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

[4] An appellate Court, however, must bear in mind that in case of acquittal there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent Court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial Court.

[5] If two reasonable conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court."

13. Thus, it is a settled principle that while exercising appellate powers, even if two reasonable views/conclusions are possible on the basis of the evidence on record, the appellate Court should not

disturb the finding of acquittal recorded by the trial Court.

14. Even in the case of ***State of Goa vs. Sanjay Thakran and another***, reported in *(2007) 3 S.C.C. 75*, the Apex Court has reiterated the powers of the High Court in such cases. In para 16 of the said decision, the Court has observed as under:

"16. From the aforesaid decisions, it is apparent that while exercising the powers in appeal against the order of acquittal the Court of appeal would not ordinarily interfere with the order of acquittal unless the approach of the lower Court is vitiated by some manifest illegality and the conclusion arrived at would not be arrived at by any reasonable person and, therefore, the decision is to be characterized as perverse. Merely because two views are possible, the Court of appeal would not take the view which would upset the judgment delivered by the Court below. However, the appellate Court has a power to review the evidence if it is of the view that the conclusion arrived at by the Court below is perverse and the Court has committed a manifest error of law and ignored the material evidence on record. A duty is cast upon the appellate Court, in such circumstances, to re-appreciate the evidence to arrive to a just decision on the basis of material placed on record to find out whether any of the accused is connected with the commission of the crime he is charged with."

15. Similar principle has been laid down by the Apex Court in cases of ***State of Uttar Pradesh vs. Ram Veer Singh and others***, *2007 A.I.R. S.C.W. 5553* and in ***Girja Prasad (Dead) by L.R.s vs. State of MP***, *2007 A.I.R. S.C.W. 5589*. Thus, the powers, which this Court may exercise against an order of acquittal, are well settled.

16. In the case of ***Luna Ram vs. Bhupat Singh and others***, reported in *(2009) SCC 749*, the Apex Court in para 10 and 11 has held as under:

"10. The High Court has noted that the prosecution version was not clearly believable. Some of the so called eye witnesses stated that the deceased died because his ankle was twisted by an accused. Others said that he was strangulated. It was the case of the prosecution that the injured witnesses were thrown out of the bus. The doctor who conducted the postmortem and examined the witnesses had categorically stated that it was not possible that somebody would throw a person out of the bus when it was in running condition.

11. Considering the parameters of appeal against the judgment of acquittal, we are not inclined to interfere in this appeal. The view of the High Court cannot be termed to be perverse and is a possible view on the evidence."

17. Even in a recent decision of the Apex Court in the case of ***Mookkiah and another vs. State Representatives by the Inspector of Police, Tamil Nadu***, reported in *AIR 2013 SC 321*, the Apex Court in para 4 has held as under:

"4. It is not in dispute that the trial Court, on appreciation of oral and documentary evidence led in by the prosecution and defence, acquitted the accused in respect of the charges leveled against them. On appeal by the State, the High Court, by impugned order, reversed

the said decision and convicted the accused under Section 302 read with Section 34 of IPC and awarded RI for life. Since counsel for the appellants very much emphasized that the High Court has exceeded its jurisdiction in upsetting the order of acquittal into conviction, let us analyze the scope and power of the High Court in an appeal filed against the order of acquittal. This Court in a series of decisions has repeatedly laid down that as the first appellate court the High Court, even while dealing with an appeal against acquittal, was also entitled, and obliged as well, to scan through and if need be reappreciate the entire evidence, though while hoosing to interfere only the court should find an absolute assurance of the guilt on the basis of the evidence on record and not merely because the High Court could take one more possible or a different view only. Except the above, where the matter of the extent and depth of consideration of the appeal is concerned, no distinctions or differences in approach are envisaged in dealing with an appeal as such merely because one was against conviction or the other against an acquittal. [Vide State of Rajasthan vs. Sohan Lal and Others, (2004) 5 SCC 573]"

18. It is also a settled legal position that in acquittal appeals, the appellate Court is not required to rewrite the judgment or to give fresh reasonings, when the reasons assigned by the Court below are found to be just and proper. Such principle is laid down by the Apex Court in the case of ***State of Karnataka vs. Hemareddy***, *AIR 1981, SC 1417*, wherein it is held as under:

" ... This Court has observed in Girija Nandini Devi V. Bigendra Nandini Choudhary (1967) 1 SCR 93:(AIR 1967 SC 1124) that it is not the duty of the Appellate Court on the evidence to repeat the narration of the evidence or to reiterate the reasons given by the trial Court expression of general agreement with the reasons given by the Court the decision of which is under appeal, will ordinarily suffice."

19. In a recent decision, the Hon'ble Apex Court in ***Shivasharanappa and others vs. State of Karnataka***, *JT 2013 (7) SC 66* has held as under:

"That appellate Court is empowered to reappreciate the entire evidence, though, certain other principles are also to be adhered to and it has to be kept in mind that acquittal results into double presumption of innocence."

20. Further, in the case of ***State of Punjab vs. Madan Mohan Lal Verma***, *(2013) 14 SCC 153*, the Apex Court has held as under:

"The law on the issue is well settled that demand of illegal gratification is sine qua non for constituting an offence under the 1988 Act. Mere recovery of tainted money is not sufficient to convict the accused when substantive evidence in the case is not reliable, unless there is evidence to prove payment of bribe or to show that the money was taken voluntarily as a bribe. Mere receipt of the amount by the accused is not sufficient to fasten guilt, in the absence of any evidence with regard to demand and acceptance of the amount as illegal gratification. Hence, the burden rests on the accused to displace the statutory presumption raised under Section 20 of the 1988 Act, by bringing on record evidence, either direct or circumstantial, to establish with reasonable probability, that the money was accepted by him, other than as a motive or reward as referred to in

Section 7 of the 1988 Act. While invoking the provisions of Section 20 of the Act, the court is required to consider the explanation offered by the accused, if any, only on the touchstone of preponderance of probability and not on the touchstone of proof beyond all reasonable doubt. However, before the accused is called upon to explain how the amount in question was found in his possession, the foundational facts must be established by the prosecution. The complainant is an interested and partisan witness concerned with the success of the trap and his evidence must be tested in the same way as that of any other interested witness. In a proper case, the court may look for independent corroboration before convincing the accused person."

21. The Apex Court recently in ***Jayaswamy vs. State of Karnataka***, *(2018) 7 SCC 219*, has laid down the principles for laying down the powers of appellate court in re-appreciating the evidence in a case where the State has preferred an appeal against acquittal, which read as follows:

"10. It is by now well settled that the Appellate Court hearing the appeal filed against the judgment and order of acquittal will not overrule or otherwise disturb the Trial Court's acquittal if the Appellate Court does not find substantial and compelling reasons for doing so. If the Trial Court's conclusion with regard to the facts is palpably wrong; if the Trial Court's decision was based on erroneous view of law; if the Trial Court's judgment is likely to result in grave miscarriage of justice; if the entire approach of the Trial Court in dealing with the evidence was patently illegal; if the Trial Court judgment was manifestly unjust and unreasonable; and if the Trial Court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of the ballistic expert etc. the same may be construed as substantial and compelling reasons and the first appellate court may interfere in the order of acquittl. However, if the view taken by the Trial Court while acquitting the accused is one of the possible views under the facts and circumstances of the case, the Appellate Court generally will not interfere with the order of acquittal particularly in the absence of the aforementioned factors.

.....It is relevant to note the observations of this Court in the case of Ramanand Yadav vs. Prabhu Nath Jha & Ors., (2003) 12 SCC 606, which reads thus:

"21.There is no embargo on the appellate court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate court to re-appreciate the evidence in a case where the accused has been acquitted, for the purpose of

ascertaining as to whether any of the accused committed any offence or not."

22. The Apex Court recently in ***Shailendra Rajdev Pasvan v. State of Gujarat***, *(2020) 14 SC 750*, has held that the appellate court is reversing the trial court's order of acquittal, it should give proper weight and consideration to the presumption of innocence in favour of accused, and to the principle that such a presumption sands reinforced, reaffirmed and strengthened by the trial court and in ***Samsul Haque v. State of Assam***, *(2019) 18 SCC 161* held that judgment of acquittal, where two views are possible, should not be set aside, even if view formed by appellate court may be a more probable one, interference with acquittal can only be justified when it is based on a perverse view.

23. The victim has levelled allegations against all the accused persons/respondents that they tortured her for want of additional dowry and tried to kill her by pouring kerosene oil on her body. It is also the charge against the accused Navratan Lal that he tried to commit rape also with the victim. To prove the allegations made against the respondents, prosecution has produced two witnesses of facts, namely, the victim (PW1) and Laxman Prasad (PW2). Laxman Prasad, who has examined as PW2 is cousin of the victim. Learned trial court has scrutinized his testimony and put the conclusion that he was interested witness. It is concluded by the trial court that he is not the eye-witness of the facts, which took place inside the house of the victim. It is admitted fact in defence that PW2 was not present inside the house of the victim, therefore, learned trial court has rightly opined that he could not depose the version of facts, which took place inside the house. Moreover, his testimony was not found reliable. Learned trial-court has examined the statement of victim (PW1) also and concluded that there are several contradictions in her evidence and statements under Sections 161 and 164 Cr.P.C.

24. We also threadbare examined the statements of witnesses of fact. Victim (PW1) has nowhere mentioned the demand of additional dowry in the form of the gold and her torture in her statement under Sections 161 and 164 Cr.P.C. There is no evidence of fact that when she ran out of her home, anybody saw her. It is alleged by the victim that she ran out from her in-laws house and reached to the house of her cousin (brother), but no such witness is produced by prosecution, who had seen her between the two houses. Laxman Prasad (PW2) is her cousin and admittedly he is not the eye-witness of the facts relating to alleged offences inside the house of the victim. The sole evidence of victim does not find any corroboration by any independent or impartial witness. There is no evidence of this fact also on the record that after coming out of the house of her in-laws, the victim had raised any alarm or any hue and cry outside the house, which seems unnatural. Hence, keeping in view the evidence put forward by PW1 and PW2 as also the conduct of the victim, learned trial-court has rightly concluded that charges levelled against the respondents are not proved.

25. In view of above, we are of the considered opinion that no two views are possible and we cannot take different view from that taken by the learned trial-court. We also do not find any infirmity in the impugned judgment and order, therefore,

we have no other option, but to concur with the findings recorded by the learned trial Judge.

26. The appeal lacks merit and is **dismissed**, accordingly.

27. The record and proceedings be sent back to the court-below.

(2022)01ILR A955
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.01.2022

BEFORE

THE HON'BLE SUNEET KUMAR, J.
THE HON'BLE BRIJ RAJ SINGH, J.

Government Appeal No. 2781 of 2012

State of U.P. ...Appellant
Versus
Samar Nath Yadav & Ors. ...Respondents

Counsel for the Appellant:
A.G.A.

Counsel for the Respondents:
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(A) Criminal Law - Government Appeal - Appeal against acquittal - Indian Penal Code, 1860 - Sections 147,148,149,302/149,506 - The Code of criminal procedure, 1973 - Section 313 - Criminal law ammendment Act - section 7 (Para -)

Dispute regarding construction of house on the residential lease land between the accused and cousin brother of the complainant - Accused stopped the construction on the disputed land - threatened to kill in case construction would be done - accused after trial was acquitted - hence present appeal.(Para - 1to5)

HELD:-Prosecution failed to prove the case beyond reasonable doubt . P.W.-1 and P.W.-2 shattered their case in cross examination. Complainant did not receive a single injury. Prosecution failed to establish the case and the circumstances beyond reasonable doubt. **Leave to appeal application rejected.**(Para -16,17)

Appeal dismissed. (E-7)

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

1. The present appeal has been filed against the judgment and order of acquittal of the accused-respondents dated 07.04.2012 passed by learned Additional Sessions Judge, Court No.3, Jaunpur in Sessions Trial No.256 of 2003 (State Vs. Samar Nath and others), arising out of Case Crime No.892 of 2002, for offences under Sections 147, 302/149 I.P.C., Police Station Kotwali, District Jaunpur.

2. As per prosecution case, Rajeev Ratan lodged first information report alleging that there is a dispute regarding construction of house on the residential lease land between the accused and cousin brother of the complainant. Accused stopped the construction on the disputed land and threatened to kill in case construction would be done. Complainant, further alleged that while coming along with his father Dr. Bhagwan Das from the city on 09.11.2002 and as soon as, they reached Nai Ganj Tiraha at 4.15 evening, accused Samar Nath, Lal Sahab, Shailesh, Raju Yadav and Suraj stopped the complainant and his father. Accused started beating his father with iron rod, hockey stick. In the meantime, Lallan Yadav, Anil Kumar and younger brother of the complainant Sanjeev Ratan came on the spot and accused ran away. The complainant brought his injured father to

Sadar Hospital, where he was medically examined and referred to Varanasi. On the way to Varanasi, his father succumbed to the injury. The F.I.R. was lodged under Sections 147, 148, 149, 506 I.P.C. and Section 7 Criminal Law Amendment Act. Investigating Officer investigated the case and submitted the charge sheet.

3. Case was committed by the Chief Judicial Magistrate and thereafter the charges were framed by the Sessions Court. The prosecution produced seven witnesses i.e. P.W.-1 Rajeev Ratan, P.W.-2 Sanjeev Ratan, P.W.-3 (S.I.) P.P. Shukla, P.W.-4 Dr. Prem Bahadur Gautam, P.W.-5 Dr. Awadhesh Kumar, P.W.-6 (Inspector) Surendra Tiwari and P.W.-7 (S.I.) Uma Shankar Pandey.

4. The accused were afforded opportunity under Section 313 Cr.P.C. They pleaded not guilty and stated before the Court that they were falsely implicated due to enmity. The accused also produced the document of Case Crime No.771 of 1997, under Sections 323, 325, 504, 506 I.P.C. and the charge sheet (Exhibit Kha-1).

5. The trial court conducted the trial and after recording the statement of witnesses and upon examining the evidences on record, the accused were acquitted. Hence, the present appeal.

6. We have heard learned A.G.A. and perused the lower court record with the assistance of learned counsel.

7. The doctor has found eight injuries on the body of the deceased, which are as under:-

(i) Lacerated wound 2 cm x 0.2 cm x bone deep on top of skull 15 cm behild left eyebrow. Fresh blood ozzing.

(ii) Lacerated wound 3 cm x 0.2 cm x bone deep on left side skull. 3 cm left to injury no.1. Fresh blood ozzing.

(iii) Contusion 3 cm x 2 cm on right side skull, 7 cm above right ear.

(iv) Lacerated wound 1 cm x 0.5 cm x muscle deep on upper lip just below nostril. Bleeding from left nostril.

(v) Lacerated wound 3 cm x 2 cm x bone deep on anterior aspect of little finger of right hand. Fresh blood ozzing.

(vi) Abraded contusion 5 cm x 3 cm on left side chest 8 cm above & left to umbilicus.

(vii) Traumatic Swelling 15 cm x 10 cm on and arround right ankle joint.

(viii) Traumatic swelling 14 cm x 8 cm on and around left ankle joint.

Injury nos.4 and 6 are simple in nature, whereas, x-ray was advised for injury nos.3, 5, 7 and 8. As per post-mortem report, it was opined by the doctor that death occured due to excessive bleeding caused by anti-mortem injuries.

8. P.W.-1, Rajeev Ratan and P.W.-2, Sanjeev Ratan are the witnesses of fact, whereas, P.W.-3 to P.W.-7 are formal witnesses. P.W.-1 and P.W.-2 have stated the same facts in examination-in-chief which was narrated by P.W.1 (the complainant) in the F.I.R.

9. We have to examine whether prosecution proved the case beyond reasonable doubt against the accused. It is admitted case that P.W.-1 Rajeev Ratan and his father Dr. Bhagwan Das were coming togther on a scooter. Dr. Bhagwan Das was inflicted injuries by the accused but complainant, who was also accompanying, did not receive a single injury. As per statement of complainant, his father died of serious injuries, but the complainant did not receive even a scratch

on his body. It is, thus, obvious that the presence of P.W.-1 is highly doubtful at the place of occurrence/incident.

10. Accused, Samar Nath Yadav was armed with rifle and hockey stick and Sahilesh was armed with gun and hockey stick, but medical report indicates that no fire arm injury was found on the body of the deceased. If there was an intention to kill Bhagwan Das, the accused would have in all probability caused firearm injury. It is also unnatural to believe that accused were armed with firearm in one hand and hockey stick in another hand.

11. The deceased was brought to the Hospital and the entry made in the register was an accidental case. P.W.-4 Dr. Prem Bahadur Gautam was examined who admitted the said fact. P.W.-4 deposed that no firearm injury was found and all the injuries were caused with blunt object.

12. P.W.-5, Dr. Awadhesh Kumar, conducted the post-mortem admitted in cross examination that there was possibility that injuries could have been caused in an accident.

13. P.W.-1, Rajeev Ratan admitted that his father died when he was carrying him to Varanasi and then he came back to Police Station Kotwali, District Jaunpur, and handed the written Tahrir. F.I.R. was lodged at 9.30 in the night on the same day. F.I.R. is belated. As per prosecution case, P.W.-1, Rajeev Ratan and P.W.-2, Sanjeev Ratan both sons of the deceased were present in the hospital at 5 o'clock in the evening at Jaunpur, but nobody lodged the F.I.R. In all probability F.I.R. was lodged on consultation and afterthought.

14. After death of the deceased, the body was brought to Police Station Kotwali, but no *Panchayatnama* was done, rather *Panchayatnama* was done on the next day i.e. 10.11.2002 in the mortuary. The dead body, if present at Police Station, the *Panchayatnama* was not done, for which, no explanation has been furnished. The Investigating Officer, Surendra Tiwari was also examined before the Court, who admitted that he got information about the death of deceased at 10 o'clock in the night of 09.11.2002. He did not inspect the spot and went to the place of occurrence on the next day. He prepared the site plan. Entire exercise was done after 15 hours from the incident. The hockey stick was not sent for expert examination. After four days from the date of incident Raju Yadav was taken on remand by the police. The belated recovery of hockey stick weakened the prosecution case.

15. P.W.-3 to P.W.-7 are formal witnesses, they proved the documents prepared by them.

16. The prosecution failed to prove the case beyond reasonable doubt. P.W.-1 and P.W.-2 shattered their case in cross examination. The complainant did not receive a single injury, who was accompaning the deceased on the scooter. The opinion and finding of trial court calls for no interference. The prosecution failed to establish the case and the circumstances beyond reasonable doubt.

17. Accordingly, leave to appeal application is **rejected**. In consequence, the appeal is also **dismissed**.

(2022)01ILR A958
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.12.2021

BEFORE

THE HON'BLE SUNEET KUMAR, J.
THE HON'BLE BRIJ RAJ SINGH, J.

Govt. Appeal No. 5120 of 2017

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

Counsel for the Petitioner:
A.G.A.

Counsel for the Respondents:
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(A) Criminal Law - Government appeal - Appeal against acquittal - Indian Penal Code, 1860 - Sections 302/120B & 307 - The Code of criminal procedure, 1973 - Section 313.

Mother of accused - witness in a triple murder case - Assault enacted by causing firearm injury by the son of his mother - to enable enlargement of his brother on bail **-** trial court summoned accused respondent to face trial trial - court acquitted the accused - Hence, appeal.

HELD:-Alleged conspiracy hatched by accused/complainant not proved , no firearm recovered, thus, the entire prosecution becomes doubtful. Trial court rightly recorded that the prosecution (I.O.) failed to produce evidence against the accused, rather the witnesses are unbelievable, false and were set up in connivance with the accused in triple murder case, in which the deceased was a witness and pursuing the case. Her son (accused) falsely implicated by the I.O. to favour the accused in the triple murder case. I.O. committed serious lapse while discharging his duties as an Investigating Officer. Mechanically submitted the charge sheet against the complainant/accused . Direction issued to initiate disciplinary proceedings against the officials . Application seeking leave to appeal is rejected. (Para - 14,20,21,23)

Appeal dismissed. (E-7)

List of Cases cited:-

1. Sahabuddin & anr. Vs St. of Assam , (2012) 13 SCC 213)

2. Gajoo Vs St. of Uttarakhand , (2012) 9 SCC 532

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

1. This government appeal has been preferred against the judgment dated 12 June 2017 passed by the Additional Sessions Judge, Khurja Nagar Bulandshahr in Sessions Trial No. 519 of 2015 (State of U.P. Vs. Gajju), arising out of Case Crime No. 528 of 2014 for offences under Sections 302/120B I.P.C., Police Station Khurja Nagar, District Bulandshahr, by which the sole accused respondent has been acquitted.

2. Gajju/accused lodged a report on 28.06.2014 being Case Crime No. 528 of 2014 at 5:15 p.m., under Section 307 I.P.C. (altered to Section 302 I.P.C., on 28.06.2014 during investigtion). As per prosecution case, the complainant had gone in pairavi of a case to the District Court, Bulandshahr, and was informed by his Bhabhi Omvati (D.W. -1)) that around 4 p.m., Bachchu, son of Sheeshram, Sukhvir, son of Bachchu Singh, Gaurav, son of Surendra @ Pappu, caused fire arm injury in the stomach of his mother (Sukhveeri) who had gone to fetch Kanda (cow dung cake). His niece Meenu (D.W. -2) was with his mother. He further mentioned that the nominated accused had killed four persons in the year 2010, in some other case, in which his mother (Sukhveeri), was a

witness. The firearm injury was caused with an intention to eliminate the witness.

3. The inquest was done on 29.06.2014 at 8:30 a.m.. (Exhibit Ka-6) and post mortem was also conducted on 29.06.2014 (Exhibit -Ka-3) at 12:30 p.m. The statement of some witnesses was recorded by the Investigating Officer (IO) on 14.08.2014 and the complainant (Gajju) was made an accused and charge sheet was submitted against him, exonerating all the accused named in the F.I.R.

4. The trial court summoned the accused respondent to face trial. After going through the records, as well as, the statements of the witnesses, the trial court acquitted the accused. Hence, the present appeal.

5. We have heard Sri R.P. Shukla, learned A.G.A. for the State appellant and perused the record with the assistance of the learned counsel.

6. Prosecution, in order to prove the charge, produced the witnesses P.W. -1 (Rajkumar), P.W. -2 (Dileep @ Guddan), P.W. -3 (Jaipal), P.W. -4 (Constable Clerk 1021 Ratanpal), P.W. -5 (Virendra Singh), P.W. -6 (Dr. Vinod Kumar Nirichetak), P.W. -7 (S.I. Brajpal Singh), P.W. -8 (Shatrughna Upadhyay) and P.W. -9 (Sudhir Kumar Tyagi) (the IInd I.O.).

7. The accused was confronted with the prosecution evidence and the circumstances under Section 313 Cr.P.C. He denied all the charge and stated that he was falsely implicated..

8. The accused produced witnesses, D.W. -1 (Omvati) (Bhabhi of the accused) and D.W. -2 (Meenu) (niece of the accused), in defence.

9. P.W. -1 (Rajkumar), P.W. -2 (Dileep @ Guddan), P.W. -3 (Jaipal) and P.W. -5 (Virendra Singh), are witnesses of fact. They deposed that the accused respondent murdered his mother. There was enmity between respondent accused and the nominated accused in the F.I.R. All the four witnesses stated that the accused (Gajju) wanted to help his elder brother, namely, Kunwarpal, who was in jail in a case for offence under Section 302 I.P.C. Gajju (accused) wanted to fabricate a false case under Section 307 I.P.C., by causing injury to his mother, so that his elder brother Kunwarpal could be bailed out.

10. The record reveals that the second I.O. (Sudhir Kumar Tyagi) had recorded the statements of P.W. -1 (Rajkumar), P.W. -2 (Dileep @ Guddan), P.W. -3 (Jaipal) and P.W. -5 (Virendra Singh), on 14.08.2014 and the entire case was turned topsy turby, the complainant Gajju was made an accused. The I.O. in a casual manner investigated the crime; the theory that the assault was enacted by causing firearm injury by the son of his mother to enable enlargement of his brother on bail is an improbable. The record further indicates that there is long standing enmity between the accused respondent and the family of Bachchu Singh nominated in the F.I.R.

11. It is pertinent to note here that Kunwarpal, (the elder brother of the accused) was implicated in a cross case being Case Crime No. 718 of 2010, Police Station Khurja Nagar. P.W. -3 (Jaipal) and P.W. -5 (Virendra Singh), are nominated accused in that case at Serial Nos. 6 and 10 respectively, which is admitted by them in

cross examination. P.W. -1 (Rajkumar) has been convicted with a sentence for five years in a case for offence under Section 307, 504, 506 I.P.C. P.W. -1 does not belong to the village of the accused and he has a relation with Bachchu Singh.

12. The defence produced the bail order (Exhibit 42Kha/2), which indicates that Kunwarpal was bailed out on 20.06.2014 by the order of the Sessions Judge, Bulandshahr. It is thus clear that eight days prior to the date of incident, bail was granted to Kunwarpal; there was no occasion for the respondent accused to stage a false case by causing firearm injury, in the stomach (vital part) of his own mother.

13. Mother of the accused, namely, Sukhveeri, was witness in a triple murder case, wherein the nominated persons, in the F.I.R., were accused. Four Investigating Officers, conducted the investigation from 28.06.2014 to 16.06.2015, but the statement of P.W. -1, P.W. -2, P.W. -3 and P.W. -5, were recorded on a single day i.e. on 14.08.2014 and the respondent herein was made an accused.

14. The alleged conspiracy hatched by Gajju with the help of Siril @ Sunil, has not been proved, Siril @ Sunil was attributed the role of causing firearm injury to the mother of Gajju, but no firearm was recovered, thus, the entire prosecution becomes doubtful.

15. The prosecution miserably failed to prove the case beyond reasonable doubt.

16. We record our displeasure in the manner investigation was undertaken in the instant case. The I.O. appears, is unaware how investigation is done, which we are not prepared to accept being thana incharge. It is a case of serious dereliction of duty undertaken with ulterior motive, which is writ large from the facts and materials placed on record.

17. The incident is of 28.6.2014, F.I.R. came to be lodged promptly by the accused at 5:15 P.M. on being informed by his bhabhi, Omwati (D.W. -1) on mobile that his mother was shot by the nominated accused. Meenu (D.W. -2) daughter of D.W. -1 was with the deceased at the time of the incident. The first I.O. Brijpal Singh (P.W. -7) recorded the statement of the complainant/accused and other independent witnesses. They supported the prosecution case. The F.I.R. was initially lodged under Section 307 I.P.C., but upon the death of the deceased it was converted to Section 302 I.P.C. The investigation came to be transferred to the thana incharge Sudhir Kumar Tyagi (P.W. -9) on 29.6.2014. For the next forty five days until 14.8.2014, he did nothing except perusing the panchayatnama, post mortem report and recorded the statement of the earlier I.O. and the Constables. Thereafter, recording the statements of independent witnesses (P.W. -1, P.W. -2, P.W. -3 and P.W. -5) implicating the complainant/accused of having committed the crime. In examination the I.O. (P.W. -9) admitted that he had not paid attention to the statement of the complainant/accused and the two other witnesses recorded by his predecessor. He admitted that he had not recorded the statement of Omwati (D.W. -1) who informed the complainant/accused of the incident. Nor did he record the statement of the deceased or her grand daughter (D.W. -2) who claims to be the occular witness. He did not visit the hospital to record the statement of the doctor who examined the injuries of the

deceased. The I.O. (P.W.-9) admits that he was present in the thana at the time of the incident. The I.O. further admitted that he did not enquire whether there was any enmity between the deceased and the nominated accused. He ignored the crime case (718/2010) stated in the complaint. The deceased was a witness in the murder case. P.W. -3 and P.W. -5 are accused in the said case, who were set up by Bachchu Singh.

18. The theory set up by the I.O. (P.W. -9) for commission of the offence by the complainant/accused was that he wanted to stage a crime by causing firearm injury on the non-vital part of his mother, to ensure the enlargement of his brother Kunwarpal on bail. The theory fell flat as Kunwarpal was ordered to be enlarged on bail on 20.6.2014 i.e. eight days prior to the incident (28.6.2014). Siril @ Sunil was set up as an accomplice with the complainant to have committed the offence, read with Section 120 I.P.C. The investigation against Siril is probably inconclusive, the weapon employed in the commission of the offence has not been recovered.

19. The investigation finally came to be transferred to I.O. Shatrughna Upadhyay (P.W. -8) on 28.4.2015 who upon perusal of the case diary mechanically submitted the charge sheet against the complainant/accused on 16.6.2015.

20. In the circumstances the trial court has rightly recorded that the prosecution (I.O.) failed to produce evidence against the accused, rather the witnesses are unbelievable, false and were set up in connivance with the accused in triple murder case, in which the deceased was a witness and pursuing the case. Her son (accused) was falsely implicated by the I.O. to favour the accused in the triple murder case.

21. After going through the entire record of the instant appeal, we are convinced that the I.O. (Sudhir Kumar Tyagi) has committed serious lapse while discharging his duties as an Investigating Officer. The investigation is designedly defective and there was deliberate attempt on the part of the I.O. to misdirect evidence in connivance with the nominated accused by setting up interested witnesses, implicating the complainant as an accused.

22. The Supreme Court in **Sahabuddin and another vs. State of Assam (2012) 13 SCC 213)** directed disciplinary action against the erring Investigating Officer, as well as, the Medical Expert, relying upon an earlier decision rendered in **Gajoo vs. State of Uttarakhand, (2012) 9 SCC 532.** Paragraph 33 is extracted:

"In view of the above settled position of law, we hereby direct the Director General of Police, State of Assam and the Director General of Health Services, State of Assam to take disciplinary action against PW-1 and PW-11, whether they are in service or have since retired. If not in service, action shall be taken against them for deducting/stoppage of pension in accordance with the service rules. However, the plea of limitation, if any under the relevant rules would not operate, as the departmental enquiry shall be conducted in furtherance of the order of this Court."

23. Having regard to the conduct of I.O. Sudhir Kumar Tyagi (P.W. -9) and the

I.O. Shatrughna Upadhyay (P.W. -8), we direct the Director General of Police, U.P., to initiate disciplinary proceedings against the aforenoted officials, if in service. It is clarified that in the event the officers have retired on attaining the age of superannuation, the embargo of limitation, if any under the rules would not operate and be an impediment. The departmental enquiry shall be conducted in furtherance of the order of this Court for deducting/stoppage of pension.

24. In such peculiar facts and circumstances, as discussed above, we are unable to persuade ourselves in taking a different opinion than that of the trial court.

25. The prayer for leave to appeal is consequently, refused. The application seeking leave to appeal is **rejected.**

26. The appeal, in consequence, stands **dismissed**, however with the above directions.

27. The Registrar General to ensure compliance of the order.

(2022)01ILR A962
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 10.12.2021

BEFORE

THE HON'BLE RAKESH SRIVASTAVA, J.
THE HON'BLE SHAMIM AHMED, J.

Misc. Bench No. 28898 of 2021

Tribhuwan Verma ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Bhup Chandra Singh, Shiwa Sagar Singh

Counsel for the Respondents:
C.S.C., Jaibind Singh Rathour, Tanay Hazari

A. Practice & Procedure - Indian Constitution, 1950 - Article 226 - In the present case, the petitioner being a complainant fails to establish any legal right or able to show any breach of statutory duty on the part of authorities. Thus he has no locus to prefer the present writ. (Para 9 & 12)

Writ Petition Rejected. (E-10)

List of Cases cited:

1. Ravi Yashwant Bhoir Vs Collector (2012) 4 SCC 407 *(followed)*

2. Dharam Raj Vs St. of U.P. 7 ors (2010) 2 AWC 1878 (All) *(followed)*

3. Ayaaubkhan Noorkhan Pathan Vs St. of Mah. & ors. AIR 2013 SC 58

(Delivered by Hon'ble Shamim Ahmed, J.)

1. Heard Shri Bhup Chandra Singh, learned counsel for the petitioner, Shri Tanay Hazari, learned counsel for respondent no. 2 and learned Standing counsel for State-respondent no.1.

2. In view of the order proposed to be passed, notice to respondent no.3 is dispensed with.

3. This writ petition has been filed praying inter alia the following reliefs:-

(i) Issue a writ , order or direction in the nature of certiorari thereby set aside the letter no. 8582-89/2021-22 dated 08.09.2021 passed by opposite party no.2/District Basic Education Officer, Sultanpur because the opposite party no. 2 without investigating the matter seriously and also ignoring the material facts and documents available on record which was provided before him by the petitioner

regarding the selection of opposite party no.3 on the post of Assistant Teacher fraudulently at Primary School Nonara, Block-Kadipur, Sultanpur on the basis of forged and fabricated documents likewise date of birth mentioned as 10.04.1983 in the High School Marksheet which was regularly passed out and another Marksheet of High School bearing date of birth is 20.03.1984 in the interest of justice.

(ii) Issue a writ, order or direction in the nature of mandamus thereby directing the concerned authority to terminate the service of the private opposite party no. 3 presently working as Assistant Teacher at Primary School Nonara, Block-Kadipur, Sultanpur on the basis of forged and fabricated documents in the interest of justice.

4. Learned counsel for the petitioner submits that respondent no.3 namely Pradeep Kumar took admission in class 1st at Primary School Daulatpur, Jaisinghpur, Sultanpur and studied upto 5th class. His date of birth has been mentioned as 10.04.1983 in the school records. He studied from 6th to 10th class at Subhash Inter College, Paliya, Sultanpur and passed High School examination in the year 1999 and in T.C. of High School, his date of birth is mentioned as 10.4.1983.

5. It was further argued by the learned counsel for the petitioner that respondent no.3 studied from class 6th to 8th at Munna Misr Laghu Madhymic School, Misrauli, Jaisinghpur, Sultanpur and passed 8th class in the year 1997, but with fraudulent intention in order to reduce his age, he has mentioned his date of birth as 20.3.1984 in the school's documents. Thereafter he has passed 9th and 10th class as private candidate in the year 2000 from Janta Inter College, Belhari, Sultanpur on the aforesaid date of birth and thereafter regularly passed 11th and 12th class in the year 2001-2002 from the aforesaid school on the same date of birth i.e. 20.3.1984. Further the respondent no. 3 took admission as regular student in I.T.I. course in the year 2000 to 2002 and simultaneously he was also pursuing studies as regular student of class 11th and 12th in the same year. Learned counsel for the petitioner submitted that it is very surprising that how respondent no. 3 can attend classes simultaneously at two places , which is against the rules.

6. Learned counsel for the petitioner further argued that the respondent no.3 on the basis of forged and fabricated documents and wrong date of birth was appointed on the post of Assistant Teacher by the Uttar Pradesh Basic Shiksha Parishad and was regularly promoted and is presently working as Head Master, as such his appointment be cancelled and the salary paid to him be recovered by the State authorities.

7. It was further argued by the learned counsel for the petitioner that letters dated 29.6.2021 and 21.11.2020 were sent by the petitioner mentioning each and every fraudulent activities of respondent no.3 with documentary evidence to the respondent No. 2, who decided the same exculpating the respondent no.3 without applying fair and legal mind in connivance with him with ulterior motives and the allegation levelled by the petitioner was ignored and no action was taken by the concerned Basic Shiksha Adhikari against the respondent No.3 and the finding was given that his date of birth is correct.

8. Per contra, learned counsel appearing for respondent nos. 1 and 2 submits that petitioner has no locus to file the present writ petition challenging the appointment of respondent no. 3 as he is not aggrieved person nor he has any concern with the fraud committed by respondent no.3 who got enrolled with different date of birth in two schools simultaneously and in this regard after due enquiry the Basic Shiksha Adhikari has given finding that the date of birth of respondent no.3 is not forged and the representation of the petitioner was rejected by the authorities concerned after due verification. Further the present writ petition is not a Public Interest Litigation nor there is any prayer for a writ of quo warranto.

9. After considering the arguments advanced by the learned counsel for the parties and after perusal of the record, we find that for a person to prefer the writ petition, has to establish that he has been deprived of or denied of a legal right and he has sustained injury to any legally protected interest. Thus in order to prefer a writ, the person entitled would be one who has either been wrongly deprived of his entitlement which he is legally entitled to receive and it does not include any kind of disappointment or personal inconvenience. It is settled proposition of law that the person who suffers from legal injury only can challenge the act or action or order by filing a writ petition inasmuch as the writ petition under Article 226 of Constitution of India is maintainable for enforcing a statutory or legal right or when there is a complaint by the petitioner that there is breach of statutory duty on the part of authorities. Thus, there must be a judicially enforceable right for the enforcement of which the writ jurisdiction can be resorted to and not for the purpose of settlement of a personal grievance. In the present case, the petitioner fails to establish his any legal right or able to show any breach of statutory duty on the part of authorities.

10. The same view was observed by the Hon'ble Supreme Court in the case of **Ravi Yashwant Bhoir Vs. Collector, (2012) 4 SCC 407** with regard to the locus of a complainant and was pleased to observe as under:-

"58. Shri Chintaman Raghunath Gharat, Ex- President was the complainant, thus, at the most, he could lead the evidence as a witness. He could not claim the status of an adversial litigant. The complainant cannot be the party to the lies. A legal right is an averment of entitlement arising out of law. In fact, it is a benefit conferred upon a person by the rule of law. Thus, a person who suffers from legal injury can only challenge the act or omission. There may be some harm or loss that may not be wrongful in the eyes of law because it may not result in injury to a legal right or legally protected interest of the complainant but juridically harm of this description is called damnum sine injuria.

59. The complainant has to establish that he has been deprived of or denied of a legal right and he has sustained injury to any legally protected interest. In case he has no legal peg for a justiciable claim to hang on, he cannot be heard as a party in a lies. A fanciful or sentimental grievance may not be sufficient to confer a locus stand to sue upon the individual. There must be injuria or a legal grievance which can be appreciated and not a stat pro rationed valuntas reasons.

60. Under the garb of being necessary party, a person cannot be permitted to make a case as that of general public interest. A

person having a remote interest cannot be permitted to become a party in the lies, as the person wants to become a party in a case, has to establish that he has a proprietary right which has been or is threatened to be violated, for the reason that a legal injury creates a remedial right in the injured person. A person cannot be heard as a party unless he answers the description of aggrieved party."

11. The same view was taken by the Division Bench of this Court in the case of **Dharam Raj Vs. State of U.P and others, (2010) 2 AWC 1878 (All)** with respect to the locus of complainant and was pleased to observe as under:-

"9. As evident from narration of the facts given above, it is evident that the petitioner was one of the complainants in the complaint against the respondent No. 4 on 12.3.2008. The action has since been taken on the complaint so made by the petitioner and others against the respondent No. 4, and fine of Rs. 5,000 has been imposed.

10. In the circumstances, the petitioner cannot have any grievance in the matter, and he is not an aggrieved person rather he is a person annoyed,

11. In the case of R. v. London Country Keepers of the Peace of Justice, (1890) 25 QBD 357, the Court has held:

A person who cannot succeed in getting a conviction against another may be annoyed by the said findings. He may also feel that what he thought to be a breach of law was wrongly held to be not a breach of law by the Magistrate.

He thus may be said to be a person annoyed but not a person aggrieved, entitle to prefer an appeal against such order.

12. According to our opinion a "person aggrieved" means a person who is wrongly deprived of his entitlement which he is legally entitled to receive and it does not include any kind of disappointment or personal inconvenience. "Person aggrieved" means a person who is injured or he is adversely affected in a legal sense.

13. It is settled law that a person who suffers from legal injury only can challenge the act/action/order etc. by filing a writ petition. Writ petition under Article 226 of the Constitution is maintainable for enforcing a statutory or legal right or when there is a complaint by the petitioner that there is a breach of the statutory duty on the part of the authorities. Therefore, there must be a judicially enforceable right for the enforcement of which the writ jurisdiction can be resorted to. The Court can enforce the performance of a statutory duty by public bodies through its writ jurisdiction at the behest of a person, provided such person satisfied the Court that he has a legal right to insist on such performance. The existence of the said right is the condition precedent to invoke the writ jurisdiction [Utkal University etc. v. Dr. Nrusingha Charan Sarangi and Ors. AIR 1999 SC 943 and Laxminarayan R. Bhattad and Ors. v. State of Maharashtra and Anr. (2003) 5 SCC 413].

14. Legal right is an averment of entitlement arising out of law. It is, in fact, an advantage or benefit conferred upon a person by a rule of law, [Shanti Kumar R. Canji v. Home Insurance Co. of New York AIR 1974 SC 1719 and State of Rajasthan v. Union of India and Ors. AIR 1977 SC 1361).

15. In Jasbhai Motibhai Desat v. Roshan Kumar Hazi Bashir Ahmad and Ors.: AIR 1976 SC 578, the Apex Court has held that only a person who is aggrieved by

an order, can maintain a writ petition. The expression "aggrieved person" has been explained by the Apex Court observing that such a person must show that he has a more particular or peculiar interest of his own beyond that of the general public in seeing that the law is properly administered. In the said case, a cinema hall owner had challenged the sanction of setting up of a rival cinema hall in the town contending that it would adversely affect monopolistic commercial interest, causing pecuniary harm and loss of business from competition. The Hon'ble Apex Court observed as under:

Such harm or loss is not wrongful in the eye of law because it does not result in injury to a legal right or a legally protected interest, the business competition causing it being a lawful activity. Judicially, harm of this description is called damnum sine injuria. The term injuria being here used in its true sense reason why law suffers a person knowingly to inflict harm of this description on another, without holding him accountable for it, is that such harm done to an individual is a gain to society at large. In the light of the above discussion, it is demonstratively clear that the appellant has not been denied or deprived of a legal right. He has not sustained injury to any legally protected interest. In fact, the impugned order does not operate as a decision against him, much less does it wrongfully effect his title to something. He has not been subjected to legal wrong. He has suffered no grievance. He has no legal peg for a justiciable claim to hang on. Therefore, he is not a "person aggrieved" to challenge the ground of the no objection certificate."

In Northern Plastics Ltd. v. Hindustan Photo Films Mfg Co. Ltd. and Ors. MANU/SC/1151/1997 MANU/SC/ 1151/1997 : (1997) 4 SCC 452, the Hon'ble Supreme Court again considered the meaning of "person aggrieved" and "locus of a rival Government undertaking" and held that a rival businessman cannot maintain a writ petition on the ground that its business prospects would be adversely affected.

16. The view taken by us that the petitioner is not a person aggrieved, thus he has no locus standi to file the present writ petition thereby challenging the order dated 16.3.2009 passed by Sub-Divisional Magistrate, Jaisinghpur, district Sultanpur is also supported by the decision of this Court in the case of Suresh Singh v. Commissioner Moradabad Division 1993 (1) AWC 601, where it was held that in an inquiry under Section 95(g) of the U.P. Panchayat Raj Act, 1947, the complainant who was Up-Pradhan could be a witness in. an inquiry but had no locus standi to approach this Court against the order of the State authorities, for the reasons that none of his personal statutory right are affected.

17. As such the petitioner has no focus standi to file the present writ petition under Article 226 of the Constitution of India. Even otherwise having regard to the facts and circumstances of the case, we are not inclined to exercise our discretionary jurisdiction under Article 226 of the Constitution of India."

12. When the facts of the instant case are tested on the touchstone of the law laid down in the aforesaid two judgments, it clearly comes out that the petitioner has no legal right of his own and neither has suffered from any legal injury, rather is only a complainant, and thus would not have any locus to prefer the present petition.

13. Further the Hon'ble Supreme Court in the case of **Ayaaubkhan Noorkhan Pathan Vs. State of**

Maharashtra and others, AIR 2013 SC 58 was pleased to observe in paragraph 22 that under ordinary circumstances, a third person, having no concern with the case at hand, cannot claim to have any locus-standi to raise any grievance whatsoever but in the exceptional circumstances, the Court may examine the issue and in exceptional circumstances the Court may proceed suo-motu. For the sake of convenience, the relevant observations in the case of **Ayaaubkhan Noorkhan Pathan (supra)** are reproduced as under:-

"22. Thus, from the above it is evident that under ordinary circumstances, a third person, having no concern with the case at hand, cannot claim to have any locus-standi to raise any grievance whatsoever. However, in the exceptional circumstances as referred to above, if the actual persons aggrieved, because of ignorance, illiteracy, in articulation or poverty, are unable to approach the court, and a person, who has no personal agenda, or object, in relation to which, he can grind his own axe, approaches the court, then the court may examine the issue and in exceptional circumstances, even if his bonafides are doubted, but the issue raised by him, in the opinion of the court, requires consideration, the court may proceed suo-motu, in such respect."

14. This Court has gone through the entire petition and no such averment has been made anywhere in the entire petition that the actual aggrieved persons because of ignorance, illiteracy, in articulation or poverty are unable to approach the Court and in those circumstances the petitioner has approached this Court. Thus, the present case would not stand the exceptional circumstances as have been spelt out by the Apex Court in the cases of **Ayaaubkhan Noorkhan Pathan (supra) and Dharm Raj (supra).**

15. Accordingly, we find that the petitioner has no locus to file the present writ petition challenging the appointment of respondent no.3 as he is not an aggrieved person nor he has any concern with the fraud alleged to have been committed by respondent no.3. The objection raised by the learned counsel for respondent nos.1 and 2 appears to be justified regarding the locus of the petitioner.

16. Accordingly, keeping in view the aforesaid discussion, the writ petition is dismissed.

(2022)01ILR A967
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.11.2021

BEFORE

THE HON'BLE J.J. MUNIR, J.

S.C.C. Revision No. 135 of 2019

Smt. Pushpa Gupta ...Revisionist
Versus
Subhash Chandra & Anr. ...Opp. Parties

Counsel for the Revisionist:
Sri Ashish Kumar Srivastava

Counsel for the Respondents:
Sri Ayush Khanna, Sri Vaishali Sahu, Sri Atul Dayal

A. Civil Law - Civil Procedure Code, 1908: Order XV Rule 5 - The U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 197 - Section 30(2) - The Court below has observed that the lower court has finalized the question of law between the parties and has further noted that the Court has no jurisdiction

to condone the delay in depositing rent under Order XV Rule 5 of the Code, if the tenant were to represent her case about the deposit to be made on the first date of hearing beyond ten days of that date. However, the tenant through this application has sought to condone the delay much after the first date of hearing. Since the application is beyond the condonable limit of delay available to the Court to exercise its discretion, therefore this Court rejected the revision. (Para 20)

Revision Rejected. (E-10)

List of Cases cited:

1. Sanjay Agrawal Vs Ganga Prasad Agrawal & anr. 2009 (1) ARC 291

2. Haider Abbas Vs A.D.J., Allahabad & ors. 2006 (62) ALR 552 (All)

(Delivered by Hon'ble J.J. Munir, J.)

1. This S.S.C. Revision by the defendant is directed against an order of the Additional District Judge, Court no.2, Varanasi, sitting as the Small Cause Court, dated 11.11.2019 passed in SCC Suit no.7 of 2017, rejecting the defendant's application, seeking to condone the delay in complying with the provisions of Order XV Rule 5 CPC, with a further prayer to permit the defendant to deposit arrears of rent from the month of March, 2015; in the alternative, to adjust the rent deposited by the defendant under Section 30(2) of the U.P. Act No.13 of 1972, with permission to deposit the outstanding rent from the date of institution of the suit.

2. Notice pending admission was issued vide order dated 17.07.2019, and an interim stay of proceedings of the suit was granted. The landlord has put in appearance and opposed the motion to admit this Revision to hearing. Learned Counsel for the parties were heard and orders were reserved.

3. Heard Mr. Ashish Kumar Srivastava, learned Counsel for the revisionist-tenant in support of the motion to admit the Revision to hearing and Mr. Atul Dayal, learned Senior Advocate assisted by Mr. Ayush Khanna, appearing on behalf of the plaintiff-opposite party.

4. The facts of this case, and more particularly, the course of proceedings here would show that this Revision is a second attempt by the defendant in the suit, who is the tenant, to unshackle himself of his liability under Order XV Rule 5 of the Code of Civil Procedure, 1908 (for short, "the Code'). The defendant, Pushpa Gupta, shall hereinafter be referred to as, ''the tenant'. Subhash Chandra and Pankaj Deovanshi, the plaintiffs, shall hereinafter be referred to as, "the landlords'.

5. The landlords instituted S.C.C. Suit no.7 of 2017 on 10th of February, 2017 before the District Judge, Varanasi, sitting as the Judge, Small Cause Court, against the tenant, seeking a decree of eviction, recovery of arrears of rent and damages for use and occupation till delivery of possession. The demised premises are described as two rooms together with a lavatory, a bathroom and kitchen, located on the First Floor of House no. CK-48/178, situate at Mohalla Harha, City Varanasi and bounded as detailed at the foot of the plaint. The aforesaid premises shall hereinafter be referred to as, "the demised premises'. It appears that the demised premises were earlier part of House no. CK- 48/178, of which one Smt. Saroj Gupta was the owner. Saroj Gupta executed a registered sale deed

dated 16.03.2015, conveying in favour of one Saurabh Singh and others, a part of the said house on the southern side of it. It appears that the demised premises is the part of the house bearing no. CK-48/178, that was transferred by Smt. Saroj Gupta in favour of Saurabh Singh and others. Smt. Saroj Gupta served the tenant with a notice dated 18.03.2016, informing the tenant that she had sold a part of house no. CK-48/178 to Saurabh Singh and others. The notice said that Smt. Saroj Gupta had received the current rent, inclusive of taxes up to the month of February, 2015 from the tenant, relating to the demised premises. The notice also said that after execution of the sale deed, she was no longer entitled to receive rent for the demised premises, which would be payable to Saurabh Singh and others.

6. After service of this notice, the tenant instituted an application under Section 30(2) of the U.P. Act No.13 of 1972 (for short, "the Act') on 30.05.2016, that was registered as Misc. Case no.46 of 2016, Smt. Pushpa Gupta vs. Subhash Chandra and others. These proceedings by the tenant were brought with a case that a portion of the demised premises was part of house no. CK-48/178, the owner and landlady whereof was Smt. Saroj Gupta, and another portion of the said premises was part of house no. CK-48/178-A, the owners whereof were Subhash Chandra and Pankaj Deovanshi (the landlords).

7. It was pleaded that Smt. Saroj Gupta was not accepting rent, though she was entitled to a share in it. Subhash Chandra and Pankaj Deovanshi, on the other hand, were insisting that the tenant should attorn them as the owners and the landlord of the demised premises in their entirety. Considering the aforesaid facts, the tenants said that a bona fide doubt has arisen about the identity of the person entitled to receive rent relating to the demised premises, and, therefore, prayed that they be permitted to deposit rent under Section 30(2) of the Act. The present suit for eviction came to be instituted in the year 2017 by the landlords, wherein the tenant put in her written statement on 31.10.2017. It was said in the written statement that she was depositing rent under Section 30(2) of the Act. The tenant, however, admitted the fact that she had been served with a notice dated 18.03.2016 by her former landlady, Smt. Saroj Gupta, as hereinbefore detailed. Along with the written statement an application, bearing paper no.16-C was also made on behalf of the tenant, seeking exemption from the liability to deposit rent under Order XV Rule 5 of the Code. The tenant asserted that she may be exempted from making good the deposit of rent, as envisaged under Order XV Rule 5 of the Code, until decision about the inter se apportionment of rent between Smt. Saroj Gupta, on one hand and Subhash Chandra and Pankaj Deovanshi on the other. A further prayer was made to permit the tenant to deposit rent under Section 30(2) of the Act. The landlords objected to the said application and demanded striking off the tenant's defence under Order XV Rule 5 of the Code.

8. The Trial Court rejected that application by means of an order dated 28.02.2019. The tenant carried an S.C.C. Revision from the order dated 28.02.2019 to this Court, being **S.C.C. Revision no.48 of 2019, Pushpa Gupta vs. Subhash Chandra and another**. The said Revision was heard and dismissed by this Court vide

judgement and order dated 10.07.2019. The aforesaid decision is reported in **2020 (2) All L.J.** 68. This Court while dismissing S.C.C. Revision no.48 of 2019 inter partes observed:

"55. The judgments in the case of Dr. Ram Prakash Mishra (since deceased) v. IVth Additional District Judge, Etah another, 1999 (1) ARC 7; Habiburahaman v. District Judge, Jhansi and others 2000(1) ARC 4; and Sanjay Agrawal v. Ganga Prasad Agrawal and another, 2009(1) ARC 291: (2009 (5) All LJ (DOC) 184 (All)), upon which reliance has been sought to be placed by the revisionist are to the effect that if there is sufficient material on record to indicate that there are good reasons for condoning the default the Court has a reserve power to reject the application for striking off the defence. There can be no quarrel with the aforementioned legal proposition that powers under Order XV Rule 5 are not to be exercised in the case of a mere technical default.

57. The present case, however, is not a case where the revisionist is claiming condonation of the default in making compliance with the statutory provisions. It is a case where the revisionist claims exemption from complying with the mandatory provisions as contained under Order XV Rule 5 C.P.C., and in the absence of any provision whereunder exemption can be claimed from complying with the conditions under Order XV Rule 5 C.P.C. apart from consideration of a representation in terms of Rule 5 (2) thereof the claim of the revisionist is clearly unsustainable."

9. Taking a cue, as it were, from the remarks of this Court in S.C.C. Revision no.48 of 2019 above referred, the tenant moved another application before the Trial Court bearing paper no.42ग. This time the prayer was in the following words (translated into English from Hindi):

"It is, therefore, prayed that condoning the delay, that has occurred on the defendant's part, occasioned by mistake and error based on the legal advice received from her Advocate, she be permitted to deposit in Court the entire rent under Order XV Rule 5 of the Code due from the month of March, 2015, or adjusting the rent, already deposited by the tenant, under Section 30(2) of the Act, she may be permitted to deposit rent accrued from the date of institution of the suit, in the interest of Justice."

10. This application has come to be dismissed by the Trial Court by means of the order impugned.

11. Mr. Ashish Srivastava, learned Counsel for the tenant, has argued that the Trial Court has committed a manifest error of law in rejecting the tenant's application by misconstruing the provisions of Order XV Rule 5 CPC. It is submitted that it has always been both the endeavour and the intention of the defendant to deposit due rent and the application bearing paper no.42-C, that has now been rejected by the impugned order, seeks condonation of delay in depositing the rent under Order XV Rule 5 of the Code. The alternate player to adjust the sum of money, already deposited by the tenant under Section 30(2) of the Act, and to permit deposit under Order XV Rule 5 of the Code from the date of the institution of the suit, also shows the intention of the tenant to deposit all rent due.

12. It is argued that the purpose of the provisions of Order XV Rule 5 is to ensure remittance of rent to the landlord and not to

non-suit the tenant on a technicality. He submits that the provisions of Order XV Rule 5, where the tenant comes forward to deposit rent, must receive not only a liberal construction, but also the prayer ought to be liberally granted.

13. In support of his submission, learned Counsel for the tenant has placed reliance upon a decision of this Court in **Sanjay Agrawal v. Ganga Prasad Agrawal and another, 2009 (1) ARC 291.** As part of this submission, it is emphasized that what is important is substantial compliance with the provisions of Order XV Rule 5 CPC, where deposit made under Section 30(2) of the Act would enure to the benefit of the tenant. The Trial Court, in discarding the tenant's prayer to condone the delay in complying with the provisions of Order XV Rule 5 of the Act and permitting the tenant to deposit rent, or in alternate, to adjust the sum of money deposited under Section 30(2) of the Act and permitting her to deposit the rent from the date of institution of the suit, has acted in contravention of the provisions of Order XV Rule 5 of the Code.

14. Learned Counsel for the tenant, in support of his contention that deposit of rent under Section 30(2) of the Act should enure to her benefit, has placed reliance on the decision of this Court in **Sanjay Agrawal (supra).** He has drawn the Court's attention to the decision in **Sanjay Agrawal**, where it has been held:

"11. One of the points arises in his case as to whether tender made by the defendant under section 30 of the Act was valid within the meaning of Order XV, Rule 5 of the Code. It is admitted fact that the defendants have made deposit of the arrears of rent under section 30 of the Act from 1.3.2000 to 31.8.2005, details of which have been given in the reply of the plaintiff annexed with the affidavit dated 16.12.2005. Such deposits ought to be taken into account by the Trial Court otherwise it would render sub-section (1) of section 30 and sub-section (6) of section 30 otiose."

15. Mr. Atul Dayal learned Senior Advocate, appearing for the landlords, refuting the submissions of the learned Counsel for the tenant, says that the law laid down in **Sanjay Agrawal** is not good law, in view of the decision of the Division Bench in **Haider Abbas v. Additional District Judge (Court No.3) Allahabad and others, 2006 (62) ALR 552 (All).** In this case, the learned Single Judge, finding conflict of opinion between learned Single Judges of the Court, had referred the following question of law for decision by a Larger Bench:

"Whether the deposit made under section 30(1) of U.P. Act No. 13 of 1972 after the date of service of summons of a civil suit for arrears of rent can be taken into consideration for computing the deposit for the purpose of deciding the question whether the defence should or should not be struck off under Order XV, Rule 5, C.P.C.?"

16. The Division Bench answered the question in the following words:

"38. We, therefore, upon an analysis of the provisions of Rule 5(1) of Order XV, C.P.C., hold that while depositing the amount at or before the first hearing of the suit, the tenant can deduct the amount deposited under section 30 of the Act but

the deposits of the monthly amount thereafter throughout the continuation of the suit must be made in the Court where the suit is filed for eviction and recovery of rent or compensation for use and occupation and the amount, if any, deposited under section 30 of the Act cannot be deducted."

17. So far as the issue whether the tenant is entitled to an adjustment of whatever he has deposited under Section 30(2) of the Act is concerned, this Court must at once notice that this issue has been gone into earlier by this Court and decided inter partes by the decision in **Pushpa Gupta (supra**) where it has been held:

"**49**. In the facts of the present case, the revisionist-tenant having admitted to have been served with a notice dated 18.3.2016 by the erstwhile owner Smt. Saroj Gupta containing a recital to the effect that she had sold a portion of the house bearing House No. C.K 48/178, Hadaha Varanasi, on 16.3.2015 to Saurabh Singh and others, and that she had received the rent inclusive of taxes upto the month of February, 2015 from the revisionist tenant in respect of the premises in question, and further that after execution of the sale deed she was no longer entitled to receive rent for the aforesaid tenanted portion and that the rent henceforth be paid to Saurabh Singh and others leads to the inescapable conclusion that there was no doubt or dispute as to the person who was entitled to receive rent in respect of the building in question and clearly the necessary jurisdictional facts for invocation of the provisions of sub-section (2) of Section 30 in terms of which the revisionist-tenant could claim benefit of deposit of rent in Court, did not exist."

18. The deposit made under Section 30(2) of the Act by the tenant had not been held to be validly made by this Court in Pushpa Gupta and that finding now operates as res judicata. Therefore, that part of the prayer in the application now made, which asks for adjustment of the amount deposited under Section 30(2) of the Act, is not open to agitation any further at the instance of the tenant in this Revision.

19. The next submission that has been made is that the prayer in the earlier application, which came to be decided in **Pushpa Gupta** was to the effect of seeking an exemption from complying with the provisions of Order XV Rule 5, whereas, by the present application the tenant seeks to deposit the arrears of rent after condonation of delay. Learned Counsel for the tenant has also urged, as already noticed, that the provisions of Order XV Rule 5 must receive a liberal construction in the tenant's favour, particularly, where on facts, the tenant is ready to deposit the entire rent due. Sadly, this question also is no longer open to agitation at the tenant's instance in this Revision for reason that, that issue has also been decided by this Court inter partes in **Pushpa Gupta**. In **Pushpa Gupta**, it has been held:

"50. The provisions contained under Order XV Rule 5 C.P.C., have been consistently held to be mandatory, and it has been held that the benefits conferred on tenants under the rent control legislation can be enjoyed only on the basis of strict compliance of the statutory provisions. There is no provision to claim exemption from complying with the conditions under Order XV Rule 5 C.P.C. apart from consideration of a representation made by the defendant as per Order 15 Rule 5 (2) C.P.C.

53. It has been consistently held that the tenant is required to comply with the requirements of Order XV Rule 5 CPC and make the deposits strictly in accordance with the procedure contained therein, and any deposit not made in consonance with the said rule cannot enure the benefit of the tenant. Also, the amount to be deposited by the tenant during the continuation of the suit is required to be deposited in the court where the suit is filed failing which the court may strike off the defence of the tenant since the deposits made by the tenant under Section 30 after the first hearing of the suit cannot be taken into consideration.

54. The provisions under Order XV Rule 5(2) provides a locus poenitentiae to the defaulting tenant to make a representation, which must be made within ten days of the first hearing or within a week from the date of accrual of rent as the case may be, and if the representation is not made within the specified time the court has no jurisdiction to consider a time barred representation or condone the delay or extend time. Apart from the aforementioned provision of filing a representation there is no provision wherein exemption can be claimed from complying the conditions under Order XV Rule 5."

(Emphasis by Court)

20. The holding in **Pushpa Gupta** clearly shows that the finding on the question of law has become final inter partes, andthat the Court has no jurisdiction to condone the delay in depositing rent under Order XV Rule 5 of the Code, if the tenant were to represent her case about the deposit to be made on the first date of hearing beyond ten days of that date. It has been held that the Court has no power to condone the delay beyond ten days in the case of deposit of accrued rent due on the first date of hearing, or beyond one week in the case of rent that accrues from month to month. This Court has clearly held inter partes that the Court has no power to condone delay in making good the deposit of rent under Order XV Rule 5 of either kind beyond the specified period of time envisaged under Order XV Rule 5(2) of the Code. Here, the prayer in the application clearly shows that the tenant has sought to condone the delay much after the first date of hearing, losing all the time in pursuing the first application that was made seeking exemption from deposit under Order XV Rule 5 of the Code, up to this Court in Revision. It is not the tenant's case that the first date of hearing in the suit had not gone by or that a period of ten days of the first date of hearing not elapsed, until time when the application bearing paper no.42-C was made. Clearly, the application is now beyond the condonable limit of delay available to the Court to exercise its discretion, a legal position that has been finally settled inter partes by this Court in Pushpa Gupta.

21. This Court is, therefore, of clear opinion that the tenant's application bearing paper no.42-C could not have been granted by the Trial Court. It has rightly been rejected.

22. In the result this Revision fails and is dismissed. The interim order dated 17.12.2019 is hereby vacated. There shall be no order as to costs.

(2022)01ILR A973
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 24.12.2021

BEFORE

THE HON'BLE SALIL KUMAR RAI, J.

Second Appeal No. 247 of 2015

Janki Prasad ...Appellant
Versus
Sanjay Kumar & Ors. ...Respondents

Counsel for the Appellant:

S. Mohd Kazim

Counsel for the Respondents:
Pratap Krishan

Civil Law - Civil Procedure Code (5 of 1908) - O.41 R.17(1) Expln. - Appeal - counsel refuses to argue - Court has no jurisdiction to decide the appeal on merits

If counsel for the appellant, though physically present in the Court when the appeal is called on for hearing but refuses to argue the appeal or for any other reason is not able to address the Court - *Held* - in such situations appellate Court has no jurisdiction to decide the appeal on merits - Explanation to Order XLI Rule 17 CPC applies in cases (Para 20)

Allowed. (E-5)

List of Cases cited:

1. Ghanshyam Das Gupta Vs Makhan Lal 2012 (30) LCD 1806

2. Mohammad Khalil Vs Kamaruddin (1996) 5 SCC 625

3. Smt. Binda Bau & ors. Vs Board of Revenue & ors. AIR 2007 ALLAHABAD 10

4. Babu Ram Vs Bhagwan Din & anr. AIR 1966 All 1 (FB)

5. St. of J&K Vs Enquiry Officer and ors., (1998) 9 SCC 387

6. M.S. Khalsa Vs Chiranji Lal (AIR 1976 All 290)

(Delivered by Hon'ble Salil Kumar Rai, J.)

1. Heard the counsel for the appellant and the counsel for the respondents.

2. The present Second Appeal has been filed against the judgment and decree dated 23.9.2015 passed by the Special Jude (Prevention of Corruption Act), Court No. 2/Additional District Judge, Lucknow (hereinafter in short referred to as "lower appellate Court') dismissing the ***Regular Civil Appeal No. 5000248 of 2013 (Janki Prasad vs. Sanjay Kumar and others)*** filed by the appellant. The records of the case indicate that the appeal has not yet been admitted for final hearing. By order dated 4.12.2015, the records of the case were summoned and have been received by this Court. In the circumstances, with the consent of the counsel for the parties, the Court proceeded to hear the present Second Appeal on admission and also for final hearing.

3. The facts relevant for the decision of the Second Appeal are that the respondents instituted Original Suit No. 36 of 2010 praying for a decree of permanent prohibitory injunction restraining the appellant from interfering in their peaceful possession over the suit-property. The respondents were the plaintiffs in the Suit and the appellant was the defendant in the Suit. The Trial Court i.e., the Additional Civil Judge (Junior Division), Court No. 35, District Lucknow vide its judgment and decree dated 29.8.2013 decreed Original Suit No. 36 of 2010. Against the judgment and decree dated 29.8.2013 passed by the Trial Court, the defendant-appellant filed Regular Civil Appeal No. 5000248 of 2015. The records of the lower appellate Court show that by order dated 18.8.2015 passed by the District Judge, Lucknow the case was transferred to the Special Judge (Prevention of Corruption Act), Court No. 2/Additional District Judge, Lucknow and the same was received by the said Court on 25.8.2015. The appeal was called out for hearing on 8.9.2015 on which date the hearing of the appeal was adjourned on the request of the counsel for the appellant and 15.9.2015 was fixed for hearing. On 15.9.2015, the lower appellant Court recorded, on its order-sheet, that the

counsel for the parties were present but despite repeated requests they were not arguing the case and the judgment in the appeal was reserved to be delivered on 23.9.2015. By order dated 15.9.2015, the lower appellate Court also permitted the parties to argue the case on any date till two days before the pronouncement of judgment. The order-sheet does not show that the case was argued by the parties as permitted by order dated 15.9.2015. Vide its judgment dated 23.9.2015, the lower appellate Court dismissed the appeal on merits. In its judgment dated 23.9.2015 also the lower appellate Court has recited the fact that the counsel for the parties were present on the date fixed for hearing of the case but despite repeated requests they did not argue the case. The judgment also recites the fact that the records of the Trial Court had been received by the lower appellate Court and the same were perused by the lower appellate Court.

4. The lower appellate Court framed point for determination in appeal and after considering the appeal on merits held against the appellant. In its impugned judgment, the lower appellate Court has extensively referred to the evidence and pleadings of the parties filed in the Trial Court.

5. The following substantial question of law arises in the present appeal and the appeal was heard on the said question of law:

"Whether the Explanation to Order XLI Rule 17 CPC would apply in a case where, when the appeal is called out for hearing by the appellate Court, the counsel for the appellant though physically present in the Court, refuses to argue the same for any reason and whether in such circumstances, the appellate Court has the power to decide the appeal on merits after considering the records of the case?"

6. It was argued by the counsel for the appellant that the recital dated 15.9.2015 in the order-sheet of the appeal and in the judgment dated 23.9.2015 to the effect that the counsel for the parties had not argued the case despite repeated requests, amounts to refusal by the counsel to argue the case and, in the circumstances the lower appellate Court had no jurisdiction to decide the appeal on merits but in light of the Explanation to Order XLI Rule 17 of the Code of Civil Procedure, 1908 (hereinafter in short referred to as "CPC) could have only dismissed the appeal in default. It was argued that the appearance of the counsel referred in Order XLI Rule 17 CPC means "appearance to argue the appeal' and if the counsel for the appellant refuses to argue the case or does not argue the case, even though physically present in the Court when the case is called on for hearing, the appellate Court has no jurisdiction to consider and decide the appeal on merits. It was argued that for the aforesaid reason the judgment dated 23.9.2015 passed by the lower appellate Court is without jurisdiction and liable to be set-aside. In support of his arguments, the counsel for the appellant has relied on the judgment of the Supreme Court reported in ***Ghanshyam Das Gupta versus Makhan Lal; [2012 (30) LCD 1806].***

7. Rebutting the arguments of the counsel for the appellant, the counsel for the plaintiffs-respondents has argued that from the recitals in the order-sheet as well as in the judgment of the lower appellate Court, it was evident that the counsel for

the appellant was physically present and appeared when the appeal was called out for hearing on 15.9.2015 but did not argue the appeal, therefore, the Explanation to Order XLI Rule 17 CPC was not applicable because the provision does not prohibit the Court from considering and deciding the appeal on merits if the counsel for the appellant is present but does not argue the case. It was argued that in the circumstances the appellate Court was not bound to dismiss the appeal in default, but had a discretion to either dismiss the appeal in default or pass any other order, including an order deciding the appeal on merits. In support of his contentions, the counsel for the respondents relied on the judgment of the Supreme Court reported in ***Mohammad Khalil versus Kamaruddin; (1996) 5 SCC 625*** and the judgment of this Court reported in ***Smt. Binda Bau & Ors versus Board of Revenue & Ors; AIR 2007 ALLAHABAD 10.***

8. I have considered the rival submissions of the counsel for the parties and perused the records.

9. Before proceeding further, it would be apt to reproduce Order XLI Rule 17 CPC:

"ORDER XLI APPEALS FROM ORIGINAL DECREES. Rule 17*. Dismissal of appeal for appellant's default.--(1) Where on the day fixed, or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed.*

[Explanation.--Nothing in this sub-rule shall be construed as empowering the Court to dismiss the appeal on the merits.]

(2) Hearing appeal ex parte.--Where the appellant appears and the respondent does not appear, the appeal shall be heard ex parte."

10. The Explanation to Order XLI Rule 17 (1) CPC which provides that nothing in the sub-rule shall be construed as empowering the Court to dismiss the appeal on merits was added by Act No. 104 of 1976. Before 1976, there was a difference of opinion between the High Courts regarding the powers of the appellate Court under Order XLI Rule 17 (1) CPC. Certain High Courts were of the opinion that if the counsel for the parties were not present when the appeal is called on for hearing, the appellate Court did not have the jurisdiction to decide the appeal on merits but could only dismiss the same in default or adjourn the case, while some High Courts were of the opinion that under Order XLI Rule 17 CPC, the appellate Court had a discretion to either dismiss the appeal in default or to decide the same on merits in the absence of the appellant and his counsel. The Allahabad High Court subscribed to the second view and in this context reference is made to the Full Bench decision of the Allahabad High Court in ***Babu Ram versus Bhagwan Din and another; AIR 1966 All 1 (FB).***

11. Subsequently, by Act No. 104 of 1976, CPC was amended and the Explanation was added in Order XLI Rule 17 (1) CPC and now, the appellate Court has no jurisdiction to decide the appeal on merits if the counsel for the appellant is not present when the appeal is called on for hearing. However, the question involved in the present appeal is as to whether the Explanation to Order XLI Rule 17 (1) CPC would apply when the counsel for the

appellant, even though physically present in the Court while the appeal is called on for hearing, either refuses or for any other reason, does not argue the appeal on merits.

12. For all practical purposes, there is no difference between the counsel for the appellant being not present in the Court when the case is called on for hearing and, even though physically present when the case is called on for hearing, but refusing to argue the appeal. In both situations the appellant, i.e., the litigant in the case, fails to avail the opportunity of hearing given to him. In both the situations, the appellate Court is deprived of the assistance provided by the counsel as required under Order XLI Rule 16 CPC. It is the assistance given by the counsel which helps the appellate Court in framing the points for determination stipulated in Order XLI Rule 31 CPC. The fact that there is no difference between the physical absence of the counsel for the appellant when the appeal is called on for hearing and his refusal to argue, even though physically present, was also noted by the Full Bench of this Court in ***Babu Ram (supra).*** In this context, the relevant observations of this Court in paragraph no. 20 are reproduced below:

"20. The above observations make it clear that a provision enjoining that the appellant shall be heard is complied with if the appellant has been afforded an opportunity to be heard, and it cannot be said that he has not been heard merely because he has not availed of the opportunity given to him. The force of these observations is in no way lessened by the fact that the appellant in that case was present at the hearing but was not prepared to address the Court, ***because it should make no difference in principle whether the failure to avail of the opportunity consists in the absence of the appellant or in his refusal or inability to address the Court in support of the appeal****. The essence of the matter is that opportunity to be heard has been given but has not been availed of. If the requirement of hearing is to be deemed to be fulfilled by giving the appellant who is present an opportunity to be heard it should be regarded as equally fulfilled even in the case of an appellant who has chosen to be absent in spite of having been given an opportunity to be heard. The principle laid down by the Supreme Court with reference to Order XLI, Rule 16 applies with equal force to Order XLI, Rule 30 as well and it must likewise be held that what Order XLI, Rule 30 requires is not that the parties or their pleaders be actually heard but that they should be given the opportunity of being heard. The requirement of Order XLI, Rule 30 must, therefore, be considered as having been satisfied if the opportunity so given is not availed of, whether the failure to do so consists in the absence of the parties and their pleaders or in their refusal or inability to address the Court. ..... "*

(emphasis supplied)

13. The Full Bench of this Court in ***Babu Ram*** (supra), while interpreting Order XLI Rule 17 (as it stood before 1976) held that an appeal Court has the jurisdiction to decide the appeal on merits even if the appellant and his counsel are absent when the appeal is called on for hearing. The proposition decided by the Full Bench is no more the law in view of the Explanation added to Order XLI Rule 17 CPC. The Full Bench has been referred as a precedent only to show that, in principle, there is no difference between the two situations, i.e., when the counsel is

physically not present when the appeal is called on for hearing and when the counsel refuses to argue the appeal, though physically present, when the appeal is called on for hearing. In the circumstances, the prohibition prescribed in the Explanation to Order XLI Rule 17 (1) CPC shall also be applicable in cases where the counsel for the appellant is physically present in the Court when the appeal is called on for hearing but does not address the Court on merits or refuses to argue the appeal.

14. The view that the appeal Court has no jurisdiction to decide the appeal on merits if the counsel for the appellant is physically present in the Court when the appeal is called on for hearing but refuses to argue it is also supported by the observations of the Supreme Court in paragraph 5 of its judgment reported in ***State of J&K versusl Enquiry Officer and others; (1998) 9 SCC 387***. The observations of the Supreme Court in paragraph 5 of the said judgment are reproduced below:

"5. The appeal was dismissed for this reason: ".... a request for adjournment sought by the Government Advocate, Mr. Geelani, is rejected and this appeal is dismissed for non-prosecution". That the High Court was right in declining the adjournment is not in dispute, but it was then necessary for it to hear the appeal and come to a conclusion on its merits. ***If for any reason the appellant's advocate declined to argue the appeal, that is what the High Court should have recorded and should then have dismissed the appeal on the ground of non-prosecution****. There was no justification for dismissing the appeal only on the ground that the appellant's application for adjournment had been rejected." (emphasis supplied*)

15. At this stage, it would be relevant to consider the judgments relied upon by the counsel for the respondents. In ***Mohammad Khalil*** (supra), there were four appellants before the second appellate Court i.e., the High Court and the counsel for one of the appellants had initially argued the matter on behalf of other appellants also and, therefore, the Explanation to Order XLI Rule 17 CPC was not applicable in the case.

16. In ***Smt. Binda Bau & Ors.*** (supra), the counsel for the appellant had appeared and moved an application for adjournment which had been rejected and consequently the Board of Revenue proceeded to decide the case on merits. The facts of the case as reported in ***Smt. Binda Bau & Ors*** (supra) show that the counsel for the appellant was physically present in the Court when the appeal was called for hearing but the facts as reported do not indicate that the counsel for the appellant had either refused to argue the case or did not for any other reason address the Court. The judgment is clearly not applicable in the facts of the present case.

17. It is also relevant to note that the judgment in ***Smt. Binda Bau and Ors*** (supra) relies on the Full Bench judgment of this Court in ***M.S. Khalsa vs. Chiranji Lal (AIR 1976 All 290)***. The Full Bench in ***M.S. Khalsa*** (supra) held that an application for adjournment was within the purview of the Explanation to the Allahabad amendment in Order XVII Rule 2 CPC. Order XVII Rule 2 CPC along with Allahabad amendment is reproduced below:

*"**Order XVII Rule 2. Procedure if parties fail to appear on day fixed**--Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or make such other order as it thinks fit.*

[Explanation.--Where the evidence or a substantial portion of the evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned, the Court may, in its discretion, proceed with the case as if such party were present.]

High Court Amendments

***ALLAHABAD.**--Add the following:*
"Where the evidence, or a substantial portion of the evidence, of any party has already been recorded, and such party fails to appear on such day, the Court may in its discretion proceed with the case as if such party were present, and may dispose of it on the merits.
Explanation.--No party shall be deemed to have failed to appear if he is either present or is represented in Court by an agent or pleader, though engaged only for the purpose of making an application."(28-5-1943)

18. Order XVII prescribes the procedure to be followed by the Court in trial of Suits. The procedure to be followed by appeal Court while hearing an appeal is prescribed in Order XLI CPC. The Explanation to Order XVII Rule 2 (Allahabad amendment) only clarifies or explains the phrase "the parties or any of them fail to appear' in Order XVII Rule 2. Explanation added to a particular provision in an enactment cannot be treated as an illustration to define a similar situation or concept in a different provision in the same enactment. The role of an Explanation is to explain the meaning and effect of the main provision to which, it is an explanation and to clear up any doubt or ambiguity in it'. ***[Dattatraya Govind Mahajan and Ors. vs. State of Maharashtra and Ors (1997) 2 SCC 548; Government of Andhra Pradesh vs. Cooperative Bank (2007) 9 SCC 55]***. The Explanation to Order XVII Rule 2 (Allahabad amendment) cannot be read in Order XLI Rule 17 (1) CPC to interpret the phrase "the appellant does not appear when the appeal is called on for hearing'. The phrase has to be interpreted independently of the Explanation to Order XVII Rule 2 CPC.

19. Evidently, the judgments in *Mohammad Khalil* (supra) and ***Smt. Binda Bau & Ors*** (supra) are not applicable in the present case and do not help the respondents.

20. The substantial question of law framed by this Court is decided in favour of the appellant and it is held that the Explanation to Order XLI Rule 17 CPC also applies in cases where the counsel for the appellant, though physically present in the Court when the appeal is called on for hearing, refuses to argue the appeal or for any other reason is not able to address the Court and in such situations the appellate Court has no jurisdiction to decide the appeal on merits. For the aforesaid reason, the lower appellate Court had exceeded its jurisdiction in deciding the appeal on merits vide its judgment dated 23.9.2015 and the appeal is to be allowed.

21. The question that remains to be decided is regarding the order to be passed

by this Court. By virtue of Section 107 CPC the appellate Courts have the same power as are conferred on Courts of Original jurisdiction in respect of Suits instituted therein. Order XLI Rule 33 CPC provides that the appellate Court shall have the power to pass any order which ought to have been passed and to pass such further other orders as the case may require. A similar situation arose before the Division Bench of this Court in Nasir Khan versus Itwari & Ors.; AIR 1924 All 144 and the Division Bench while allowing the Second Appeal passed order which the first appellate Court should have passed. The Division Bench dismissed the appeal of the Court below for default and permitted the appellant to file an application for restoration of appeal which was to be decided by the lower appellate Court on merits.

22. Following the Division Bench judgment of this Court in Nasir Khan (supra), the present Second Appeal is allowed, the judgment and decree of the lower appellate Court is set aside and the Regular Civil Appeal No. 5000248 of 2013 (***Janki Prasad vs. Sanjay Kumar and others***) filed by the appellant is dismissed in default. The appellant shall have the liberty to file an application for restoration of the said appeal before the lower appellate Court which, if filed, shall be decided by the lower appellate Court in accordance with law.

22. With the aforesaid observations, the Second Appeal is ***allowed.***

(2022)01ILR A980
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 29.11.2021

BEFORE

THE HON'BLE J.J. MUNIR, J.

Second Appeal No. 280 of 2018

Suraj Prasad ...Appellant
Versus
Smt. Vandana Pitariya ...Respondents

Counsel for the Appellant:
Anuj Dayal

Counsel for the Respondents:
Vipul Gupta, Mohd. Aslam Khan

Specific Relief Act, 1963 - Section 26 - Rectification of instrument - power of the Court to rectify an instrument - *Held* - rectification to a sale deed can be ordered to express the real intention of parties about identity of the property sold, but incorrectly described in the sale deed due to fraud or a mutual mistake - All that is to be seen is whether the instrument embodies the true intention of parties; or it does not - If it does not, it has to be examined whether the error is the result of fraud or a mutual mistake - In case, it is caused by either of the two, the instrument has to be rectified, though the result of it may be an alternation in the identity of the property sold - consequences of rectification are absolutely foreign to the exercise of the power under Section 26(1) (Para 23, 25)

In the sale deed, executed by defendant, suit property correctly described with reference to its plot number, but village incorrectly mentioned as Udaipur Maheva instead of Chhauchh - plaintiff requested defendant to get mistake rectified - defendant declined - plaintiff brought suit seeking a rectification to the registered sale deed - defendant admits plaintiff's case, in his W.S. & in his testimony in the examination-in-chief & in cross-examination, that the property, in respect whereof the sale deed, subject matter of rectification, was executed, is situate in Village Chhauchh & not in Village Udaipur Maheva - by a mutual mistake village came to be incorrectly described as Udaipur Maheva instead of Chhauchh with other particulars of the property correctly mentioned -

Held - there is no change in the identity of the property sold - change is only in the description of it by virtue of its situation in the village, where it is really located (Para 16, 24, 25)

Dismissed. (E-5)

List of Cases cited:

1. St. of Karn. & anr. Vs K.K. Mohandas & ors. (2007) 6 SCC 484

2. Subhadra & ors. Vs Thankam, (2010) 11 SCC 514

(Delivered by Hon'ble J.J. Munir, J.)

1. "What's in a name", is not always true. In a given situation or transaction, everything could revolve around a name. It is about the name of the Village, where the suit property is situate, but incorrectly mentioned in the registered deed of conveyance as another village, that has led the respondent in this appeal, Smt. Vandana Pitariya, to institute a suit for rectification.

2. The facts giving rise to this appeal lie in a narrow compass. According to Smt. Vandana Pitariya, the sole respondent, and hereinafter referred to as 'the plaintiff', an agreement to sell dated 03.02.2004 was entered into between her and the sole appellant, Suraj Prasad, hereinafter referred to as 'the defendant', with the latter covenanting to transfer in favour of the plaintiff his 1/3rd share in Gata No.39, admeasuring 1.502 hectares, situate in Village Chhauchh, Pargana Kheri, District Kheri, for a total sale consideration of Rs.3,09.000/-. The agreement, that was duly admitted to registration, carries an acknowledgment that the defendant has received from the plaintiff out of the agreed sale consideration, a sum of Rs.2,50,000/-.

3. It was further covenanted that the balance sale consideration would be payable at the time of execution and registration of the sale deed. Nothing else is material about the agreement, for shortly after its execution, on 20th April, 2004, a sale deed was executed by the defendant in the plaintiff's favour, acknowledging receipt of the balance consideration. The sale deed was duly registered.

4. The plaintiff's case is that the suit property lies on the border of an adjoining Village Udaipur Maheva, Pargana and District Kheri, a fact the plaintiff did not know. In the sale deed, that was executed by the defendant, the suit property was correctly described with reference to its plot number, but the village was incorrectly mentioned as Udaipur Maheva instead of Chhauchh. The plaintiff requested the defendant to get the aforesaid mistake rectified by presenting a mutually done deed of rectification to the Sub-Registrar concerned, but the defendant declined. It is on this cause of action that the plaintiff brought the suit seeking a rectification to the registered sale deed dated 20.04.2004 in terms of a decree of Court ordering the defendant to execute a deed of rectification, substituting for Village Udaipur Maheva, Village Chhauchh. It was further prayed that in case the defendant does not execute the requisite deed of rectification, the Court may execute it at the plaintiff's expense.

5. The defendant put in a written statement, where in Paragraph No.5, it was not denied that the suit property was situate in Village Chhauchh, but it was denied that the plaintiff has been delivered possession over the suit property, as claimed. In the additional pleas, the defendant has

acknowledged the fact that the terms of the transaction were negotiated by Ratan Lal on the defendant's behalf with the plaintiff's husband and the entire formalities of paper work and conveyancing was got done by the plaintiff's husband and Ratan Lal together.

6. It is also pleaded that at the time of execution of the sale deed, the plaintiff was obliged to pay the defendant a balance of Rs.1,17,000/-. The plaintiff's husband and Ratan Lal had instructed the defendant to the effect that the duly scribed sale deed was ready and the defendant may proceed with its execution and registration while the plaintiff's husband and Ratan Lal would go and fetch the balance sale consideration. The defendant has also pleaded that reposing faith in the words of the plaintiff's husband and Ratan Lal, he executed the sale deed, subject matter of the suit for rectification, but the plaintiff's husband declined to pay the balance. It is also averred by the defendant that about one month after the sale deed was executed, Ratan Lal told the defendant that the name of the Village had been incorrectly mentioned, to which the defendant said that the balance sale consideration may be paid to him, subject to which alone he would join the plaintiff to get the sale deed mutually corrected and deliver possession of the suit property. It is also pleaded in Paragraph No.14 that possession over the suit property, situate in Village Chhauchh is not with the plaintiff. The defendant asserted that the suit deserves to be dismissed with costs.

7. On the pleadings of parties, the Trial Judge framed issues on 06.07.2016, which read to the following effect (translated into English from Hindi):

"(i) Whether the plaintiff, on the basis of pleas set out in the plaint, is entitled to seek rectification of the sale deed dated 20.04.2004?

(ii) Whether the suit is undervalued?

(iii) Whether the court fee paid is insufficient?

(iv) Whether the Court has jurisdiction to try the suit?

(v) To what relief is the plaintiff entitled?"

8. The record of the Trial Court shows that Issues Nos.2 and 3 were decided against the defendant on the day these were framed, to wit, 06.07.2016. Thus, Issue Nos.1, 4 and 5 came up for trial, at the hearing of the suit. The learned Civil Judge (Jr. Div.), Lakhimpur Kheri vide his judgment and decree of April the 25th, 2017 dismissed the suit, leaving parties to bear their own costs.

9. The plaintiff, aggrieved by the Trial Court's decree, carried an appeal to the District Judge, Lakhimpur Kheri, where the appeal was numbered as Civil Appeal No.31 of 2017. The appeal, on assignment, came up for determination before the Additional District Judge, Court No.3, Lakhimpur Kheri on 07.07.2018, who allowed the appeal, reversed the Trial Court and decreed the suit for rectification. The learned Additional District Judge did not say anything about cost.

10. The defendant, aggrieved by the appellate decree, has instituted the present Second Appeal. The Appeal was admitted to hearing on 15.02.2019 and the following substantial questions of law were formulated:

(i) Whether a suit for correction of a sale-deed is maintainable to include a

different property which is not the subject matter of sale-deed.

(ii) Whether a property which is not the subject matter of an agreement to sell and the sale deed executed in pursuance thereof could be included in a sale deed on the ground of seeking correction in the sale deed.

(iii) Whether the first appellate Court could reverse the finding without meeting the reason and consideration of the evidence dealt with by the trial court and decree the suit for correction of sale-deed."

11. Heard Mr. Anuj Dayal, learned Counsel for the defendant and Mr. Mohd. Arif Khan, learned Senior Advocate assisted by Mr. Mohd. Aslam Khan, learned Counsel appearing for the plaintiff and perused the records.

12. So far as the first substantial question of law is concerned, it is submitted by the learned Counsel for the defendant that the subject matter of the sale deed is a property located in Village Udaipur Maheva whereas through rectification the plaintiff wants it to be corrected to Village Chhauchh. The submission proceeds that with the difference in the two villages, the identity of the suit property would be entirely changed and that is beyond the scope of rectification, envisaged under Section 26(1) of the Specific Relief Act, 1963. What Mr. Dayal says is that in the garb of rectification, transaction relating to one property cannot be substituted for another. And, this precisely is what Substantial Question of Law No. (i) is about.

13. On the other hand, Mr. Mohd. Arif Khan, learned Senior Advocate submits that the relief of rectification proceeds on the basis that if in any written contract or instrument, a fact, word or recital has been mentioned or made through fraud or a mutual mistake of parties, which does not express their true intention, it may be corrected at the suit of a party to the instrument. Learned Senior Counsel submits that if it is established that in the description of the suit property set out in the conveyance, an incorrect village has been mentioned, it could be as much the result of a fraud or a mutual mistake as anything else. If a deed in writing while describing the property subject matter of conveyance shows it to be located in a different village or place, other than the place where it is actually situate, there is no impediment to rectify the mistake, provided it is established that it is the product of fraud or a mutual mistake of parties that does not express their true intention.

14. A perusal of the record, which includes the pleadings and evidence, makes it clear that execution of the agreement followed by the sale deed subject matter of rectification, is not disputed by the defendant. Rather, the defendant has acknowledged in Paragraph No.5 of the written statement that the suit property is situate in Village Chhauchh though he says that possession thereof has not been delivered to the plaintiff. Thus, the parties are, on their pleadings, ad idem that the subject matter of transaction is property located in Village Chhauchh and not in Village Udaipur Maheva.

15. In his examination-in-chief, that is on affidavit, it is acknowledged by the defendant that on the representation of Ratan Lal and the plaintiff's husband, that they would be back with the balance of the sale consideration, he signed the sale deed.

The aforesaid testimony strengthens the position that there is absolutely no quarrel between parties about the factum of the transaction or the execution of the conveyance, wherein rectification is sought. In his cross-examination, the defendant says that the property subject matter of the agreement is situate in Village Chhauchh, Pargana Kheri. It is also said that the land in Village Chhauchh and Village Udaipur Maheva are contiguous. It is also said that an agreement about the land in Village Chhauchh was executed in favour of the plaintiff and registered. The Lower Appellate Court has drawn an inference from these facts, and in our opinion rightly so, that the transaction embodied in the sale deed in question relates to land situate in Village Chhauch. The Lower Appellate Court has also noticed the stand of the defendant in his cross-examination to the effect that Plot No.39, whereof 1/3rd share has been sold, has been acknowledged to be located in Village Chhauchh. The relevant part of the cross-examination of the defendant, who testified as DW-1 on 07.04.2017, reads:

"विवादित भूमि गाटा सं0 39 का 1/3 भाग ग्राम छाउछ का विवाद है। मैंने वन्दना पितारिया के हक में इस भूमि का पंजीकृत इकरार नामा दि0 3-2-2004 को किया था। इस एग्रीमेंट में कोई मेरा विवाद नहीं है। इस इकरार नामा के बाद इसी भूमि का बैनामा मैंने वन्दना पितारिया के हक में दि0 20-4-2004 को किया था। मुझे जानकारी नहीं थी ग्राम छाउछ के स्थान पर ग्राम उदयपुर महोवा लिख गया था।"

16. On the aforesaid stand of the defendant, it is evident that on facts the defendant admits the plaintiff's case that the property, in respect whereof the sale deed subject matter of rectification, was executed, is situate in Village Chhauchh and that the transaction was about the defendant's 1/3rd share in Gata No.39, situate in Village Chhauchh; not in Village Udaipur Maheva. The testimony of the defendant further makes it evident that the incorrect mention of the village as Udaipur Maheva for Chhauchh was not within the knowledge of the defendant. The stand of the defendant in his pleadings, his testimony in the examination-in-chief and his transparently clear stand in the cross-examination, places it beyond doubt that mention of Village Udaipur Maheva for Chhauchh, does not express the real intention of parties about the identity of the property, regarding which they entered into the transaction embodied in the sale deed. It is apparently, by a mutual mistake, that the village came to be incorrectly described as Udaipur Maheva instead of Chhauchh with the other particulars of the property correctly mentioned.

17. Section 26 of the Specific Relief Act, 1963 reads:

"26. When instrument may be rectified.--(1) When, through fraud or a mutual mistake of the parties, a contract or other instrument in writing [not being the articles of association of a company to which the Companies Act, 1956 (1 of 1956), applies] does not express their real intention, then--

(a) either party or his representative in interest may institute a suit to have the instrument rectified; or

(b) the plaintiff may, in any suit in which any right arising under the instrument is in issue, claim in his pleading that the instrument be rectified; or

(c) a defendant in any such suit as is referred to in clause (b), may, in addition to any other defence open to him, ask for rectification of the instrument.

(2) If, any suit in which a contract or other instrument is sought to be rectified

under sub-section (1), the court finds that the instrument, through fraud or mistake, does not express the real intention of the parties, the court may, in its discretion, direct rectification of the instrument so as to express that intention, so far as this can be done without prejudice to rights acquired by third persons in good faith and for value.

(3) A contract in writing may first be rectified, and then if the party claiming rectification has so prayed in his pleading and the court thinks fit, may be specifically enforced.

(4) No relief for the rectification of an instrument shall be granted to any party under this section unless it has been specifically claimed:

Provided that where a party has not claimed any such relief in his pleading, the court shall, at any stage of the proceeding, allow him to amend the pleading on such terms as may be just for including such claim."

18. Section 26(1) makes it clear that if a contract or other instrument in writing does not express the real intention of parties, as a result of fraud or a mutual mistake, the Court is empowered to direct a rectification of the instrument.

19. Learned Counsel for the defendant has placed reliance upon a decision of the Supreme Court in **State of Karnataka and another v. K.K. Mohandas and others, (2007) 6 SCC 484**. The attention of the Court has been drawn to Paragraph No.17 of the report in **State of Karnataka v. K.K. Mohandas**, where it has been held:

"17. Under Section 26 of the Specific Relief Act, an instrument or contract may be rectified when through fraud or a mutual mistake of the parties, a contract or other instrument in writing does not express their real intention. According to Dr. Banerjee in his Tagore Law Lectures on the "Law of Specific Relief", "if the parties had deliberately left out something from the written instrument, that cannot be put in" by resort to the remedy of rectification. Here, the parties have entered into written contracts and admittedly no term is incorporated therein regarding enforcement of the ban on trade of toddy to the public in the district of Dakshina Kannada. Nor is there any case pleaded in the plaint of any mutual mistake in the matter of setting down the terms of the contract. There is also no plea of fraud on the part of the State in entering into the contract. On the terms of the contract, the plaintiffs had obtained the right to vend arrack for Excise Year 1990-1991 on their obligation to pay the bid amount in monthly instalments. In the absence of any foundation in the pleadings being laid by the plaintiffs establishing a ground for the grant of the relief of rectification, the mere adding of a prayer by way of an amendment could not be considered sufficient to grant them the relief of rectification."

20. This Court fails to see how the principle laid down in **State of Karnataka v. K.K. Mohandas** is ever so remotely attracted to the facts here. In the case before their Lordships of the Supreme Court, there was no case pleaded in the plaint about a mutual mistake relating to the terms of the contract, that involved the right to sell arrack for a particular excise year, and obliged the plaintiff to pay the bid amount in monthly installments. The plaintiff wanted relief from payment of installments on the ground that contrary to

a representation of the Minister and a Government Order, sale of toddy to the public in District of Dakshin Kannad was permitted. It was, in that connection, held by their Lordships that there was no term incorporated in the contract, that the parties entered into about the right to sell arrack, banning trade or sale of toddy to the public. Apparently, it was not a case where the real intention of parties had not been incorporated in the contract. The right to seek rectification was based on something extraneous to the contract, like the Minister's speech or the Government Order. Thus, the principle in **State of Karnataka v. K.K. Mohandas** is not attracted to the defendant's case at all. Even otherwise, the question that the defendant has mooted is about the power of the Court to rectify an instrument, where the identity of the property would change in consequence of the rectification and the impermissibility of it. That is a question, that was not in the slightest consideration before their Lordships of the Supreme Court in **State of Karnataka v. K.K. Mohandas**.

21. The other decision relied upon by the learned Counsel for the defendant is **Subhadra and others v. Thankam, (2010) 11 SCC 514**. In **Subhadra**, it was held:

"15. The description of the entire property has been given in Ext. B-1. In other words, 5 cents and complete description of Ext. B-1 was the subject-matter of the sale in terms of Ext. A-1. This aspect of the case stands fully clarified and Ext. A-1 has been completely clarified with certainty by the report of the Commissioner, which was relied upon by the trial court. In face of the matters being beyond ambiguity, there is no occasion for this Court to interfere with this finding of fact.

16. Furthermore, the question of rectification in terms of Section 26 of the Act would, thus, not arise. The provisions of Section 26 of the Act would be attracted in limited cases. The provisions of this section do not have a general application. These provisions can be attracted in the cases only where the ingredients stated in the section are satisfied. The relief of rectification can be claimed where it is through fraud or a mutual mistake of the parties that real intention of the parties is not expressed in relation to an instrument. Even then, the party claiming will have to make specific pleadings and claim an issue in that behalf.

18. We have already stated that the provisions of Section 26 of the Act are not attracted in the facts and circumstances of the present case. On the contrary, the respondent had specifically taken up the plea that Exts. A-1 and B-1 relate to sale of specific property and there was no ambiguity or mutual mistake. The courts have returned a concurrent finding in favour of the respondent and we see no reason to disturb the said finding. The High Court has specifically noticed that perusal of Ext. B-1 shows that the eastern boundary is the property owned by one Kuttappan Master and the northern boundary is shown as rest of the property as old one. There is no controversy in the appreciation of evidence and the courts have recorded the concurrent finding on the basis of evidence, documentary and oral, adduced before them and have taken a view which is permissible and in accordance with law. The contention of law raised before us on behalf of the appellant, in any case, has no merit as aforestated."

22. As would be evident, the facts on which the decision in **Subhadra** turns show that there was no ambiguity at all

found by the Courts below about the description and identity of the property, subject matter of sale. It is in the context of the aforesaid facts that their Lordships of the Supreme Court have held that it is not a case where rectification can be granted by the Court in exercise of powers under Section 26 of the Specific Relief Act, 1963. In the opinion of this Court, the said decision also has no bearing on the substantial question of law raised here, given the facts found by the Lower Appellate Court on a very reasonable view of the evidence.

23. Much emphasis has been laid by the learned Counsel for the defendant still on the fact that through rectification, a different property cannot be made the subject matter of the transaction embodied in the sale deed. This Court is afraid that the submission to the above effect on behalf of the defendant is not tenable. The power of rectification under Section 26(1) of the Specific Relief Act bears no reference to the consequences of rectification of the mistake in an instrument or contract. The consequences of rectification are absolutely foreign to the exercise of the power under Section 26(1). All that is to be seen is whether the instrument embodies the true intention of parties; or it does not. It it does not, it has to be examined whether the error is the result of fraud or a mutual mistake. In case, it is caused by either of the two, the instrument has to be rectified, though the result of it may be an alternation in the identity of the property sold.

24. Here, this Court must remark that in fact, there is no change in the identity of the property sold. The change is only in the description of it by virtue of its situation in the village, where it is really located. This Court must also remark that the case of a mutual mistake is virtually admitted to the defendant, and it is disheartening to note that this litigation should have travelled to this Court, engaging some seventeen years of the parties' life in strife.

25. **Substantial Question of Law No. (i) is answered in the affirmative** in the terms that rectification to a sale deed can be ordered to express the real intention of parties about identity of the property sold, but incorrectly described in the sale deed due to fraud or a mutual mistake.

26. **Substantial Question of Law No. (ii) is substantially the same as the first question, and, therefore, need not be answered.**

27. So far as Substantial Question No. (iii) is concerned, learned Counsel for the defendant submits that the Trial Court had recorded cogent reasons to dismiss the suit, which have not been dealt with, assigning reasons by the Lower Appellate Court. The submission is that the judgment of the Lower Appellate Court is, therefore, in violation of the mandatory requirement of Order XLI Rule 31 CPC.

28. A perusal of the judgment passed by the Trial Court shows that the relevant findings have been recorded while deciding Issue No. 1. The findings go to the effect that the plaintiff's case has not been admitted by the defendant, and, therefore, burden lies on the plaintiff to prove his case. The Trial Court has said that the plaintiff has relied upon the agreement, which also describes the property as land situate in Village Udaipur Maheva. It has been inferred, therefore, that the antecedent

agreement does not lend support to the plaintiff's case that what was intended to be sold was land located in Village Chhauchh. It has then been remarked by the Trial Court that in order to prove his case, the plaintiff has examined PW-1, Ved Prakash Pitariya, who has said in his cross-examination that he does not know the boundaries of the suit property, but could tell about the same on reading the sale deed. The Trial Court has also noted that in his cross-examination PW-1 has said that he had not visited the suit property in the past 2 - 3 years. The Trial Court has drawn an inference from this stand of the plaintiff's witness that he is not familiar with the suit property.

29. It has also been remarked by the Trial Court that the plaintiff, who is the purchaser of the suit property, has not deposed in Court as a witness. By contrast, the defendant, who is the seller, has denied the plaintiff's case. The Trial Court has also said that the plaintiff has not examined the Scribe of the sale deed as a witness or any of the witnesses of the sale deed, to wit, Anil Sengar and Suresh. It has been also said by the Trial Court that evidence of the witnesses of the sale deed is crucial as they could throw light on the true intention of parties while executing the instrument. The Trial Court seems to have been much swayed by the fact that the witnesses or the Scribe of the sale deed or the plaintiff have not been examined.

30. By contrast, the Lower Appellate Court has carefully looked into the pleadings to find that the fact about the subject matter of sale, being the land in Village Chhauchh, has not been denied by the defendant in Paragraph No.5 of the written statement. The Lower Appellate Court has then carefully considered the stand of the defendant in his cross-examination to rightly infer that he admits the plaintiff's case about the transaction being one related to the sale of a 1/3rd share of Gata No.39, situate in Village Chhauchh. The Lower Appellate Court has relied more upon the admission of the defendant, which, without doubt, is the best piece of evidence. The Trial Court's findings have been carefully considered and reversed. In doing so, the Lower Appellate Court has said that it deserves mention that PW-1 has said in his evidence that he does not know about the boundaries of the suit property, and that he has not visited it in the past 2 - 3 years. The Lower Appellate Court has remarked that possibly, the Trial Court has disbelieved this witness going by this part of his evidence.

31. It has then been observed by the Lower Appellate Court that it deserves mention that PW-1 is the plaintiff's husband. If this witness says that he cannot recollect the boundaries of the suit property or has not visited the site in the past 2 - 3 years, the factum of execution of the agreement or the sale deed cannot be doubted on this ground alone. The reason is, according to the Lower Appellate Court, that the fact of execution of the sale deed is admitted to the defendant as well as the agreement. Therefore, it was not necessary to examine the witnesses of the sale deed. The Lower Appellate Court has then noted the admission of the defendant that the plaintiff's husband, PW-1 and Ratan Lal assured him that they would be back with the balance sale consideration, trusting which he signed the sale deed. The said fact has been relied upon by the Lower Appellate Court to infer a clear admission about the execution of the sale deed. The cross-examination of DW-1, who is none

other than the defendant, has been carefully looked into to infer that the suit property is situate in Village Chhauchh and that it adjoins Village Udaipur Maheva. He has admitted executing the agreement and the sale deed in respect of land of Village Chhauchh, to the extent of his 1/3rd share in Gata No.39 of Village Chhauchh.

32. With so much of careful analysis of the evidence done and findings recorded, supported by reasons, to reverse the Trial Court, it cannot be said that the Lower Appellate Court has reversed the Trial Court without meeting the reasons or considering the evidence dealt with by the Trial Court. As such, **Substantial Question of Law No. (iii) is answered in the affirmative, subject to the conclusions hereinabove.**

33. In the result, the appeal fails and is dismissed.

34. The impugned judgment and decree passed by the Lower Appellate Court is affirmed. The plaintiff shall be entitled to his costs in this Court and in both the Courts below.

35. Let a decree be drawn up, accordingly.

(2022)01ILR A989
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.12.2021

BEFORE

THE HON'BLE AJAY BHANOT, J.

Writ- C No. 20885 of 2021

Saumya Tiwari ...Petitioner

Versus

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

Counsel for the Petitioner:
Sri Udai Narain Singh, Sri Lal Dev

Counsel for the Respondents:
C.S.C., Sri Rohit Pandey, Ms. Shambhavi Tiwari, Shri Paras Nath Rai(Central Government S.C.)

A. Constitution of India – Article 21 & 42 – United Nation Declaration on Human Rights – Article 25(2) – Maternity Benefit Act, 1961 – Maternity leave – Motherhood – Right of reproductive choice of a woman – Dignified environment for motherhood in pre or post natal period – It's significance – Held, motherhood is the most sublime expression of Nature's longing for life. Dignity of motherhood is the highest manifestation of refinement in the human race – The rights of the petitioner to reproductive choices, marriage, procreation and motherhood are entrenched as fundamental rights by the law laid down by constitutional courts. (Para 67 and 73)

B. UP Technical Universities Act, 2000 – Absence of the provisions in respect of granting the maternity leave or any relaxation for expectant and new mothers – Validity challenged – Held, the respondent University has neglected to frame Regulations or create appropriate legal instruments to provide for maternity benefits to expectant mothers and new mothers – By failing to frame Regulations or appropriate legal instruments for grant of maternity benefits and by declining to grant such benefits to the petitioner, the University has violated the fundamental rights of the petitioner as guaranteed under Articles 14, 15(3) and 21 of the Constitution of India and as expounded in the law laid down by Constitutional Courts. (Para 18, 77 and 86)

C. Constitution of India – Part III – Fundamental Rights – Scope – Constitutional law defines the substance

of fundamental rights – There is a limit to human foresight, but the possibilities of life are limitless. The limits of legislation are the constraints of human foresight – The text of the Constitution contains a conceptual philosophy of fundamental rights, and is not an exhaustive compendium of all fundamental rights – The text of the Constitution is constant, fundamental rights are always evolving. This is the essence of constitutional law jurisprudence. (Para 58, 59 and 62)

D. Constitutional law jurisprudence – Evolution – Duty of the Court – Law is always in motion and never at a standstill. The Constitution of India is a forever living organism – Evolution of constitutional law rights are guided and controlled by the text of the constitution, long settled judicial principles of interpretation of the constitution, and judicial precedents in point – The march of law is also assisted by consensus of values in the comity of civilized nations. These universal values are often manifested in international instruments – Another source of such values is comparative international jurisprudence. The felt needs of the times are also factored in by the courts – Development of constitutional law and evolution of fundamental rights happens on these sure foundations – Fundamental rights are thus distilled by the constitutional courts in discharge of their constitutional obligations – This is not judicial activism by courts. It is judging. (Para 61 and 63)

E. University – Role and obligation – Universities are the custodians of old values – Universities are not teaching shops, nor are they mere examining bodies. Universities nurture intellect and develop character of young citizens in a wholesome manner – Ideals professed by the University today will be the values practised by the nation tomorrow – Lack of empathy of the University towards pregnant women will create apathy towards maternity rights among the students. The University has to show fidelity to the rule of law by creating an enabling environment to realize fundamental rights, foster fundamental duties and promote constitutional values. (Para 68, 70 and 72)

Writ petition allowed. (E-1)

List of Cases cited :-

1. Pratap Singh Vs St. of Jharkhand; 2005 (3) SCC 551

2. Suchita Srivastava & ors. Vs Chandigarh Administration; AIR 2010 SC 235

3. R. Rajagopal Vs St. of T.N. & ors.; (1994) 6 SCC 632

4. Govind Vs St. of M.P. & ors.; AIR 1975 SCC 1378

5. Justice K. S. Puttaswamy (Retd.) Vs Union of India; 2017 (10) SCC 1

6. Bandhua Mukti Morcha Vs U.O.I. & ors.; (1984) 3 SCC 161

7. Municipal Corporation of Delhi Vs Female Workers (Muster Roll) & anr.; (2000) 3 SCC 224

8. Mini K.T. Vs Senior Divisional Manager L.I.C.; 2018 (1) KLJ 245

9. Vandana Kandari Vs University of Delhi; 2010 SCC OnLine Delhi 2341

10. Madhu Kishwar & ors. Vs St. of Bihar & ors.; 1996 (5) SCC 125

11. A. Arulin Ajitha Rani Vs The Principal, Film & Television Institute of Tamil Nadu & ors.; AIR 2009 Mad 7

12. Nithya Vs University of Madras & ors.; 1994 SCC OnLine Mad 339

13. Inspector (Mahila) Ravina Vs U.O.I. & ors.; 2015 SCC OnLine Del 14619

14. Ahalya K.A. Vs Kannur University & ors.; 2016 SCC OnLine Ker 19424

15. Jasmine VsG. Vs Kannur University; 2016 SCC OnLine Ker 3221

16. Ankita Meena Vs University of Delhi; 2018 SCC OnLine Del 9049

17. Ankita Meena Vs University of Delhi; 2021 SCC OnLine SC 36

18. Dr. Shelly Jetly Vs St. of Pun. & ors.; 2000 SCC OnLine P & H 1061

19. Vishaka Vs St. of Raj.; 1997 (6) SCC 241

20. Rattan Chand Hira Chand Vs Askar Nawaz Jung; (1991) 3 SCC 67

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

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

A.	Introduction	
B.	Submission	
C.	Facts	
D.	Issues for consideration	
E.	Statutory perspectives:	
	a.	University statutes
	b.	Analogous provisions
	c.	International Instruments
	d.	Constitutional provisions
F.	Case laws	
G.	Evolution of Fundamental Rights legislative lag and executive inertia	
H.	Education & Universities	
I.	Conclusions & Directions	

A. Introduction

2. The petitioner asserts that she could not successfully complete B.Tech. (Electronics and Communication) course in the period prescribed in the University Regulations, as she was not granted maternity leave nor provided maternity support benefits as an expectant mother and as a new mother. She claims entitlement to an additional chance in an enlarged time period to appear in the two papers of B. Tech. (Electronics & Communication) which she could not clear in the regular academic calender.

B. Submissions

3. Sri Lal Dev Chaurasiya, learned counsel and Sri Uday Narain Singh, learned counsel for the petitioner submit that the petitioner could not appear in the last chance for qualifying the papers (which she could not clear in the regular academic semesters) due to her pregnancy and post natal recovery issues. The University authorities did not grant any relaxation and support to the petitioner during her pregnancy and immediately after she delivered a baby child. The pre natal and post natal conditions imposed limitations upon the petitioner which precluded her from competing equally with other students.

4. The petitioner has a fundamental right to various maternity benefits and reliefs. The action of the University in denying the petitioner maternity relief, benefits and support has violated her fundamental rights guaranteed under Articles 14, 15 and 21 of the Constitution of India and has permanently blighted her academic future.

5. Learned counsels submitted various authorities of the Constitutional Courts, Hon'ble Supreme Court & Hon'ble High Courts, international instruments and analogous statutes, which define and regulate maternity rights.

6. Sri Rohit Pandey, learned counsel assisted by Ms. Shambhavi Tiwari, learned counsel for the respondents-University contends that there is no provision for grant of any maternity benefits or reliefs to

students under the Regulations or Ordinances of the University. The University cannot act contrary to its statutes and regulations framed thereunder. The University cannot be faulted for not granting any maternity benefits or support to the petitioner.

7. Shri Ajal Krishna, learned counsel for the AICTE has filed an affidavit on behalf of the regulatory body. Learned counsel for the AICTE contends that AICTE does not oppose the creation of scheme for grant of maternity benefits to undergraduate students by the University-respondent nos. 2 and 3. Further it is for the University to create the desired Regulations for which it is adequately empowered.

8. Learned Standing Counsel for the State of U.P. contends that the creation of Regulations for grant of maternity benefits lies within the domain of the University.

9. Shri Paras Nath Rai, learned Central Government Standing Counsel submits that the Government of India had sent a communication to the University Grants Commission, New Delhi, to intimate the action taken in the matter. In response to the aforesaid communication, the University Grants Commission, New Delhi, has passed an order on 14.12.2021, requesting the Vice Chancellors of all Universities in the country to frame appropriate rules/norms with regard to the grant of maternity leave and any other facilities/relaxations deemed necessary for women students pursuing undergraduate and postgraduate programme. and also provide necessary relaxation to the women students.

10. Shri Paras Nath Rai, learned Central Government Standing Counsel further contends that the University Grants Commission, New Delhi, as well as Union of India do not contest the claim of the petitioner.

11. Facts of the case are undisputed and lie in a narrow compass. Pure questions of law arise for consideration in this writ petition. With consent of parties, the matter is being decided finally.

C. Facts

12. The petitioner was admitted to the B.Tech. (Electronics and Communication) course in the academic year 2013-14, in Krishna Institute of Technology, Kanpur, which is affiliated to Dr. A. P. J. Abdul Kalam Technical University, Uttar Pradesh, Lucknow (hereinafter referred to as the 'University').

13. The time period for completion of B.Tech. course in Electronics and Communication, as provided in the Ordinances of the University is 7 years. The relevant Ordinance is extracted hereunder:

"4.3 The maximum time allowed for a candidate admitted in 1st/IIIrd semester (for diploma holders) for completing the B.Tech course shall be 7 (seven)/5(five) years respectively, failing which he/she shall not be allowed to continue for his/her B.Tech degree."

14. The petitioner cleared all the semester examinations successfully, but did not qualify the subjects of Signals and Systems in the 3rd semester and Engineering Mathematics-II in the 2nd Semester examination in the regular academic calender.

15. The petitioner could not complete the B.Tech (Electronics & Communication) course by the academic session 2019-2020, as stipulated in the Ordinances.

16. The exam schedules of the last two opportunities given to the petitioner for appearing in the said papers are as follows is as follows:

I. "Signals and System--3rd semester -- B.Tech. (Electronics and Communication) -- December 2019

Engineering Mathematics-II -- 2nd Semester -- B.Tech. (Electronics and Communication) -- September 2020"

II. Signal and System (3rd Semester), February, 2021, Engineering Mathematics (2nd Semester) July, 2021.

17. The petitioner could not appear and avail the chances as she was an expectant mother. The petitioner gave birth to a child on 22nd December, 2020. Thereafter she experienced post natal issues which delayed her recovery.

18. The University refused to give her an additional chance which catered to her maternity period and post natal recovery time. There are no provisions for grant of maternity leave or any relaxation for expectant and new mothers in the Uttar Pradesh Technical Universities Act, 2000, Ordinances, Regulations or Statutes which govern and regulate functioning of the University.

D. Issues for consideration

19. The issues which arise for consideration are as under:

I. Whether the right of reproductive choice of a woman is a fundamental right if so the implications of the same on the current controversy?

II. Whether the petitioner can be denied maternity benefits solely on the footing that no provision exists in the statutes or Ordinances or Regulations of the University to provide such relaxation?

III. What is the nature of maternity benefits and relief which can be granted to the petitioner at this stage?

E. Statutory Perspectives

(a) University Statutes

20. Section 29 of the Uttar Pradesh Technical Universities Act, 2000 empowers the Executive Council to frame new Regulations or amend or repeal Regulations made by the State in the first instance. The provision is reproduced below:

"Section 29.(1) The First Regulations of the University shall be made by the State Government by notification.

(2) The Executive Council may, from time to time, make new or additional Regulations or may amend or repeal the Regulations referred to in sub-section (1):

Provided that the Executive Council shall not make, amend or repeal any Regulation affecting the status, power or constitution of any authority of the University until such authority has been given a reasonable opportunity to express its opinion in writing on the proposed changes and any opinion so expressed has been considered by the Executive Council.

(3) Notwithstanding anything contained in the foregoing sub-

sections, the State Government may in order to implement any decision taken by it in the interest of learning, teaching or research on the basis of any suggestion or recommendation of the University Grants Commission or All India Council for Technical Education or the State or National Education Policy require the Executive Council to make new or additional Regualtions or amend or repeal the Regulations referred to in sub-section (1) or sub-section (2) within a specified time and if the Executive Council fails to comply with such requirement the State Government may make new or additional Regulations or amend or repeal the Regulations referred to in sub-section (1) of sub-section (2)."

21. The relevant Regulations which advise special arrangements for women are extracted below:

"**4.12** Subject to the provisions of the Act and Regulations, the Academic Council shall have the following powers:

(e) to advise special arrangements, if any for the teaching of female students and students of weaker section of society;

(emphasis supplied)

(g) to recommend to the Executive Council for the Ordinances regarding examinations of the University;

(h) to prepare Academic calendar.

(p) to perform, in relation to academic maters, all such duties and do all such act as may be necessary for the proper executive by carrying out of the provisions of the Act and the Regulations."

22. The Academic Council of the University is further vested with the plenary following powers:

"**4.10** The Council shall exercise all the powers of the University not otherwise provided by the Act, Regulations, and Ordinances for the fulfillment of the objects of University."

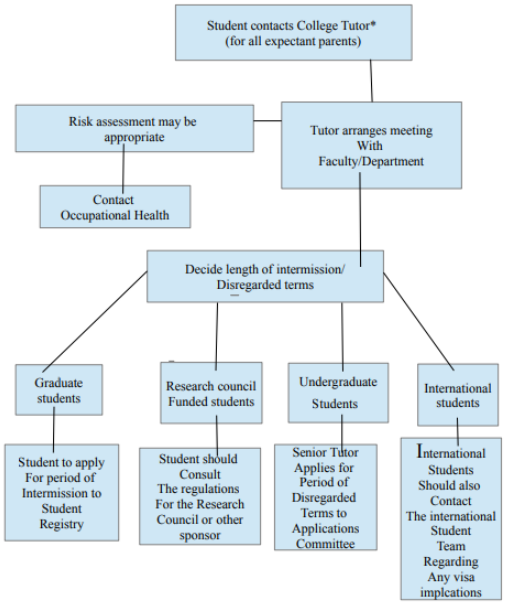
"23. The Academic Council shall have the power to relax any provision provided in the ordinance in any specific matter/situation subject to the approval of Executive Council of the University and such decision(s) shall be reported to the Chancellor of the University."

(b) Analogous Provisions

23. The Statutes, Ordinances, Regulations, directions or orders of the Academic Council and Executive Council of the University are silent on grant of maternity leave/support to expectant and new mothers. In view of the aforesaid statutory and executive void, analogous provisions created by various universities and academic regulatory bodies in India, as well as foreign universities which are sensitive to the rights of expectant mothers' students' and new parents will support the discussion.

24. Cambridge University has taken out a detailed brochure for students who are expectant parents. The flow chart which is part of brochure sums up the roles of various stake holders as well as responsibilities of University authorities and the procedure to be followed is drawn hereinunder:

"K.Pregnancy/Maternity/Paternity/Adoption Leave flow diagram"



25. Similarly, the University of Oxford has a comprehensive frame work for entitlement of parental leave, arrangements for return to study, and supportive measures for pregnant students and new mothers.

26. The provisions of the maternity leave under the Oxford University are reproduced below:

"3. MATERNITY LEAVE

The University's policy has been harmonised with the Research Councils' framework and clearly differentiates maternity leave from suspension of status for medical or disciplinary reasons. It aims to ensure consistent and fair treatment of pregnant students and new mothers and provides new mothers with the right to a protected period of leave after the birth.

3.1. Students should notify their college, department, supervisor or Director of Graduate Studies of their pregnancy as soon as possible, and preferably no later than the 15th week before the expected week of childbirth. Earlier notification may be necessary in some cases, for example where a student works in a potentially hazardous environment. If this is the case, the department in question must ensure that it has published this information and drawn students' attention to it.

3.2. Risk assessments must be made where the work environment (e.g. laboratory, clinic) might pose a threat to a pregnant student. The University Occupational Health Service (UOHS) recommends that departments seek advice from their Departmental Safety Officer, the Area Safety Officer or the Safety Office. The OUHS can also assist with health queries relating to pregnancy and breastfeeding at work. This may require a consultation with a doctor or nurse and a visit to the workplace (email enquiries@uohs.ox.ac.uk).

3.3. In conjunction with the student, the college and department should draw up a student support plan to be reviewed at key stages during pregnancy and maternity. This will help coordinate support and ensure students' needs are met during pregnancy, following the birth and on the student's return to studies.

27. Oxford university contemplates grant of one full year leave to students who give birth. The said provision is extracted as under:

"**Undergraduate and postgraduate taught students**

3.5. Students who give birth may choose to suspend their status before

recommencing their studies. This will normally last one full year so that the student may return to study at the same point at which they suspended."

28. The student is not left to fend for herself even after maternity leave. During the maternity leave the students of the Oxford University do not snap their academic links and are required to maintain them in order to plan all their return to study. The relevant provisions are as follows:

"Planning for return to study

3.12. Undergraduate and postgraduate students on maternity leave should be encouraged by their college and/or department to maintain occasional contact with their tutor and/or supervisor so that arrangements may be made for their return to study. This is likely to involve a limited amount of academic guidance and preparation, as necessary in each case.

3.13. Timely arrangements should be made to facilitate students' return to study after maternity leave, including a full assessment of their requirements in relation to e.g. training, updating, monitoring and additional learning support. Typically this assessment would be carried out by a college tutor, supervisor or other relevant academic staff.

3.14. Risk assessments must also be made where the work environment might pose a threat to a breastfeeding mother (see section 3.2 above).

3.15. If ill-health prevents a postgraduate student from returning to work after completing their maximum period of maternity leave, this should be treated as sickness absence and further suspension of status should be sought and notifications made accordingly (i.e. to the funding body). If a student is unable to return to work due to the illness of their child, they should seek a further suspension of status, if necessary by application to the Education Committee.

Undergraduate students

4.1. Some undergraduate students returning to study after the birth of a child may find it difficult to pursue their course at the normal pace. Under such circumstances it may be possible to extend the duration of their studies, typically by studying the Final Honour School over one additional year. Such a proposal requires endorsement from both the college and the faculty or department. The student's college can then apply to Education Committee to request dispensation from the examination regulations concerning overstanding for honours, the timing of multi-University of Oxford Policy on Student Maternity, Extended Paternity, Adoption and Shared Parental Leave part examinations, or if it is proposed to split Finals over two years. Approval for the extension of study will also have to be obtained from Student Finance England or the relevant regional body. Applications for remission of the additional year's university fees will be considered by the Fees Panel on a case-by-case basis."

29. Similarly the University Grants Commission, New Delhi, have set up minimum standards for supportive facilities to expectant parents under UGC (Minimum Standards and Procedures for Award of M.Phil./Ph.D. Degrees) Regulations-2016. The said Regulations contemplate grant of maternity leave and other relaxations to M.Phil/Ph.D. students The relevant provisions state thus:

"Duration of the Programme:

4.4.....In addition, the women candidates may be provided Maternity

Leave/Child Care Leave once in the entire duration of M.Phil/Ph.D. for up to 240 days."

30. Guidelines for maternity and paternity leave for fellowship students have been framed by the All India Council for Technical Education for Ph.D. Programme, which are as follows:

"9.0. Terms and Conditions:-

m) Leave:-

(ii) Candidates are eligible for maternity/ Paternity leave as per GoI norms issued from time to time at full rates of fellowship etc. once during the tenure of their award. However, maximum duration of fellowship will not be extended under any circumstances."

31. All India Council for Technical Education has also framed maternity leave guidelines for Post Graduate Scholarship Schemes in the year 2021:

"1.4 Other Entitlements:

Maternity leave :

Candidates are eligible for maternity/ Paternity leave as per Govt. of India norms issued from time to time at full rates of fellowship etc. once during the tenure of their award. However maximum duration of fellowship will not be extended in any circumstances."

32. The Ordinances of the University of Allahabad also contemplate grant of maternity leave/child care leave for the Doctor of Philosophy students. Proviso to Ordinance 4(a) which provides for the same is stated below:

"4 (a) Subject to the provisions of this Ordinance and the Regulations, each candidate shall, upon admission and enrolment to the Ph.D. programme, pursue a course of research of a duration of not less than twenty-four months in residence within the area referred to in sub-clause (b) of clause 1, and shall regularly pay the prescribed annual and other fees up to the time he withdraws from his enrolment, or such enrolment is terminated, or he duly submits his thesis to the University. The minimum duration of submitting the thesis is 36 months from the date of enrolment and maximum period of submitting the thesis is 72 months from the date of enrolment.

Provided that the Women Candidates and Persons with Disability may be allowed a relaxation of two years for Ph.D. in the maximum duration. In addition, the Women candidate may be provided maternity leave/childcare leave once in the entire duration of Ph.D. for upto 240 days."

(emphasis supplied)

33. Ordinances of the Allahabad University which provide for grant of maternity leave for various other courses are extracted hereinbelow:

"9 (d). In the case of a married woman student who is granted maternity leave, in calculating the total number of lectures delivered in the College or in the University, as the case may be, for her course of study in each academic year, the number of lectures in each subject delivered during the period of her maternity leave shall not be taken into account:

Provided that Post-graduate Degree students under the Faculty of Medical Sciences who apply for maternity leave either in I year or in II year, may be allowed the maternity leave for a period not exceeding 3 months in an academic year

but such students will be required to complete the duration of the course as regular students as required in the Ordinance and the students will be permitted to submit the thesis or to take the written examination, as the case may be, in January instead of August that year."

(c) International Instruments

34. International covenants, treaties and instruments reflect the growth of international law. Various international instruments proclaim the dignity of motherhood. These international instruments evidence a consensus of shared human values and universalisation of human rights in the comity of nations. India has cemented her international standing by being a signatory to such forward looking international instruments. Indian courts have faithfully implemented the international obligations through judicial pronouncements. The strong commitment of the constitutional courts in India to the cause of women and motherhood in consistent with the constitutional scheme and various international instruments.

35. A scholarly discussion on the importance of discharging national obligations under various international instruments is found in ***Pratap Singh vs. State of Jharkhand***1.

36. Some relevant international instruments and provisions of the Constitution of India are extracted below:

I. United Nation Universal Declaration on Human Rights Article 25(2):

"2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection."

II. International Convention on Economic and Cultural Rights.

Need for supportive measures to expectant mothers both before and after child birth as provided in Article 10 (2):

"2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits."

III. Convention on elimination of all forms of discrimination against women:

"*Article I*

For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."

"Article 10

States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women: (a) The same conditions for career and vocational guidance, for access to studies and for the achievement of diplomas in educational establishments of all categories in rural as well as in urban areas; this

equality shall be ensured in pre-school, general, technical, professional and higher technical education, as well as in all types of vocational training;

(b) Access to the same curricula, the same examinations, teaching staff with qualifications of the same standard and school premises and equipment of the same quality;

(c) The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programmes and the adaptation of teaching methods;

(d) The same opportunities to benefit from scholarships and other study grants;

(e) The same opportunities for access to programmes of continuing education, including adult and functional literacy programmes, particulary those aimed at reducing, at the earliest possible time, any gap in education existing between men and women;

(f) The reduction of female student drop-out rates and the organization of programmes for girls and women who have left school prematurely;

(g) The same Opportunities to participate actively in sports and physical education;

(h) Access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning."

(d) Constitutional Provisions:

37. Articles 42 of the Constitution of India provides for humane conditions of work and maternity relief.

"**42. Provision for just and humane conditions of work and maternity relief.-**

The State shall make provision for securing just and humane conditions of work and for maternity relief."

38. Other relevant provisions are Article 41 and Article 43 of the Constitution of India. Article 15(3) prohibits discrimination on the basis of sex.

F. Case Laws:

39. The Supreme Court in **Suchita Srivastava and others Vs. Chandigarh Administration**2, gave widest amplitude to a woman's right to make reproductive choices. Reproductive choices were construed as inherent to a woman's right to privacy, dignity and bodily integrity which are relatable to Article 21 of the Constitution of India. The Supreme Court then declined to put any restriction on such choices by holding forth:

"22.There is no doubt that a woman's right to make reproductive choices is also a dimension of `personal liberty' as understood under Article 21 of the Constitution of India. It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods. Furthermore, women are also free to choose birth-control methods such as undergoing sterilisation

procedures. Taken to their logical conclusion, reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children...."

40. **R. Rajagopal Vs. State of Tamil Nadu and others**3 was the precursor to **Suchita Srivastava (supra)**, wherein the right to motherhood, procreation and child bearing was found to be relatable to the fundamental right vested by Article 21 of the Constitution of India. **R. Rajagopal (supra)** was cited with approval while expounding the following proposition in **Govind Vs. State of Madhya Pradesh and others**4:

"9.....Any right to privacy must encompass and protect the personal intimacies of the home, the family, marriage, motherhood, procreation and child-rearing. This catalogue approach to the question is obviously not as instructive as it does not give analytical picture of the distinctive characteristics of the right of privacy. Perhaps, the only suggestion that can be offered as unifying principle underlying the concept has been the assertion that a claimed right must be a fundamental right implicit in the concept of ordered liberty...."

41. **Justice K. S. Puttaswamy (Retd.) Vs. Union of India**5 following Suchita Srivastava (supra) firmly and irrevocably reiterated that human dignity is a fundamental right under Article 21 of the Indian Constitution. With customary eloquence, in **K.S. Puttaswamy (supra)** Dr. D. Y. Chandrachud, J., speaking for the learned Constitution Bench upon consideration of the judicial precedents in point distilled the concept of human dignity and its place in part III of the Constitution:

"**Jurisprudence on dignity**

"108. Over the last four decades, our constitutional jurisprudence has recognised the inseparable relationship between protection of life and liberty with dignity. Dignity as a constitutional value finds expression in the Preamble. The constitutional vision seeks the realisation of justice (social, economic and political); liberty (of thought, expression, belief, faith and worship); equality (as a guarantee against arbitrary treatment of individuals) and fraternity (which assures a life of dignity to every individual). These constitutional precepts exist in unity to facilitate a humane and compassionate society. The individual is the focal point of the Constitution because it is in the realisation of individual rights that the collective well-being of the community is determined. Human dignity is an integral part of the Constitution. Reflections of dignity are found in the guarantee against arbitrariness (Article 14), the lamps of freedom (Article 19) and in the right to life and personal liberty (Article 21).

118. Life is precious intself. But life is worth living because of the freedoms which enable each individual to live life as it should be lived. The best decisions on how life should be lived are entrusted to the individual. They are continuously shaped by the social milieu in which individuals exist. The duty of the State is to safeguard the ability to take decisions. "Life" within the meaning of Article 21 is not confined to the integrity of the physical body. The right comprehends one's being in its fullest sense. That which facilitates the fulfillment of life is as much within the protection of the guarantee of life.

119. To live is to live with dignity. The draftsmen of the Constitution defined their vision of the society in which constitutional values would be attained by

emphasising, among other freedoms, liberty and dignity. So fundamental is dignity that it permeates the core of the rights guaranteed to the individual by Part III. Dignity is the core which unites the fundamental rights because the fundamental rights seek to achieve for each individual the dignity of existence. Privacy with its attendant values assures dignity to the individual and it is only when life can be enjoyed with dignity can liberty be of true substance. Privacy ensures the fulfilment of dignity and is a core value which the protection of life and liberty is intended to achieve."

42. Maternity relief was embedded in the minimum requirement for dignified life in **Bandhua Mukti Morcha Vs Union of India (UOI) and others**6:

"10. Moreover, when a complaint is made on behalf of workmen that they are held in bondage and are working and living in miserable conditions without any proper or adequate shelter over their heads, without any protection against sun and rain, without two square meals per day and with only dirty water from a nullah to drink, it is difficult to appreciate how such a complaint can be thrown out on the ground that it is not violative of the fundamental right of the workmen. It is the fundamental right of every one in this Country, assured under the interpretation given to Article 21 by this Court in Francis Mullen's case, to live with human dignity, free from exploitation. This right to live with human dignity, enshrined in Article 21 derives its life breath from the Directive Principles of State Policy and particularly clauses (e) and (f) of Article 39 and Article 41 and 42 and at the least, therefore, *it must include protection of the health and strength of workers men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief."*

(emphasis supplied)

43. The importance of dignified environment for motherhood in pre or post natal period was propounded in the context of the Maternity Benefit Act 1961 and in the backdrop of Articles 39, 42 and 43 of the Constitution of India in **Municipal Corporation of Delhi Vs Female Workers (Muster Roll) and Another**7: The Supreme Court in **Municipal Corporation of Delhi (supra)** set its face against victimization of pregnant women:

"33. A just social order can be achieved only when inequalities are obliterated and everyone is provided what is legally due. Women who constitute almost half of the segment of our society have to be honoured and treated with dignity at places where they work to earn their livelihood. Whatever be the nature of their duties, their avocation and the place where they work; they must be provided all the facilities to which they are entitled. To become a mother is the most natural phenomena in the life of a woman. Whatever is needed to facilitate the birth of child to a woman who is in service, the employer has to be considerate and sympathetic towards her and must realise the physical difficulties which a working woman would face in performing her duties at the work place while carrying a baby in the womb or while rearing up the child after birth The Maternity Benefit Act, 1961 aims to provide all these facilities to a

working woman in a dignified manner so that she may overcome the state of motherhood honourably, peaceably, undeterred by the fear of being victimised for forced absence during the pre or post-natal period."
(emphasis supplied)

44. The High Court of Kerala in **Mini K.T. Vs Senior Divisional Manager L.I.C**.8 emphasized the need for an institutional support system for expectant mothers in light of our civilisational values, cultural ethos and constitutional law and held thus:

"23.Coming back to the question of dignity, those dignity has to be understood in the societal background. Indian cultural and traditional practices would go to show that motherhood is an essential part of family responsibility. International Human Rights Law thus protect dignity of woman and also family. The Constitution thus demand interpretation of its WPC 22007/2012 provisions in that background. Person-hood of a woman as mother is her acclaim of individuality essentially valued as liberty of her life. This was so designed by culture, tradition and civilisation. Mother's role in taking care of the child has been considered as an honour; she enjoyed such status because of her position in respect of the child. If on any reason she could not attend her workplace due to her duties towards child (compelling circumstances), the employer has to protect her person-hood as "mother". If not that, it will be an affront to her status and dignity. No action is possible against a woman employee for her absence from duty on account of compelling circumstances for taking care of her child. No service Regulations can stand in the way of a woman for claiming protection of her fundamental right of dignity as a mother. Any action by an employer can be only regarded as a challenge against the dignity of a woman. Motherhood is not an excuse in employment but motherhood is a right which demands protection in given circumstances. What employer has to consider is whether her duty attached WPC 22007/2012 to mother prevented her from attending employment or not. As already adverted above, motherhood is an inherent dignity of woman, which cannot be compromised.

24. A mother cannot be compelled to choose between her motherhood and employment. A woman employee is not expected to surrender her self respect fearing action against her for not being able to attend duty for compelling family responsibility. John Rawls in the book, "A Theory of Justice", identifies that in a just Society, self respect is not subject to political bargaining while parties in original position thrust for justice as fairness. He describes self respect thus:

"67. SELF-RESPECT, EXCELLENCES, AND SHAME ...We may define self-respect (or self-esteem) as having two aspects. First of all, as we noted earlier, it includes a person's sense of his own value, his secure conviction that his conception of his good, his plan of life, is worth carrying out. And second, self-respect implies a confidence in one's ability, so far as within one's power, to fulfill one's intentions. When we feel that our plans are of little value, we cannot pursue them with pleasure or take delight in their execution. Nor plagued by failure and self- doubt can we continue in our endeavors. It is clear then why self-respect is a primary good. Without it nothing may seem worth doing, or if some things have

value for us, we lack the will to WPC 22007/2012 strive for them. All desire and activity becomes empty and vain, and we sink into apathy and cynicism. Therefore the parties in the original position would wish to avoid at almost any cost the social conditions that undermine self-respect. The fact that justice as fairness gives more support to self-esteem than other principles is a strong reason for them to adopt it."

26. In patriarchy, woman belonged to kitchen. It needs to be realised that girls do have a dream and woman do have a vision, and motherhood cannot be seen as a burden on them to pursue such dreams and visions. The court while considering amplitude and meaning of life under Article 21 of the Constitution has to embrace its full meaning in the societal background on which the court is called upon to WPC 22007/2012 decide such disputes. Thus, a woman employee cannot be thrown out from service for remaining absent on account of taking care of child, if such taking care is indispensable for her. It is made clear that it is only in compelling circumstances, such right can be claimed and protected. In the enforcement of fundamental right, the employer cannot raise a plea to defend themselves by referring to financial implication or organisational interest. Whatever be the inconvenience that the employer may suffer, that is no excuse against claim of protection of fundamental rights.

Our culture, tradition and practice venerate motherhood; our Constitution proclaim and protect status, dignity and self-respect of motherhood; let our deeds, action and decision not be allowed to become profane on motherhood of a woman."

(emphasis supplied)

45. The issue of maternity benefits for students of Delhi University arose before the Delhi High Court in **Vandana Kandari Vs University of Delhi**9. The ordinances of the Delhi University came in the way of grant of relief to the petitioner who was an expectant mother. After examining the rights of pregnant female students and the said ordinances the anvil of Articles 41, 42, 43, Article 15(3) of the Constitution of India and the judgments rendered in **Madhu Kishwar and others Vs State of Bihar and others**10, the Delhi High Court held as under:

"62. In the light of the above discussion, if any female candidate is deprived or detained in any of the semester just on the ground that she could not attend classes being in the advanced stage of pregnancy or due to the delivery of the child, then such an act on the part of any of the university or college would not only be completely in negation of the conscience of the Constitution of India but also of the women rights and gender equality this nation has long been striving for. It is a saying that "Motherhood is priced of God, at price no man may dare to lessen or misunderstand". By not granting these students relaxation, we will be making motherhood a crime which no civilized democracy in the history of mankind has ever done or will ever do. We cannot make them pay the price for the glory that is motherhood."

46. The judgment of the learned Single Judge in **Vandana Kandari (supra)** was carried in appeal **(Ref: LPA 662/2010, University of Delhi and another Vs. Vandana Kandari and another).** The learned Division Bench of Delhi High Court while not agreeing with the findings of the learned Single Judge held that the petitioners were entitled to relaxation in

view of the concession given by the University. The concession was commended by the learned Division Bench:

"3. We are of the considered opinion that the maternity leave could not have been put in a different compartment for the purpose of relaxation of attendence. In view of the aforesaid, the decision rendered by the learned single Judge to this extent suffers from an infirmity and is accordingly set aside. Be it noted, a peculiar circumstance has emerged in this case. Though we have allowed, appeal, we have asked Mr. M.J.S. Rupal whether the University has any objection to the benefit of relaxation to the two respondents. Regard being had to the special features of the case, Mr. M.J.S. Rupal has fairly stated that the University has no objection to give the benefit of relaxation to the respondent students. We record our appreciation for the statement made by Mr. M.J.S. Rupal after obtaining instructions from the University. We may also aptly note that the said concession has been given by the University as the result of the respondents have already been declared. Needless to say that when a case is decided and benefit of concession is given, the same cannot be cited as a precedent in future cases. There shall be no order as to costs."

47. Similarly in **A. Arulin Ajitha Rani Vs. The Principal, Film and Television Institute of Tamil Nadu and others**11, the Madras High Court directed the institution to frame a policy for pregnant women after finding that the maternity support granted to the petitioner to be inadequate:

"27. Therefore, the writ petition is allowed and the impugned order is set aside. The first respondent is directed to formulate a policy in general, for all educational institutions and universities in the State, so as to ensure that girl students, whose attendance falls short of the prescription, on account of marriage and pregnancy, are granted the benefit of condonation of shortage of attendance, so that the natural biological process does not act as a hindrance to the education and empower of women. There will be no order as to costs."

48. The Madras High Court in **Nithya Vs. University of Madras and others**12 mandated the grant of maternity support in view of Article 42 of the Constitution of India by holding thus:

"5. Learned counsel for the first respondent, University of Madras submitted that as per the attendance regulation applicable to the petitioner even if 50% of attendance is condoned as the rule stands, she has to appear for the next September or subsequent University examination by paying the prescribed condonation fee without putting in further attendance. There is force in the contention of Miss K. Geetha, learned counsel appearing for the respondent that as the rule stands the University is bound by the said regulations. However, in the instant case, it is clear that the petitioner during the last course of her academic year for B.A. Corporate Secretaryship was married on 18-10-1993 and she was conceived shortly thereafter and as a result she was suffering from morning sick- ness and other indispositions and, therefore, she was not in a position to attend the classes regularly. The reasons given by the petitioner for not attending the classes have to be accepted as they are genuine and natural consequences of married life. However, there is an impediment as far as University is

concerned as long as Regulation 2(ii) is there. Taking into the peculiar facts and circumstances of the case, I feel that it is a fit case to give an exemption from the operation of the said rule as the petitioner has completed 55.75% of attendance and as such she is entitled to condonations of attendance by paying necessary condonation fee to the University. In this connection it is observed that as large number of women students are joining University courses and the type of situation in which the petitioner was involved viz., she was married, may also occur in case of any woman students. The directive principles of State policy contain in parly IV of our Constitution by Art. 41 says that the State shall, within the limits of its economic capacity, make of active provision for secur ing education. If equal opportunity is given to women for education, they can stand on equal terms with men. Article 42 the Directive Principles of State Policy says that the State shall make provision for securing just and humane conditions of work and for maternity relief. Maternity relief in case of girl student will include leave. The University of Madras, a creature of statute can make provisions for granting leave to girl students, if they get married during the period of study and lose their minimum attendance. It is high time that the regulations that have been framed by the University are modified taking into consideration such situations where women student are married during the last course of their academic career and due to pregnancy they may not be in position to attend and complete the course."

(emphasis supplied)

49. The Delhi High Court examined service conditions in CRPF, which put pregnant employees at a disadvantage in **Inspector (Mahila) Ravina Vs. Union of India and others**13. The Delhi High Court looked askance against such discriminatory treatment against women and after viewing the controversy on the foot of Articles 14, 15 (1), 16 (2) and 21 of the Constitution of India laid down the following proposition of law:

"12. It would be a travesty of justice if a female public employee were forced to choose between having a child and her career. This is exactly what the CRPF‟s position entails. Pregnancy is a departure from an employee‟s "normal" condition and to equate both sets of public employees- i.e. those who do not have to make such choice and those who do (like the petitioner) and apply the same standards mechanically is discriminatory. Unlike plain unwillingness- on the part of an officer to undertake the course, which can possibly entail loss of seniority- the choice exercised by a female employee to become a parent stands on an entirely different footing. If the latter is W.P.(C) 4525/2014 Page 6 treated as expressing unwillingness, CRPF would clearly violate Article 21. As between a male official and female official, there is no distinction, in regard to promotional avenues; none was asserted. In fact, there is a common pre-promotional programme which both have to undergo; both belong to a common cadre. In these circumstances, the denial of seniority benefit to the petitioner amounts to an infraction of Article 16 (1) and (2) of the Constitution, which guarantee equality to all in matters of public employment, regardless of religion, caste, sex, descent, place of birth, residence etc. A seemingly "neutral" reason such as inability of the employee, or unwillingness, if not probed

closely, would act in a discriminatory manner, directly impacting her service rights. That is exactly what has happened here: though CRPF asserts that seniority benefit at par with the petitioner‟s colleagues and batchmates (who were able to clear course No. 85) cannot be given to her because she did not attend that course, in truth, her "unwillingness" stemmed from her inability due to her pregnancy. In this present situation the course was in Coimbatore. Travelling and living in an alien area without support was not a feasible proposition for an expecting mother; besides, the CRPF had determined that her medical category was SHAPE III. Mercifully, the CRPF does not contend that its regulations imposed any restrictions on a female employee‟s pregnancy at the stage of the Petitioner‟s career. That the petitioner exercised her right therefore to become a parent should not operate to penalise her, and her ,,choice‟ to do so was irrelevant, in the circumstances of the case; the CRPF should have taken the reasons for the unwillingness into account given the admitted fact that she was pregnant.

13. Standing Order dated 19.03.1999, by clause (J), clothes the Director General, CRPF with discretion - through non-obstante and overriding power. This case was eminently suitable for the Director General to exercise his powers on a compassionate basis, enabling the petitioner to catch up on lost opportunity due to her involuntary condition (on account of her exercise of reproductive rights) and regain her seniority with her batchmates who cleared the 85th course. The omission to exercise this power has led to the present dispute. The lack of an express plea of pregnancy based discrimination does not in any way stop this court from doing complete justice, to further the rights of the petitioner under Articles 14, 15 (1), 16 (2) and 21 of the Constitution of India. (emphasis supplied)

14. For the foregoing reasons, this Court hereby directs the Respondents to restore seniority of the Petitioner from 10.07.2010, the completion date of SICC SL. No. 83- as in the case of her other batchmates who completed that course, and consequently promote as well as assign her consequential seniority. Consequential seniority and all pay benefits including fixation of pay and arrears of pay shall also be disbursed to the petitioner within twelve weeks. The writ petition is allowed in the above terms. No costs."

50. Per contra on behalf of the University, Sri Rohit Pandey, learned counsel assisted by Ms. Shambhavi Tiwari, learned counsel for the University relied on the judgment of the Madras High Court rendered in **A. Arulin Ajitha Rani (supra).** The learned Division Bench in **A. Arulin Ajitha Rani (supra)** declined to apply the provisions of Articles 42 and 51 of the Constitution of India and also the international conventions to which India is a signatory, to grant any maternity benefits to the petitioner:

"10. Even assuming that an Educational Institution may also come within the aforesaid provisions, there is no dispute that the State Government has not issued any notification declaring that the provisions of the Act would be applicable to the educational institutions. There can not be any dispute regarding the requirement of grant of maternity benefit to the working women. However, the question is, in the absence of any specific provision applicable to educational institution, whether such provision can be extended.

11. We do not think that in the content in which such provisions have been made

for the working women, such provisions can be ipso facto made applicable. Whether such benefit can be extended or not is essentially a policy decision to be taken by either the State Government or the Central Government.

14. For the aforesaid reasons, we are unable to persuade ourselves to interfere with the order of the learned single Judge. The question as to whether similar beneficial provisions should be made applicable to the educational institutions is essentially a policy matter left to the wisdom of the legislature and we do not express any opinion in one way or the other."

51. Similarly, in **Ahalya K.A. Vs. Kannur University and others**14, the Kerala High Court did not deviate from the regulations of the University which provided for minimum attendance requirement even when the absence was on account of pregnancy. The Kerala High Court created a distinction between women who are pursuing academic courses and working women to deny relief by holding:

"5. The learned Counsel for the petitioner would argue that leave on grounds of maternity is an accepted practice, even in service and the employer is also obliged to pay salary for the period spend on maternity leave. The same welfare measure extended to women in service, should also be extended to them in studies; is the argument. This court is not prepared to accept the said contention. The incidence of service and the requirement in a regular course of study cannot be equated . While in employment, the grant of maternity leave is a statutory mandate which the employer definitely has to comply with; even to his or her disadvantage, of not having the services of such woman employee when payment of salary is made. That is a definite advantage conferred on the employee who has to remain out of employment only for reason of her pregnancy. However in studies, if a student keeps away from classes, on the ground of pregnancy, then disadvantage is to that student. The University definitely does not suffer any disadvantage but it has to go by its regulations which have a binding nature on the University and the student. Such regulations are also made to ensure the quality of education and the degree offered; on completion of studies; upon which the Society acts. A student cannot be allowed to keep away from the regular courses in a structured system of education and then be permitted to appear for the examinations as a equitable measure. "

52. The Kerala High Court declined to depart from the University regulations to ameliorate the disadvantage imposed by pregnancy in **Jasmine V.G. Vs. Kannur University**15 by holding :

"6. This Court, with due respect, is unable to accept the finding of the learned Single Judge that in providing just and humane conditions of work and for maternity relief and in making effective provisions for securing the right work and to education, a female student could be given relaxation from attending the requisite classes as stipulated by the educational agency or the University for participating in the examination. The requirement, insofar as providing minimum attendance in lecture classed, is to equip the students to better perform in the profession they wish to pursue. Mere bookish knowledge is not the criteria of judging a

professional, and pass in examination is not the only standard. The professional courses insist that the structured as semesters over a period of years. That involves attendance in lecture classes, participation in seminars, performance in practicals; herein giving lectures and so on and so forth, which; together with the pass in the final examinations, not only awards a degree but sends forth a well molded professional into society. This ensures that the students, after the award of the degree when set out to the professional world, is equipped to discharge the professional duties with high standards, commitment and orientation in the chosen vocation.

7. The petitioner herein is a student of B.Ed., a teacher training course, and is being trained to work as a teacher, whose role in nation building cannot , but be emphasized. It cannot be said that merely for the reason of her pregnancy a student could be allowed to sit for the examinations even without satisfying the requisite attendance, as prescribed by the educational agency. It cannot also be said that the case of the petitioner is an exceptional one, since, pregnancy cannot be considered to be a medical condition visited on the petitioner unexpectedly. This Court is of the firm view that the petitioner ought to have definitely adjusted her priorities when continuing a higher education, especially in a course which trains her to be a professional teacher. Pregnancy was an optional choice and that cannot be a reason to permit a student to deviate from the requirements of a regular course of study, and the insistence to adhere to the course regulations cannot be termed to be, a negation of the preferential values of motherhood. The petitioner has chosen to expand her family and can only be deemed to have taken a sabbatical form regular studies; which is definitely permissible and laudable too. But that cannot be turned to her advantage for wriggling out of the terms and conditions of a regular academic course. The award of a degree is not a private affair concerning the awardee along; when it also brings with it the stump of approval of a reputed educational agency, on which the society acts. Personal preferences and individual predilection should bow down to the larger public interest and societal obligations. The petitioner definitely will be entitled to continue the second semester in the next year and appear for the examination after securing the requisite attendance."

53. The Delhi High Court in Ankita Meena Vs. University of Delhi16, refused to condone the shortfall in attendance even after acknowledging the inability of the petitioner to attend the regular classes on account of her pregnancy.

54. The judgement of **Ankita Meena (supra)** rendered by Delhi High Court was taken in appeal before the Supreme Court. Various interim orders were passed from time to time in favour of the petitioner Ankita Meena. In **Ankita Meena Vs. University of Delhi**17 the Supreme Court ruling in favour of the petitioner held as follows:

"12. Therefore, the I.A. and the SLP are disposed of directing the University to declare the 5thSemester supplementary Examination results of the petitioner and issue the provisional degree along with necessary certificates, if she had passed the examinations, subject to the petitioner clearing the other formalities. This order is passed in the peculiar facts and circumstances of the case."

55. University regulations for minimum attendance and medical council

rules were strictly interpreted and rigidly enforced by Punjab and Haryana High Court in **Dr. Shelly Jetly Vs. State of Punjab and others**18. In **Dr. Sheely Jetly (supra)** while denying relief to the petitioner, who could not fulfill the attendance criteria because of her pregnancy, it was held:

"8. The above recommendations leave no manner of doubt that no exemption is provided to the candidate during the period of three years either for doing housemanship or for any other experience or diploma. Necessarily it has to be taken that the candidate should not have any continuous break from the period of training. It has not been disputed by the petitioner that the recommendations and directions of the Medical Council of India are binding on respondent Nos. 2 and 3 and these cannot by bye-passed by the petitioner. It cannot be overlooked that the entire study course is traning based. It has to be kept in mind that candidate during the course of training has not only to share greater responsibility in the management, but has also to acquire expertise kinwledge during his clinical performance and, therefore, necessarily the training period would also include Sundays and public holidays. The retionable behind such a course of specialization appears to be that utmost benefit can be derived by the student by following the scheduled course of training. It is for that reason that it is a residency system course. It cannot be ignored that continuous break of six months of the training whether on account of maternity leave or for any other reason like aliment etc. does have a direct impact on the schedule of training based and the medical Council of India has chosen to limit the absence from the training up to 20%, it does not fall within the domain of any other authority to bye-pass that requirement. Once this limit is allowed to be tinkered with for one reason for the other, it would lead to defeat the very purpose for which training course has been envisaged. The direct consequence would be that it would ultimately affect the prescribed standards of the Post- Graduate Decree Course. The recommendations of the Medical Council of India note above does not give any option to the university to deviate from them."

56. With utmost respect to the erudite holdings of **A. Arulin Ajitha Rani (supra)**, Kerala High Court in **Ahalya K.A. (supra) and Jasmine V.G. (supra),** Delhi High Court in **Ankita Meena (supra)**, Punjab & Haryana High Court in **Dr. Shelly Jetley (supra)** it has to be observed that the judgements of the Supreme Court and the High Courts in point, applicable constitutional provisions as well as the international instruments to which India is signatory were not referred to the Hon'ble Courts.

57. In such wake, the aforesaid judgements relied upon by the respondent University do not constitute binding precedents applicable to the facts of this case.

G. Evolution of Fundamental Rights by courts, Legislative Lag & Executive Inertia:

58. The fundamental rights of citizens are stated in Part III of the Constitution of India. In many cases, text of the right does not contain an exhaustive description of the scope of the right. Rights have to be interpreted from the text of the

Constitution. The process of interpretation of the text, results in the evolution of rights. The Constitution is the textual origin of fundamental rights. Constitutional law defines the substance of fundamental rights.

59. The fast pace of life in modern times often outstrips the capacity of the legislature to cope with the consequences of social change. There is a limit to human foresight, but the possibilities of life are limitless. The limits of legislation are the constraints of human foresight. The legislative process is complex and even time taking. Human affairs do not wait on the legislative process. These facts frequently create a legislative lag. It is almost inevitable in the nature of things.

60. The first intersection of life with law, at times happens in courts, even before the legislatures grapple with the problems. The courts are often seized of various emerging issues in social and individual lives, before the legislatures are cognizant of them.

61. A legislative hiatus or executive lethargy cannot cause a constitutional stasis. The enforcement of fundamental rights cannot be forestalled by a legislative lag or executive inertia or a regulatory void. Constitutional guarantees and Fundamental Rights have to be enforced on demand. Constitutional overhang is perpetual. Law is always in motion and never at a standstill. The Constitution of India is a forever living organism. Constitutional law can never be stone deaf to calls of violations of fundamental rights.

62. The text of the Constitution contains a conceptual philosophy of fundamental rights, and is not an exhaustive compendium of all fundamental rights. The text of the Constitution is constant, fundamental rights are always evolving. This is the essence of constitutional law jurisprudence.

63. There is a method in the evolution of constitutional law jurisprudence. Evolution of constitutional law rights are guided and controlled by the text of the constitution, long settled judicial principles of interpretation of the constitution, and judicial precedents in point. The march of law is also assisted by consensus of values in the comity of civilized nations. These universal values are often manifested in international instruments. Another source of such values is comparative international jurisprudence. The felt needs of the times are also factored in by the courts. Development of constitutional law and evolution of fundamental rights happens on these sure foundations. Fundamental rights are thus distilled by the constitutional courts in discharge of their constitutional obligations. This is not judicial activism by courts. It is judging.

64. The Supreme Court in **Vishaka Vs. State of Rajasthan**19, issued various guidelines for the safety of women at working places. The guidelines held the field, till the Parliament enacted a legislation. Judicial directions in that case preceded the legislative enactment. Infact the legislature was alerted, to the need of a legislation to cover the field, by the judgment of the constitutional court.

65. This narrative will profit from the observations made in **Rattan Chand Hira Chand v. Askar Nawaz Jung**20:

"The legislature often fails to keep pace with the changing needs and values

nor is it realistic to expect that it will have provided for all contingencies and eventualities. It is, therefore, not only necessary but obligatory on the courts to step in to fill the lacuna. When courts perform this function undoubtedly they legislate judicially. But that is a kind of legislation which stands implicitly delegated to them to further the object of the legislation and to promote the goals of the society. Or to put it negatively, to prevent the frustration of the legislation or perversion of the goals and values of the society. So long as the courts keep themselves tethered to the ethos of the society and do not travel off its course, so long as they attempt to furnish the felt necessities of the time and do not refurbish them, their role in this respect has to be welcomed. (emphasis supplied)

All courts have at one time or the other felt the need to bridge the gap between what is and what is intended to be. The courts cannot in such circumstances shirk from their duty and refuse to fill the gap. In performing this duty they do not foist upon the society their value judgments. They respect and accept the prevailing values, and do what is expected of them. The courts will, on the other hand, fail in their duty if they do not rise to the occasion but approve helplessly of an interpretation of a statute or a document or of an action of an individual which is certain to subvert the societal goals and endanger the public good."

66. **K. S. Puttaswamy (supra)** unequivocally set forth that determining different facets of dignified existence which fall within Article 21 of the Constitution of India, is a function of judicial review:

"127. The submission that recognising the right to privacy is an exercise which would require a constitutional amendment and cannot be a matter of judicial interpretation is not an acceptable doctrinal position. The argument assumes that the right to privacy is independent of the liberties guaranteed by Part III of the Constitution. There lies the error. The right to privacy is an element of human dignity. The sanctity of privacy lies in its functional relationship with dignity. Privacy ensures that a human being can lead a life of dignity by securing the inner recesses of the human personality from unwanted intrusion. Privacy recognises the autonomy of the individual and the right of every person to make essential choices which affect the course of life. In doing so privacy recognises that living a life of dignity is essential for a human being to fulfill the liberties and freedoms which are the cornerstone of the Constitution. To recognise the value of privacy as a constitutional entitlement and interest is not to fashion a new fundamental right by a process of amendment through judicial fiat. Neither are the Judges nor is the process of judicial review entrusted with the constitutional responsibility to amend the Constitution. But judicial review certainly has the task before it of determining the nature and extent of the freedoms available to each person under the fabric of those constitutional guarantees which are protected. Courts have traditionally discharged that function and in the context of Article 21, as we have already noted, a panoply of protections governing different facets of a dignified existence has been held to fall within the protection of Article 21."

(emphasis supplied)

67. Motherhood is the most sublime expression of Nature's longing for life. Dignity of motherhood is the highest manifestation of refinement in the human race. To recognize maternal dignity as a constitutional entitlement is not to create a new fundamental right through judicial fiat.

H. Education & Universities
Role and obligation of universities

"Universities are made by love, love of beauty and learning." ~**Annie Besant**

68. Universities are the custodians of old values, even as they ceaselessly push the boundaries of modern knowledge.

69. In universities students of diverse backgrounds and different beliefs, congregate in a common pursuit of knowledge. Through knowledge they will learn, that humanity unites more than diversity differentiates. With learning they will understand that diversity enriches human life, and does not divide humankind. University experience will help them cultivate constitutional values and transcend parochial attitudes.

70. Universities are not teaching shops, nor are they mere examining bodies. Universities nurture intellect and develop character of young citizens in a wholesome manner. Students gain knowledge and imbibe values in universities. These dual pursuits constitute the founding purpose of a university, in fact its raison detre.

71. A unifocal approach promoting scholastic achievements, to the exclusion of character building will degrade the founding principles of a university.

72. Ideals professed by the University today will be the values practised by the nation tomorrow. Lack of empathy of the University towards pregnant women will create apathy towards maternity rights among the students. The University has to show fidelity to the rule of law by creating an enabling environment to realize fundamental rights, foster fundamental duties and promote constitutional values.

I. Conclusions & Directions

73. The rights of the petitioner to reproductive choices, marriage, procreation and motherhood are entrenched as fundamental rights by the law laid down by constitutional courts.

74. The need to ameliorate the constraints imposed by pregnancy and its aftermath and to dignify motherhood by providing institutional support systems for expectant mothers and new mothers is an imperative command of law. The respondent University has to implement the fundamental rights of the petitioner vested by the aforesaid pronouncements of law made by constitutional courts.

75. The petitioner in this case could not clear her exams in the stipulated attempts and time period due to pre natal and post natal conditions. The petitioner could not compete equally with other students due to constraints of pregnancy and new motherhood. Her disadvantage was not compensated by the respondent University.

76. Wide amplitude of powers vested by virtue of Section 29 of the Uttar Pradesh Technical University Act, 2000 enjoin upon the University to create necessary Regulations which will exalt constitutional

values and bring fundamental rights of the students to fruition. Regulation 4.12 contemplates making special arrangements for female students.

77. The respondent University has neglected to frame Regulations or create appropriate legal instruments to provide for maternity benefits to expectant mothers and new mothers. The failure of the University to perform its statutory functions has left the students bereft of maternity benefits. This inertia of the University betrays its insensitivity to the plight of pregnant students, undermines the rule of law and subverts the ideal of holistic education. The University cannot justify violation of fundamental rights of the petitioner on the foot of its own omissions.

78. Gurudev Tagore had alerted the nation to the consequences of absence of empathy in societal values: "Stupendous load of callousness that accumulates till the moral foundations of our society begins to show dangerous cracks and civilizations are undermined21."

79. Various regulatory bodies including All India Council for Technical Education (AICTE) restrict the grant of maternity benefits to post graduate fellowship students while overlooking undergraduate students. Such discriminatory treatment is violative of Articles 14 and 15(3) of the Constitution of India.

80. However, it is noteworthy that in the counter affidavit filed on behalf of the All Indian Council for Technical Education (AICTE) does not resist grant of maternity benefits to the petitioner. Sequitur of the stand of the AICTE before this Court is that the University is not constrained by any regulatory standards in creating provisions for grant of maternity benefits for undergraduate students. No other co-respondents, namely Union of India, State of U.P. or the UGC have contested the entitlement claimed by the petitioner.

81. The circular/order issued by the University Grants Commission, New Delhi on 14.12.2021, produced by Shri Paras Nath Rai, learned Central Government Standing Counsel is reproduced hereinunder:

"D.O.No. 21-116/2021 (CPP-II) 14th December, 2021

Subject: Maternity leave to women students.

Respected Madam/Sir,

The UGC has made a provision in the UGC (Minimum Standards and Procedure for Award of M.Phil./Ph.D. Degrees) Regulations, 2016 that:

"***that women candidate may be provided Maternity Leave/Child Care Leave once in the entire duration of M.Phil./Ph.D. for up to 240 days."***

In addition to above, all Higher Education Institutions(HEIs) are requested to frame appropriate rules/norms with regard to granting Maternity Leave to the women students enrolled in their respective institution/affiliated Colleges and also provide all relaxations/exemptions relating to attendance, extension in date for submitting examination forms or any other facility deemed necessary for women students pursuing Under Graduate and Post Graduate programmes.

With kind regards.

Yours sincerely

(Rajesh Jain)

The Vice Chancellors of all Universities"

82. In wake of the aforesaid circular issued by the University Grants Commission, New Delhi, and the stand of the Union of India, there is no legal impediment before the respondent University to frame the necessary Regulations for grant of maternity benefits.

83. The University by framing the aforesaid Regulation will be true to the legacy of Dr. A. P. J. Abdul Kalam, former President of India, in whose name the University is founded. The University will do itself credit by realizing the vision of the scholar statesman. The University cannot rest content in the reflected glory of his undying name.

84. This Court wishes to record its appreciation on the sensitivity in the stand and promptness of response of the Union of India and the University Grants Commissions, New Delhi in the matter.

85. The Court also commends Shri Paras Nath Rai, learned Central Government Standing Counsel for the diligence with which he has discharged his duties as counsel for the Union of India and an officer of this Court.

86. By failing to frame Regulations or appropriate legal instruments for grant of maternity benefits and by declining to grant such benefits to the petitioner, the University has violated the fundamental rights of the petitioner as guaranteed under Articles 14, 15(3) and 21 of the Constitution of India and as expounded in the law laid down by Constitutional Courts.

87. The questions framed for consideration are answered as under:

I. The petitioner is entitled to an additional chance to appear in the examinations which she could not clear in the admissible time frame due to her pregnancy and post natal recovery period.

II. The petitioner cannot be denied maternity benefits on the foot that the University Ordinances or University Regulations do not provide such relaxation. The University is under an obligation of law to frame the requisite Regulations/appropriate legal instruments for grant of maternity benefits to students which embrace the pregnancy period and post natal recovery time. The University is also liable to consider the grant of maternity benefits to the petitioner in light of the said Regulations.

III. The relief to which the petitioner is entitled to set out below.

88. A writ in the nature of mandamus is issued to the respondent-University to execute the following directions:

I. The University shall create Regulations/Ordinances/appropriate legal instruments for grant of pre-natal and post-natal support and other maternity benefits to expectant mothers and new mothers who are pursuing various courses in the University. The maternity benefits shall also include additional chances to clear the exams in an enlarged time frame.

II. The petitioner shall make an representation with supporting documents (including medical reports/certificates) to appear in the aforesaid examinations in the subjects of (a) Signals and System--3rd semester--B.Tech. (Electronics and Communication) (b) Engineering Mathematics-II, 2nd Semester--B.Tech. (Electronics and Communication), which will be conducted by the University. The

examinations schedule shall be decided by the University.

III. The petitioner shall be permitted by the University to appear in the aforesaid examinations.

IV. The above directions shall be complied with within a period of four months from the date of receipt of a certified copy of this order.

89. The writ petition is allowed to the extent indicated above.

(2022)01ILR A1015
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 23.12.2021

BEFORE

THE HON'BLE RAJNISH KUMAR, J.

Rent Control No. 33330 of 2019

Ravi Ahuja ...Petitioner
Versus
Rajee Kumar & Anr. ...Respondents

Counsel for the Petitioner:
Mohd. Shakeel

Counsel for the Respondents:
P.S. Mehra

A. Rent Control - The court is of the view that the doors of justice will be closed for a litigant whose case is based upon false or suppression of material facts. The petition is liable to be rejected as it suffers from material concealment of facts. (Para 17)

Writ Petition Rejected. (E-10)

List of Cases cited:

1. U.O.I. Vs Ibrahim Uddin (2012) 8 SCC 148

2. Udham Singh Vs Ram Singh & anr. (2007) 15 SCC 529

3. M/s S.J.S. Business Enterprises Vs St. of Bihar & ors. MANU/SC/0236/2004: (2004) 7 SCC 166

4. Commissioner of Customs Vs Aafloat Textiles India Pvt. Ltd. Ors. (2009) 11 SCC 18

5. S.P. Chengalvarya Naidu (Dead) by LRs Vs Joganath (Dead) by LRs & ors. (1994) 1 SCC 1

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

1. Heard, Sri Mohd. Shakeel, learned counsel for the petitioner and Sri P.S. Mehra,learned counsel for the respondents.

2. The petitioner has approached this Court by means of the present petition under Article 227 of the Constitution of India for setting aside judgment and order dated 05.02.2016(Annexure No.2) passed by the Prescribed Authority/II Add. Judge Small Causes Court no.18, Lucknow in P.A. Case No.10/2008(Smt. Shashi Srivastava & Another versus Ravi Ahuja), by means of which the case has been allowed and the judgment and order dated 17.09.2019 (Annexure No.1) passed by Additional District Judge/Special Judge(P.C. Act) No.9, Lucknow in Rent Appeal No.8/2016(Ravi Ahuja versus Rajeev Kumar and another), by means of which the appeal has been dismissed.

3. The brief facts of the case, for adjudication of the present petition, are that the respondents had purchased the land in dispute bearing House No. 289/323 measuring an area of 1000 sq. ft,Moti Nagar, P.S. Naka Hindola, Lucknow through registered sale deed dated 06.07.2000 from the previous owners and landlords, Smt. Sushila Devi, Hanuman Prasad, Satya Narain and Ram Narain. The entire first floor of the said house was in

occupation of the petitioner, as a tenant, since before its purchase by the respondents. The respondents had moved an application under Section 21(1)(a) of the Act No.13 of 1972; Uttar Pradesh Urban Buildings (Regulation of Letting Rent and Eviction) Act 1972(hereinafter referred to as the Act of 1972) on 19.01.2008 before the prescribed authority seeking release of the first floor of the house in question from the petitioner on the ground of their as well as their family's bonafide need. In the said application, the respondents had categorically averred that the petitioner had illegally occupied two rooms, store and some covered space on the ground floor, which was earlier in the tenancy of Nanku Ram and deemed vacant under provisions of Section 12 of Act of 1972. As such, the applicants had filed an application under 16(1)(b) of the Act of 1972 before the City Magistrate,Rent Control Lucknow.

4. The petitioner had filed a written statement on 24.04.2008 admitting that the respondents were the co-owners and landlords of the house in question and the petitioner was their tenant with respect to the entire first floor of the said house. He had also contended that apart from the first floor, two rooms on the ground floor were also in his tenancy. The averments made in the release application pertaining to bona fide need and comparative hardship were denied. After a long time, the petitioner had filed additional written statement on 24.01.2011, in which interalia it was averred by him that as per the sale deed dated 06.07.2000, the respondents had purchased only 350 sq. ft covered area which was situated on the ground floor and since the first floor of the house in question was not purchased by the respondents, the release application on their behest was not maintainable. The respondents filed their replication denying the averments made in the written statement and the additional written statement.

5. After considering the pleadings of the parties and the evidence adduced before it, the prescribed authority allowed the application by means of the judgment and order dated 05.02.2016 and directed to the petitioner to hand over the possession of the property under his tenancy to the respondents. The petitioner had filed an appeal which has been dismissed by means of the judgment and order dated 17.09.2019 by the Additional District Judge. Hence the present petition has been filed.

6. The first issue raised by learned counsel for the petitioner was that the petitioner is not the tenant of the respondents on the ground that the petitioner had filed a suit for permanent injunction, in which the respondents have filed written statement denying the relationship of the landlord and tenant between the petitioner and the respondents. It was vehemently denied and it was submitted that the petitioner has admitted his tenancy before the prescribed authority. The respondents purchased 1000 sq. ft. of House No.329/223, Moti nagar,P.S.Naka Hindola,Lucknow i.e. the property in dispute by means of registered sale deed dated 06.07.2000. The petitioner had filed a suit for permanent injunction on 01.09.2009 without impleading the respondents in the suit whereas the respondents had purchased the property under the tenancy of the petitioner also. Subsequently, the respondents were impleaded in the said suit and they had filed written statement stating therein that there is no relationship of landlord and tenant between the petitioner and the respondents. It was specifically mentioned

in paragraph 3 of the written statement that the defendants no.1 to 4 have not informed to the respondents about the tenancy of the plaintiff, i.e., the present petitioner. Therefore it appears that the said plea was taken due to lack of knowledge as it was not informed to the respondents by the sellers.

7. In the proceedings under Section 21(1)(a) of the Act of 1972 before the prescribed authority, a plea has specifically been taken in paragraph 3 that the petitioner is the tenant of the applicants i.e. the respondents on the first floor. It comprises of one big room, one store and kitchen, two verandahs, and one half store and terrace. The petitioner in his written statement has admitted in paragraph 4 of the written statement that the answering opposite party i.e. the petitioner is tenant of entire first floor portion of the property in question alongwith two rooms on the ground floor in the aforesaid building on a monthly rent of Rs.85/-.In the written statement it has been admitted in paragraph 6 that the opposite party is the legal tenant of House No289/323,Moti Nagar, P.S. Naka Hindola, Lucknow of entire first floor. It has further been admitted in paragraph 10 and 18 of the written statement. The petitioner himself filed his affidavit of evidence. In the said affidavit also, the petitioner had not denied the tenancy. It has further been stated that the respondents have got released the ground floor of the house under Section 16(1)(b) of the Act of 1972 in Case No.57/62/116/210. Therefore the petitioner himself has admitted the tenancy.

8. It is a settled proposition of law that the admission is the best piece of evidence. Once the petitioner admitted the tenancy, the contention of learned counsel for the petitioner is misconceived and not tenable and liable to be rejected. The findings recorded by the prescribed authority and the appellate authority in this regard does not suffer from any illegality or error.

9. The Hon'ble Supreme Court in the case of ***Union of India versus Ibrahim Uddin; (2012) 8 SCC 148*** has held that the admission is the best piece of substantive evidence that an opposite party can rely upon, though not conclusive, is decisive of the matter, unless successfully withdrawn or proved erroneous.

10. The Hon'ble Supreme Court in the case of Udham Singh versus Ram Singh and another;(2007) 15 SCC 529 has held that admission is the best evidence against the person who is said to have made it.

11. The next issue raised by learned counsel for the petitioner was that the respondents have purchased only a part of the portion of House No.289/323, Moti Nagar, P.S. Naka, Lucknow and the portion under the tenancy of the petitioner does not fall in the said portion because he had purchased only 1000 sq. ft in which 350 sq. ft at ground floor is the covered area and the first floor has not been purchased by him. It was vehemently denied by learned counsel for the petitioner and it was submitted that the portion in the tenancy of petitioner was also included in the portion purchased by the respondents. The boundaries of the area purchased by the respondents has been given in the sale deed executed in favour of the respondents. The petitioner has not denied the boundaries of the area purchased by the respondents given in the sale deed. The petitioner is not

party to the sale deed and he is also not claiming himself to be the owner of the house. Therefore he has no right of questioning the sale deed. This Court also does not find that only the lower portion was purchased by the respondents. The petitioner has also failed to demonstrate that the portion in his tenancy is not included in 1000 sq. ft. purchased by the respondents. Therefore the contention of learned counsel for the petitioner is mis-conceived and not tenable. The prescribed authority has also recorded a categorical finding that the contention of learned counsel for the petitioner is not tenable.

12. The next contention submitted by learned counsel for the petitioner was that there was no bona fide need of the petitioner as the petitioner has also got released the portion of the house which was earlier in the tenancy of Nanku Ram is mis-conceived and not tenable. The respondents have shown in their application under Section 21(1)(a) that the respondents i.e. the husband and wife, their two daughters, who are studying in M.A. and M.B.A. respectively and one son studying in Class 11 are residing in the said house. They have only room in the basement which is used as godown and two rooms of average size, kitchen and small verandah on the ground floor, which have fallen short and insufficient for the increased growing family members of the respondents. Therefore they need the portion under the tenancy of the petitioner as their growing children require one room each. One room is required for entertaining the visitors, one room for the guests and tutor room. The petitioner had unauthorizedly occupied the portion of the ground floor earlier in the tenancy of Nanku Ram. The respondents had filed application for release of the said portion and the city Magistrate passed an order on 03.04.2012, whereby the portion on the ground floor of the house in question, illegally occupied by the petitioner was released in favour of the respondents. It was only after the petitioner contested it upto the Hon'ble Supreme Court and after passing of the order by the Hon'ble Supreme Court,he had vacated the said portion and handed over it to the respondents. The said portion is not sufficient looking to the need of the respondents. The petitioner has not denied the number of family members of the respondents and he could also not deny the need of the respondents. He has only taken a plea that the suit has been filed only to get the possession and enhancement of rent. Therefore the petitioner has not denied the bonafide need of the respondents and he has also failed to show that the respondents have any other space in the city of lucknow, which is available for them. Therefore, this Court is of the view that the respondents have successfully proved their case and bonafide requirement of the portion, in the tenancy of the petitioner.

13. Section 21(1)(a) of the Act of 1972 provides that the prescribed authority may, on an application of the landlord in that behalf, order the eviction of a tenant from the building under tenancy or any specified part thereof if it is satisfied that the building is bona fide required either in its existing form or after demolition and new construction by the landlord for occupation by himself or any member of his family, or any person for whose benefit it is held by him, either for residential purposes or for purposes of any profession, trade or calling, or where the landlord is the trustee of a public charitable trust, for the objects of the trust. Therefore, the application of the respondents has rightly been allowed by the prescribed authority

and the appeal filed by the petitioner has also been dismissed in accordance with law.

14. The next issue raised by learned counsel for the petitioner was that the petitioner had moved an application for spot inspection on 23.05.2014 for ascertaining the truth, which was dismissed by means of the order dated 23.08.2014 with the observation that after adducing the entire evidence of the parties, if this Court finds that local inspection is necessary then appropriate order will be passed but thereafter without passing any order in pursuance of the order dated 23.06.2014 and ascertaining the real truth of relationship of landlord and tenant and extent of accommodation whether covered from sale deed or not, the learned trial court allowed the release application. It was vehemently opposed by learned counsel for the respondents and it was submitted that subsequently, the petitioner had moved an application for local inspection before prescribed authority and then before appellate authority, which were dismissed. The petitioner had approached this Court and the writ petition was also dismissed but all these facts have not been disclosed in the present petition. Therefore it suffers from material concealment of facts and taking a false plea.

15. The petitioner had filed an application for local inspection on 23.05.2014. The said application was rejected by means of the order dated 23.08.2014 on the ground that the respondents had filed their evidence long back and inspite of last opportunity being given for filing his evidence, the petitioner failed to file the same. Instead he moved an application for spot inspection. The prescribed authority held that the petitioner cannot be permitted to collect the evidence by local inspection and after the evidence of the petitioner was over, if need be, appropriate orders of local inspection may be passed.

16. The petitioner moved another application on 19.09.2014 for local inspection. After filing of the objection by the respondents, the said application was also rejected by means of the order dated 17.04.2015. During pendency of the appeal the petitioner had again moved an application for inspection on 14.03.2016, which was rejected by means of the order dated 28.10.2016. The petitioner challenged the same before this Court in petition Rent Control No.28539 of 2016(Ravi Ahuja versus Rajeev Kumar & Anr.).The said petition was dismissed by the judgment and order dated 18.04.2018 upholding the order passed by the apppellate authority on the application for inspection on 28.10.2016. Therefore this issue was final between the parties and is not considerable in this petition. However the petitioner has not disclosed all these facts in this petition and tried to allege that prescribed authority has allowed his release application without complying its own order dated 24.04.2014 passed on the application of the petitioner for local inspection. Therefore this Court is of the view that the present petition suffers from material concealment of fact and infact taking a false plea which is not available to the petitioner.

17. This Court is of the view that doors of justice will be closed for a litigant whose case is based on false or suppression of material facts. Fraud and justice never dwell together. They are opposite to each

other. Concealment and suppression of material facts is nothing but a fraud to obtain the order in his favour. It is a settled proposition of law that one who has not come with clean hands is not entitled for any relief. Therefore on this ground itself the petitioner is not entitled for any relief or interference by this Court.

18. The Hon'ble Supreme Court in the case of ***M/S S.J.S. Business Enterprises vs State Of Bihar And Ors; MANU/SC/0236/2004 / (2004) 7 SCC 166*** has held that as a general rule, suppression of a material fact by a litigant disqualifies such litigant from obtaining any relief. This rule has been evolved out of the need of the courts to deter a litigant from abusing the process of court by deceiving it.

19. The Hon'ble Supreme court in the case of ***Commissioner of Customs Versus Aafloat Textiles India Pvt. Ltd. others; (2009) 11 SCC 18***, has held that suppression of a material document would also amount to a fraud on Court. The Hon'ble Supreme Court, in the case of ***S.P.Chengalvaraya Naidu (Dead) by LRs Versus Joganath (Dead) by LRs and others; (1994) 1 SCC 1***, has held that "fraud avoids all judicial acts, ecclesiastical or temporal" observed Chief Justice Edward Coke of England about three centuries ago and a judgment or decree obtained by playing fraud on the court is a nullity and non est in the eyes of law.

20. In view of above, this Court is of the considered view that the impugned orders have rightly been passed by reasoned and speaking orders after considering the pleadings of the parties and evidence on record. There is no illegality or error in the impugned orders. The petition is misconceived, lacks merit and suffers from material concealment and taking false plea. It is liable to be dismissed with cost.

21. The petition is, accordingly, **dismissed** with a cost of Rs.20,000/-.

22. The petitioner shall vacate the portion in his tenancy and hand over it to the respondents alongwith the aforesaid cost of Rs.20,000/- within a period of six weeks from today.

(2022)01ILR A1020
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.01.2022

BEFORE

THE HON'BLE JAYANT BANERJI, J.

Writ Tax No. 738 of 2021

M/s Co-operative Co. Ltd. ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Namit Srivastava, Shashi Nandan Sr. Advocate, Sri Manoj Kumar Ahuja

Counsel for the Respondents:
C.S.C., Sri Avinash Chandra Tripathi

A. Natural Justice - Opportunity of hearing - The Court held that non-furnishing of the inspection report resulted in denial of opportunity to the petitioner to submit a proper reply to the show cause notice. (Para 23)

In the present case, FIR was lodged against the petitioner on finding gross irregularities and violations to the conditions of the license and of the Act and Rules. Consequent to which show cause notice-cum-order was issued to the petitioner cancelling the license of the petitioner. **The Court did not find any discrepancy in the cancellation of license after issuance of show cause notice-cum-order based on FIR and inspection. (Para 14)**

Writ Petition Allowed. (E-10)

List of Cases cited:

1. Smt. Raj Kumari Vs State of U.P. & ors. 2011 (3) ADJ 638 (DB)

2. Jagdish Narain Mishra Vs St. of U.P. & ors. Civil Misc. Writ Petition No. 28051 of 2008

3. Natwar Singh Vs Director of Enforcement & anr. (2010) 13 SCC 255

4. Har Shankar & ors. Vs The Deputy Excise & Taxation Commissioner & ors. *(distinguished)*

5. Mangilal Vs St. of M.P. (2004) 2 SCC 447

6. Suresh Chandra Nanhorya Vs Rajendra Rajak (2006) 7 SCC 800

7. Institute of Chartered Accountants of India Vs LK. Ratna (1986) 4 SCC 537

8. Dharampal Satyapal Ltd. Vs CCE (2015) 8 SCC 519

9. City Corner Vs P.A. to Collector & ADM (1976) 1 SCC 124

(Delivered by Hon'ble Jayant Banerji, J.)

1. Heard Sri Shashi Nandan, learned Senior Advocate assisted by Sri Namit Srivastava and Sri Manoj Kumar Ahuja, learned counsel appearing for the petitioner and Sri Avinash Chandra Tripathi and Sri Jagdish Mishra, learned Standing Counsel, appearing for the respondents.

2. The facts, as appearing from the writ petition are, that the petitioner, which was initially registered on 08.09.1910 as a Joint Stock Company, was allotted Corporate Identity Number U51226DL1910PL299886 and altered the provisions of its Memorandum of Association. The order of the Regional Director, Ministry of Corporate Affairs, confirming the alteration was registered under Section 13(5) of the Companies Act, 2013 on 17.05.2016. The petitioner has, as one of its main objects, preparation and manufacture of liquor, ethanol, etc., and to carry on trade in the aforesaid product. Under the provisions of United Provinces Excise Act, 19101 the petitioner was granted a licence to distil liquor which was renewed by the Excise Commissioner, the respondent no. 3, by means of its order dated 15.5.2018 and PD-2 licence was issued for the Excise Year 2018-19, 2019-20, that is, from 1.4.2018 to 31.3.2020. The PD-2 licence of the petitioner was further renewed for the Excise Year 2020-21 and 2021-22 and by an order dated 12.3.2020, the respondent no.3 also issued a licence to manufacture Extra Neutral Alcohol (ENA) for a period of two years. The petitioner also has a bottling plant of Indian Made Foreign Liqour (IMFL) in the company premises, for which a separate licence in Form FL-3(A) was issued by the Excise Commissioner, U.P. for the Excise Year 2019-20 and 2020-21. The petitioner has also obtained a licence for storage of IMFL in Form FL-1.

3. A raid was conducted on the petitioner's premises on 3.3.2021 and a show cause notice-cum-order of suspension of licence PD-2 dated 6.3.2021 was issued by respondent no.3 to the petitioner to submit a reply with regard to the inspection done by a joint team of Excise officials and a Special Task Force. Reference was made in the notice to a Truck No. UP-11-B.T.0935 which was intercepted and which was carrying 1500 boxes of country made liqour. It was also stated in the notice that the inspection was carried out in the

petitioner's distillery and glaring irregularities were found. The allegation was that the forged/duplicate bar codes were being used by the petitioner on the liqour bottles and it was also transporting illegal liquor twice on one gate pass from the distillery. A reply dated 10.3.2021 was submitted by the petitioner to the aforesaid show cause notice denying all the allegations made in the show cause notice-cum-suspension order. It was specifically stated in the reply that it was not possible to comment on the so-called irregularities because no copy of the inspection report, which formed the basis of the show-cause notice, was given to the representative of the petitioner nor was the same enclosed with the notice. However, by means of the impugned order dated 01.04.2021, the Excise Commissioner, respondent no.3, cancelled the license PD-2 of the petitioner. The revision petition filed by the petitioner under Section 11 of the Act 1910 was also dismissed by an order of the respondent no.2 on 25.08.2021.

4. It is contended by the learned counsel for the petitioner that the respondents have failed to recover any evidence from the premises of the petitioner pertaining to the forged/duplicate bar code or illegal production of ENA/spirit. It is contended that by means of an order dated 1.4.2021, the respondent no.3, without giving any opportunity of personal hearing to the petitioner, passed an order cancelling PD-2 licence of the petitioner with a further direction forfeiting all amounts deposited by the petitioner towards the PD-2 license, with no compensation or refund. The contention of the learned counsel for the petitioner is that merely on the basis of an FIR lodged on 3.3.2021, the show cause notice dated 6.3.2021 was issued to the petitioner and the respondent no. 3 has proceeded to cancel the licence on the grounds mentioned in the FIR. It is also contended that in the order of cancellation, the respondent no. 3 refers to an inspection report made by the joint team which was never supplied to the petitioner. It is contended that non-furnishing of the inspection report, has caused grave prejudice to the petitioner and violated his rights by declining opportunity to answer the material relied upon by the respondents. It is contended that though the show cause notice dated 6.3.2021, refers to an inspection report but does not disclose relevant material, if any, that may find place in the inspection report.

5. Learned counsel has referred to Section 34 of the Act to contend that none of the five conditions prescribed for suspension or cancellation of licence exist, that would vest the authority with the mandate to suspend or cancel the licence PD-2. In support of his contentions, learned counsel for the petitioner has referred to judgment of this Court in the matter of **Smt. Raj Kumari Vs. State of U.P. and others**2, **Jagdish Narian Mishra Vs. State of U.P. and others**3 and a judgment of the Supreme Court in **Natwar Singh Vs. Director of Enforcement and another**4.

6. The cited judgements of **Smt. Raj Kumari and Jagdish Narain Mishra** are to substantiate that mere lodging of an FIR cannot form the basis of action against the petitioner for canceling the licence. With regard to non-supply of inspection report being in violation of principles of natural justice and causing prejudice to the petitioner, the case of **Natwar Singh** has been relied upon.

7. Sri Avinash Chandra Tripathi, learned standing counsel, spear-heading the arguments on behalf of the respondent, has stated that the State has got power to

prohibit anyone from dealing in any form of intoxicants and that there is no fundamental right to do trade or business in intoxicants. In this regard the learned counsel has referred to the judgement of the Supreme Court in **Har Shankar and others v. The Deputy Excise and Taxation Commissioner and others**5. The learned counsel has referred to the provisions of Chapter IV of the Act 1910, particularly Sections 17, 18, 24 and 24A. Learned counsel has further referred to Chapter VI of the Act, particularly Section 31 and 34 that deal with the form and conditions of licences, and, the power to cancel or suspend licences, respectively. While referring to Rule 702(4) of Chapter IX of the U.P. Excise Manual (Distilleries Rules), learned counsel has stated that an opportunity of hearing is to be afforded to the licensee in proceedings for cancellation of licence only if he so desires. Learned counsel has drawn the attention of the Court to the show cause notice that has been appended as Annexure No.11 to the writ petition and has referred to contents of the gate pass quoted in the show cause notice to contend that the irregularities reflected in that clause of the show cause notice are those that are distinct from the other irregularities like the non-functioning of the CCTV camera in the factory premises. Learned counsel has referred to the various clauses of the show cause notice to attempt to demonstrate that the seriousness of the allegations against the petitioner necessitated cancellation of the PD-2 licence. It is stated that on the basis of inspection done by the joint team, the FIR was lodged against the petitioner/its agent and the show cause notice, which is based on the FIR, is valid in view of the facts and circumstances of the present case.

8. It is contended that the power and duties of an officer of the department are specified in Chapter IX of the Act 1910 and under Section 48, power is given to enter and inspect, at any time by day or by night any place in which the licensed manufacturer carries on the manufacture of or stores any intoxicant and my enter and inspect at any time within the hours during which sale is permitted, and at any other time during which the same may be open, any place in which any intoxicant is kept for sale by any licensed person, and may examine, test, measure or weigh any materials, stills, utensils, implements, apparatus, or intoxicant found in such place: and may seize any measures, weights or testing instruments which he has reason to believe to be false. It is stated that show cause notice reveals various violations of conditions of licence PD-2 and the impugned cancellation order has taken into account the violation of conditions of the licence and is passed in accordance with law and as such, no interference is deserved.

9. In rejoinder, learned Senior Advocate appearing for the petitioner has stated that the order impugned, passed by the respondent no.3 reflects non-application of mind, and is merely based on an FIR and a so-called inspection report which has never been made available to the petitioner. The contention is that though the learned Standing Counsel is placing reliance on the provisions of Section 34(1)(b) of the Act 1910, being the alleged breach for suspending or cancellation of licence, that provision will not apply in the case where an FIR is lodged. Further contention is that the show cause notice could have been confined to address Clause (b) of Section 34(1) of the Act 1910. It is his contention

that the FIR can only be relied upon with regard to clause (c) of Section 34(1) of the Act 1910 where conviction has actually taken place. It is stated that there is no statement in the show cause notice regarding violation of clause (b) of Section 34(1) of the Act 1910. It is stated that the power conferred upon the Government in the revision, enjoined the Government to deal with all the grounds raised in the memorandum of revision, but, in the revisional order neither were any ground raised by the petitioner were discussed nor was there any application of mind. It is stated that the FIR does not incorporate the inspection report, but is only purports to be based on the inspection report and as such, supply of inspection report was necessary and non-supply thereof has caused prejudice to the petitioner.

10. I have considered the rival contentions of the respective counsel for the parties and perused the record. At the outset, the judgement cited by learned counsel for the respondent in **Har Shankar** may be considered. The main controversy before the Constitution Bench was the power of the Government to levy and realize large license fees either through the medium of auctions or on scales fixed under the rules. Therefore, the controversy was entirely different. The observation of the Supreme Court that has been relied upon by the learned counsel for the respondents that there is no fundamental right to do trade or business in intoxicants, is almost axiomatic, in view of the law on the issue, and need not tarry me.

11. As far as reliance placed by the learned Senior counsel for the petitioner on the aforesaid two judgements cited by him in the matter of **Smt. Raj Kumari and Jagdish Narain Mishra** to submit that there can be no cancellation of licence on the basis of an FIR, it is pertinent to mention here that in the case of **Jagdish Narain Mishra**, the authority cancelled the petitioner's fair price shop license on two grounds, namely, that there were complaints of irregularities regarding distribution of scheduled commodities by the petitioner and, secondly, the petitioner was involved in a criminal case under Section 3/7 of the Essential Commodities Act. The observations of the Court made in **Jagdish Narain Mishra**, which are important for purpose of analysing the present case, are as follows:

"The law is settled that a fair price shop agreement cannot be cancelled merely on the basis of allegations made against a dealer unless the licensing authority on the basis of evidence on record is satisfied that such allegations stand proved. Hence the cancellation of of petitioner's agreement by the licensing authority only the ground of there being serious allegations against him without recording any finding that the allegations/complaints against the petitioner were proved by evidence on record, can not be sustained at all.

The order of the licensing authority further reveals that even the written explanation submitted by the petitioner before the Licensing Authority to the charge sheet has not been considered in accordance with law. The Licensing Authority brushed aside the petitioner's explanation by just mentioning in the impugned order that the matter was examined and the explanation was not found to be satisfactory. No reason has been given by the Licensing Authority for not finding the explanation submitted by the petitioner to be satisfactory. Such a consideration of the explanation, in my opinion no consideration in the eye of law.

Despite advancing lengthy arguments, learned standing counsel has failed to bring to the notice of the Court any provision either under the Essential Commodities Distribution Order, 2004 or under any other Government Order issued either under the 2004 order or 1990 order empowering the Licensing Authority to cancel a fair price shop agreement merely on account of a dealer being involved in a criminal case. Hence the cancellation of the petitioner's agreement on the ground of his involvement in aforesaid criminal case under the Essential Commodities Act is also unsustainable".

12. In the case of **Smt. Raj Kumari (supra),** the fair price shop dealership of the petitioner therein was cancelled on the ground that an FIR under Section 3/7 of the Essential Commodities Act was lodged against the petitioner. The Division Bench of this Court, relying upon the aforesaid judgement of **Jagdish Narain Mishra** held as follows:-

"5.Nothing has been brought to our attention that the said judgment has been overruled. Even otherwise, we are of the opinion that the said conclusion cannot be faulted for the reason that mere filing of a F.I.R. cannot result in holding a fair price shop owner guilty of the offences charged. If there be a conviction, then it is possible to proceed, based on the conviction and not otherwise. In case if the F.I.R. is lodged, it is still open to the respondents to proceed by leading independent evidence and statements of the persons recorded.

.....

7. Considering what we have set out earlier and the Judgment of this Court in Jagdish Narain Mishra (supra), which we approve, the cancellation of the licence of the petitioner is without authority of law.

8.Even otherwise we may point out that a reading of the order dated 10.8.2010 discloses total non application of mind. The said order purports to cancel the license merely on the ground of lodging of an F.I.R. and that suspension is going on for a long time thereby causing inconvenience in distribution of essential commodities to the card holders. The said reasons cannot be justified in law to cancel the dealership".

13. On perusal of the aforesaid two judgements, it is evident that lodging of the FIR was a ground for cancellation of licence of the dealer. In **Jagdish Narain Mishra**, no findings were recorded by the authorities that the allegation/complaint against the petitioner was proved by evidence on record. The dealer's explanation in **Jagdish Narain Mishra** was cursorily brushed aside by the authorities without assigning any reason only by stating that the explanation submitted by the petitioner was not found to be satisfactory. In the case of **Smt. Raj Kumari**, merely an FIR under Section 3/7 of the Essential Commodities Act was lodged against the fair price shop dealer and the Court held that the petitioner cannot be held guilty of the offences charged on the ground of lodging of an FIR. It was further observed that if there be a conviction, then it is possible to proceed, based on the conviction and not otherwise. It was further noticed by the Court that the order cancelling licence disclosed total non-application of mind.

14. In the present case, the fact situation is different. The petitioner, who is

a distiller, was served with a show cause notice-cum-order purportedly on the basis of material discovered during a raid conducted in the premises of the petitioner by a team of officials, the details of which are stated to find place in the FIR. The show cause notice-cum-order mentions alleged violations of conditions of the licence and of the Act and Rules, and, suspends the licence PD-2 of the petitioner. Under the facts and circumstances, though consequent to the FIR the show cause notice-cum-order was issued, however, the discovery of alleged irregularities and recovery of items during the raid conducted at the petitioner's premises was the basis on which the FIR was lodged. Moreover, after consideration of the reply of the petitioner to the show cause notice-cum-order, the detailed impugned order was passed by the respondent no.3 on 01.04.2021 cancelling the license PD-2 of the petitioner. The power to cancel or suspend licenses is provided in section 34 of the Act 1910. Therefore, under the circumstances, the cancellation of licence after issuance of show cause notice-cum-order based on the FIR and inspection, cannot be faulted. This observation, however, is not to be taken as a finding on merits of the validity of the cancellation order dated 01.04.2021 of the license PD-2 of the petitioner.

15. The other points, which are being considered in view of the facts and circumstances of the present case, are:-

(i) Whether any opportunity of personal hearing to the petitioner-company or its authorized representative was required to be given prior to canceling the PD-2 license, and if so, would the order dated 1.4.2021 passed by the Excise Commissioner canceling the license of the petitioner stand vitiated?

(ii) Whether non-furnishing of the inspection report caused serious prejudice to the petitioner thereby vitiating the impugned order dated 1.4.2021?

16. As far as the opportunity of personal hearing being granted to the petitioner is concerned, the learned standing counsel for the respondent referred to sub-rule (4) of Rule 702 of Chapter IX of Part 2 of the Excise Rules in the U.P. Excise Manual to contend that there is no right of privilege for grant of license for the manufactures of spirit and the license granted is liable to be revoked or withdrawn at any time, in public interest, after giving the holder of a license a notice to show cause against such action and after hearing him, if he so desires. It is the contention that there is no provision in the Act or the Rules that mandates grant of personal hearing to the petitioner. It is stated that a show cause notice-cum-order, as per the aforesaid rule, was given to the petitioner and the reply not having been found satisfactory, the Excise Commissioner proceeded to cancel the license, which is justified given the scale of the tax evasion and irregularities. The Special Secretary, Department of Excise, respondent no. 2, in its order of 25.8.2021 on the revision filed by the petitioner, states that though an objection regarding not granting prior opportunity of hearing before cancellation of license was raised by the petitioner, however, the petitioner had not been able to specify that under which rule the same is mandatory. The respondent no. 2 proceeded to hold that there is want of any rule which provides for mandatory opportunity of hearing to a distiller and as such the order dated 01.04.2021, canceling the license under Section 34 of the Act of 1910, was passed after considering the reply to the show cause notice-cum-order.

It is pertinent to mention here that in paragraph 16 of the counter affidavit, in reply to the contents of the paragraph 26 of the writ petition, there is no specific denial to the averment that the order cancelling the PD-2 license of the petitioner was passed by the respondent no. 3 without giving any opportunity of personal hearing to the petitioner or its authorized representative.

17. It is evident that sub-rule (4) of the aforesaid Rule 702 of the Excise Manual provides for opportunity of hearing to a noticee provided it is so desired. By cancellation of the license PD-2, the petitioner has been visited with severe civil consequences. The cancellation of license has resulted in closure of the business of the petitioner which has affected the livelihood of several people employed in the petitioner-company. In various decisions of the Supreme Court, it has been held that even if a statute is silent and there are no positive words in the Act or the Rules made thereunder, there would be nothing wrong in spelling out the need to hear the parties whose rights and interest are likely to be affected by the orders that may be passed, and in making it a requirement to follow a fair procedure before taking a decision, unless the statute provides otherwise. The principles of natural justice must be read into the unoccupied interstices of the statute, unless there is a clear mandate to the contrary. It has been further held that where the statute is silent about the observance about the principles of natural justice, such statutory silence is taken to employ compliance with the principles of natural justice where substantial rights of parties are considerably affected. The application of natural justice becomes presumptive unless, found excluded by express words of statute or necessary intendment. Reference may be had to the decisions of the Supreme Court in **Mangilal Vs. State of M.P.**6, **Suresh Chandra Nanhorya Vs. Rajendra Rajak**7, **Institute of Chartered Accountants of India Vs. L.K. Ratna**8. Further, the Supreme Court, in the case of **Dharampal Satyapal Ltd. v. CCE**9, observed as follows:-

"28. It is on the aforesaid jurisprudential premise that the fundamental principles of natural justice, including audi alteram partem, have developed. It is for this reason that the courts have consistently insisted that such procedural fairness has to be adhered to before a decision is made and infraction thereof has led to the quashing of decisions taken. In many statutes, provisions are made ensuring that a notice is given to a person against whom an order is likely to be passed before a decision is made, but there may be instances where though an authority is vested with the powers to pass such orders, which affect the liberty or property of an individual but the statute may not contain a provision for prior hearing. But what is important to be noted is that the applicability of principles of natural justice is not dependent upon any statutory provision. The principle has to be mandatorily applied irrespective of the fact as to whether there is any such statutory provision or not."

18. However, it was further observed in **Dharampal Satyapal Ltd**. that every violation of a facet of natural justice may not lead to the conclusion that the order passed is always null and void. The validity of the order has to be decided on the touchstone of "prejudice".

19. The visiting of civil consequences on the petitioner is prejudicial to its interest. The Rule 702 (4) aforesaid provides for an opportunity of hearing where it is so desired. Therefore, it is held that opportunity of personal hearing to the petitioner, under the facts and circumstances of the case, was required to be given, and that having not been done, the impugned order dated 1.4.2021 passed by the Excise Commissioner is vitiated.

20. As far as the averment made in paragraph no. 28 of the writ petition that no inspection report, as alleged in the show cause notice dated 6.3.2021 was made available to the petitioner and as such the petitioner could not submit its detailed reply, in paragraph no. 17 of the counter affidavit there is no categorical denial with regard to non-furnishing of the inspection report to the petitioner. In the counter affidavit, the existence of the inspection report has not been denied, but the inspection report has not been enclosed. In the show cause notice-cum-order, serious irregularities are stated to have been found in the working of the distiller at the time of the inspection. However, though the irregularities and violations have been briefly narrated in the show-cause notice-cum-order, the details of the irregularities have not been mentioned. This assumes significance as in its reply to the show-cause notice-cum-order, the petitioner has questioned the allegation of recovery of country made liquor and the allegation of duplicate bar codes on the ground that the same are not reflected in the FIR.

21. In the case of **Natwar Singh (supra**), the Supreme Court was considering whether a noticee served with a show cause notice under Rule 4(1) of the Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000 (Rules of 2000) is entitled to demand to furnish all the documents in possession of the adjudicating authority including those documents upon which no reliance had been placed to issue a notice requiring him to show cause why an inquiry should not be held against him. The Supreme Court considered the provisions of section 16 of the Foreign Exchange Management Act, 1999, that provides for holding an inquiry by the adjudicating authority in the manner prescribed after giving the person concerned a reasonable opportunity of being heard. Also considered was Rule 4 of the Rules of 2000, which provides for issuance of notice by the adjudicating authority to the person concerned requiring him to show cause, the show cause notice indicating the nature of contravention alleged to have been committed. In the context it was observed by the Supreme Court as follows:-

"30. The right to fair hearing is a guaranteed right. Every person before an authority exercising the adjudicatory powers has a right to know the evidence to be used against him. This principle is firmly established and recognised by this Court in Dhakeswari Cotton Mills Ltd. v. CIT [AIR 1955 SC 65 : (1955) 1 SCR 941] . However, disclosure not necessarily involves supply of the material. A person may be allowed to inspect the file and take notes. Whatever mode is used, the fundamental principle remains that nothing should be used against the person which has not been brought to his notice. If relevant material is not disclosed to a party, there is prima facie unfairness irrespective of whether the material in question arose before, during or after the hearing. The law is fairly well settled if prejudicial allegations are to be made against a person, he must be given particulars of that before hearing so that he can prepare his defence. However, there are

various exceptions to this general rule where disclosure of evidential material might inflict serious harm on the person directly concerned or other persons or where disclosure would be breach of confidence or might be injurious to the public interest because it would involve the revelation of official secrets, inhibit frankness of comment and the detection of crime, might make it impossible to obtain certain clauses of essential information at all in the future (see R. v. Secy. of State for Home Deptt., ex p H [1995 QB 43 : (1994) 3 WLR 1110 : (1995) 1 All ER 479 (CA)])."

22. It is pertinent to note here that a three Judge Bench of the Supreme Court in the case of **City Corner Vs. P.A. to Collector & ADM**10 has held that it is not always necessary that the documents asked for should themselves be furnished provided the substance of those documents is furnished, always provided, however, that the summary is not misleading. The Supreme Court held that such was not the case there, but when the appellant asked for the original documents, he could at least have been told that he had already been given a summary of documents which was sufficient to enable him to make his representation and he could make his fuller representation as he had promised in his earlier so called interim reply.

23. In view of the facts and circumstances appearing in the present case, for want of the inspection report before this Court, it cannot be presumed that the substance of the inspection report or the summary of the documents was furnished and that the summary was not misleading. It is also a matter of conjecture whether the relevant facts contained in the inspection report necessary to file an appropriate reply by the petitioner, were declared in the show-cause notice-cum-order. Therefore, it is held that non-furnishing of the inspection report resulted in denial of opportunity to the petitioner to submit a proper reply to the show cause notice, and has consequently caused serious prejudice to it, and as such has vitiated the order impugned dated 1.4.2021 passed by the respondent no. 3.

24. Therefore, the order impugned dated 1.4.2021 passed by the respondent no. 3, Excise Commissioner, Uttar Pradesh (Annexure No. 13 to the writ petition) and the order dated 25.8.2021 passed by the respondent no. 2, Special Secretary, Department of Excise in Revision No. 29 of 2021 (Annexure No. 18 to the writ petition) cannot be sustained and are hereby quashed.

25. It is, however, open to the respondents to proceed in light of the observations made above and take appropriate steps, in accordance with the law, further to the reply dated 10.3.2021 furnished by the petitioner to the show cause notice-cum-order dated 6.3.2021.

26. Subject to the aforesaid observations, this writ petition is **allowed**.

(2022)01ILR A1029
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.12.2021

BEFORE

THE HON'BLE NAHEED ARA MOONIS, J.
THE HON'BLE SAUMITRA DAYAL SINGH, J.

Writ Tax No. 749 of 2020
With Writ Tax Nos. 766 of 2020, 767 of 2020 & 768 of 2020

M/s Birla Corporation Ltd. ...Petitioner
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:

Sri Sujeet Kumar, Ms. Chhaya Gupta, Sri Santosh Kumar Bagaria (Sr. Adv.)

Counsel for the Respondents:
C.S.C., Sri C.B. Tripathi

A. Interpretation of Statute - Value Added Tax, 2008 - Sections 40 & 81 - U.P. Trade Tax Act, 1948 - Section 29 - The petitioner cannot rely on any statutory provision of the VAT Act to claim interest from the date of the order. Only two courses were available to the petitioner on 16.10.2004 to either pursue his claim of refund under Section 29 of the Act of 1948 or to have pressed before this Court to provide for payment of interest on the refund as the Act of 1948 stood repealed on that date. (Para 24)

The provision of law providing for interest on delayed payment of refund would apply to only those cases that fall under purview of section 40(1) of the VAT Act. This is the plain effect of Section 40(2) of the VAT Act. (Para 22)

Writ Petition Rejected. (E-10)

List of Cases cited:

1. M/s Shahkari Khand Udyog Mandal Ltd. Vs Commissioner of Central Excise & Customs AIR 2005 SC 1897

2. M/s Indodan Milk Products Ltd. Vs St. of U.P. & anr. 1983 UPTC 583

3. P.P.G. Asian Paints Pvt. Ltd. Vs Deputy Commissioner, Commercial Tax & ors. 2016 NT 60

4. Lucent Technologies (P) Ltd. Vs Commissioner, Trade Tax, U.P., Lko (2015) 82 VST 371 (ALL) (FB)

5. Commissioner of Sales Tax, U.P. Vs Hind Lamps Ltd. JT 2008 (8) SC 590

6. Suhas H. Pophale Vs Oriental Insurance CO. Ltd. & its Estate Officer (2014) 4 SCC 657

7. National Engineering Industries Ltd. Vs Commissioner of Central Excise Jaipur (2005) 13 SCC 418 *(distinguished)*

8. U.O.I. Vs Tata Chemicals Ltd. (2014) 6 SCC 335

(Delivered by Hon'ble Naheed Ara Moonis, J. & Hon'ble Saumitra Dayal Singh, J.)

1. Heard Sri Santosh Kumar Bagaria, learned Senior Advocate, assisted by Sri Sujeet Kumar and Ms. Chhaya Gupta, learned counsel for the petitioner and Sri C.B. Tripathi, learned Special Counsel appearing for the revenue.

2. By means of these four writ petitions, the petitioner has sought payment of interest on the alleged delayed payment of refund due to it under section 40(2) of the U.P. Value Added Tax Act, 2008 (hereinafter referred to as the 'VAT Act') for A.Ys. 2004-05, 2005-06, 2006-07 and 2007-08. Individual writ petitions have been filed for each assessment year. Brief details of the writ petitions are as below:

Sl.No.	Writ Tax No.	Assessment Year	Amount of Refund Granted
1.	749 of 2020	2004-05	1,24,73,696/-
2.	766 of 2020	2005-06	6,21,78,915/-
3.	767 of 2020	2006-07	6,02,23,413/-
4.	768 of 2020	2007-08	3,96,92,735/-

3. Though the aforesaid refund claimed were granted to the petitioner vide orders dated 29.06.2020, by further communications dated 07.07.2020 and 11.08.2020 issued by the Deputy Commissioner, Commercial Tax, Sector - 3, Prayagraj, the said authority had adjusted the amount of refund quantified at Rs.

17,45,68,741/- for A.Ys. 2004-05 (beginning 14.10.2004) to 2007-08 (ending 31.12.2007), claimed by the petitioner under the provisions of U.P. Trade Tax Act, 1948 (hereinafter referred to as the 'Erstwhile Act') against the outstanding demand of interest due on delayed payments of entry tax Rs. 18,10,01,347/- for A.Ys. 2003-04 and 2009-10 under the U.P. Tax on Entry of Goods into Local Areas Act, 2007 (hereinafter referred to as the 'Entry Tax Act').

4. The petitioner challenged the aforesaid adjustment of refund by means of Writ Tax No. 748 of 2020. It was heard and decided on 16.11.2021. That hearing proceeded on an admission made by the revenue that the claim for refund made by the petitioner [as was dealt with vide communications dated 29.06.2020, 07.07.2020 and 11.08.2020 by the Deputy Commissioner, Commercial Tax, Sector - 3, Prayagraj (impugned in that writ petition)], arose and was decided in accordance with the provisions of the VAT Act.

5. Though reference had been made to the provisions of the Erstwhile Act, no doubt was expressed by either party to the eligibility of refund claimed by and granted to the petitioner under the provisions of the VAT Act or to the applicability of that enactment. In view of such concession made by the State, the issue of applicability of the VAT Act to the refund claimed by the petitioner, was assumed to exist. Therefore, and as would be discussed later, on that issue the said decision would remain confined as a decision obtaining on the facts of that case.

6. By means of the present petitions, the issue of interest on the refund claim alone has been raised. Therefore, it must be tested on its own merits. The facts involved in the present case insofar as they are common to the earlier **M/S Birla Corporation Limited Vs. The State of U.P. And 3 Others, Writ Tax No. 748 of 2020**, as have also been recorded in the order dated 16.11.2021, are quoted below:

"5. In brief, the petitioner set up a unit to manufacture cement using fly ash as a raw material. At the relevant time, on 18.06.1997, the Government of U.P. (in exercise of its power under section5 of the Erstwhile Act), had issued a rebate notification granting rebate on payment of tax under the Erstwhile Act, to eligible units, for a period of ten years. Admittedly, the petitioner was granted that benefit for the period 14.12.1998 to 13.12.2008. Mid-way into that scheme, the said rebate notification came to be rescinded on 14.10.2004, by the State Government. Consequently, for the period 14.10.2004 to 13.12.2008, no rebate was allowed to the petitioner under the Erstwhile Act. Consequently, tax payments were made.

6. The notification dated 14.10.2004 rescinding the rebate notification dated 18.06.1997 was challenged by the petitioner and others before this Court. First, writ petition M/s Jai Prakash Associates Ltd. vs. State of U.P. and Another 2010 UPTC 757, came to be decided by the judgment dated 29.03.2010. Paragraph 125 of the said decision reads as under:-

"125. The writ petition is allowed in part to the extent petitioner's entitlement for tax exemption for the period available under the original notification dated 27th February, 1998. Accordingly, a writ in the nature of mandamus is issued directing the opposite parties to provide tax exemption to

the petitioner industry from the date of production for the period of entitlement under original notification dated 27th February, 1998."

7. On 16.04.2010, the petition filed by the present petitioner being Writ Petition (Misc. Bench) No. 6176 of 2004, M/s Birla Corporation Ltd. vs. State of U.P and others came to be decided by the order dated 16.04.2020 on the following terms:-

"Keeping in view the fact that the controversy has been set at rest, present writ petitions too are decided finally in terms of the judgment and order dated 29.3.2010, passed in writ petition No. 5861(M/B) of 2010.

No order as to costs."

8. The above judgments, were carried in appeal by the revenue, to the Supreme Court. Vide judgment dated 12.11.2019, in State of Uttar Pradesh and Another vs. Birla Corporation Ltd. (2019) SCC OnLine SC 1569, the Supreme Court dismissed the revenue's appeal with certain observations. Relevant to our issue, paragraph nos. 34 and 36 of the said decisions read as below:-

"34. A priori, the respondents and similarly placed persons would be entitled to rebate for the relevant period prescribed in the notification dated 27th February, 1998 which would continue to remain in vogue until the expiry of the specified period, namely, ten years. In the case of BCL up to 13 th December, 2008 and in the case of JPAL up to 17th September, 2014 respectively. The amount of rebate, however, would depend on the verification of their refund claim pending before the concerned authorities and would be subject to just exceptions including the principle of unjust enrichment. The respondents should be able to substantiate that the amount claimed by them has not been passed on to their consumers. Only then, they would be entitled for refund. The competent authority may verify the claim for refund of each of the respondent(s) in accordance with law and pass appropriate orders, including about the interest for the relevant period.

35. .....

36. In view of the above, these appeals must fail. Hence, the same are dismissed with observations. There shall be no order as to costs. All pending applications are also disposed of."

(emphasis supplied)

9. As was noted in the order of the Supreme Court, upon the petitioner's writ petition being allowed by this Court, the petitioner had filed applications dated 20.11.2010 claiming refund Rs. 17,90,61,418/- being the total amount of rebate denied to the petitioner during pendency of its writ petition before this Court, for different Assessment Years, during the period 14.10.2004 to 31.12.2007. It may be noted, no refund was claimed for the period beyond 01.01.2008 when the VAT Act was enforced. 10. Separate orders were passed by the respondent no. 4 on the petitioner's applications claiming refund, all on 29.06.2020. Thus, instead of granting the refund of the amount claimed, the respondent-assessing authority of the petitioner only quantified the total amount of trade tax refundable at Rs. 17,45,68,741/- for A.Y.s 1998 (from 14.12.2008)-1999 to 2007-2008 (upto 31.12.2007). It is also undisputed, at that stage, the assessing authority of the petitioner found the petitioner had not passed on that liability (of disputed trade tax). Thus, neither the principle of unjust enrichment was found applicable nor any other ground was found existing to deprive the petitioner of the refund claimed. At the same time, the assessing authority found, no interest was payable to the petitioner on

the delayed refund. Thereafter, on 07.07.2020, instead of paying out the refund, the assessment authority of the petitioner issued a further ex-parte communication to the petitioner informing adjustment of the entire amount of refund Rs. 17,45,68,741/- against the outstanding demand of dues of interest on Entry Tax Rs. 18,10,01,347/-, for the A.Ys. 2003-04 to 2009-10.

11. A similar communication giving full details of such adjustments made was issued to the petitioner on 11.08.2020. In such circumstances, the petitioner again wrote to its assessing authority on 31.08.2020 stating, no amount of tax was due against him either under the erstwhile Act or the VAT Act or the Central Sales Tax Act, 1956 (hereinafter referred to as the "Central Act"). It reiterated its demand for payment of refund due. In the present writ petition in paragraph 3, it has been specifically stated, there is no amount of tax outstanding or due against the petitioner under the provisions of the Erstwhile Act or the VAT Act or the Central Act. In reply thereto in paragraph 29 of the counter affidavit, only this much has been stated, on the date of the refund order dated 29.06.2020 being passed, interest on Entry Tax Rs. 18,10,01,347/- was outstanding against the petitioner for the A.Ys. 2003-04 to 2009-10."

7. Learned Senior Counsel appearing for the petitioner would submit, unlike section 29 of the Erstwhile Act, section 40 of the VAT Act clearly provides for payment of interest after expiry of thirty (30) days from the date of receipt of the order giving rise to refund. Referring to the order dated 16.04.2010 passed by a division bench of this Court in **M/S Birla Corporation Ltd. Vs. State of U.P. & Anr., Misc. Bench No. 6176 of 2004**, it has been submitted, the interest became due w.e.f. 16.04.2010. In appeal decision of the Supreme Court in **State of U.P & Anr. Vs. Birla Corporation Ltd., 2019 SCC Online 1569**, no fresh or independent direction was issued regarding refund. Even the stipulation of just exceptions on account of unjust enrichment, pre-existed. In that regard, reliance has been placed on a three-Judge bench decision of the **Supreme Court in M/S Sahakari Khand Udyog Mandal Ltd. Vs. Commissioner of Central Excise & Customs, AIR 2005 SC 1897**. Thus, referring to section 40(2) of the VAT Act, it has been submitted, the process of verification of facts as to the applicability or otherwise of the principle of unjust enrichment should have been made within thirty (30) days from the date 16.04.2010 and refund paid within that time. No fresh condition and no fresh limitation of time arose upon the order of the Supreme Court dated 20.11.2019 in **State of U.P. & Anr. Vs. Birla Corporation Ltd. (supra).** The interest liability was incurred by the State, by operation of law. The submissions advanced by the revenue that the refund claim did not arise, and no interest became due to the petitioner in absence of any order of refund, has been seriously disputed. The earlier decisions of this Court in **M/S Indodan Milk Products Ltd. Vs. State of U.P. & Anr., 1983 UPTC 583, P.P.G. Asian Paints Pvt. Ltd. Vs. Deputy Commissioner, Commercial Tax & Ors., 2016 NTN 60** and, a Full Bench decision in **Lucent Technologies (P) Ltd. Vs. Commissioner, Trade Tax, U.P., Lucknow, (2015) 82 VST 371 (ALL) (FB)** as also decision of the Supreme Court in **Commissioner of Sales Tax, U.P. Vs. Hind Lamps, Ltd., JT 2008 (8) SC 590**

are claimed to be wholly distinguishable as those decisions arose in the context of section 29 of the Erstwhile Act. They have no application to the present facts as refund has been granted under section 40 of the VAT Act.

8. In this regard, reference has been made to a decision of the Supreme Court in **Suhas H. Pophale Vs Oriental Insurance Company Limited and Its Estate Officer, (2014) 4 SCC 657**. Further, in support of his submission, learned Senior Counsel for the petitioner has relied on another decision of the Supreme Court in **National Engineering Industries Ltd. Vs Commissioner of Central Excise Jaipur, (2005) 13 SCC 418** to submit - the refund claim became due on 16.04.2010 upon the earlier writ petition filed by the present petitioner (Misc. Bench No. 6176 of 2004), being allowed. On that date, the Erstwhile Act did not exist. The only statutory law in force was section 40 of the VAT Act. Therefore, only that provision would govern the claim for interest. Under section 40 of the VAT Act the claim for interest may arise upon an order giving rise to refund passed by a Court and it is not dependent on any further or specific order to be passed by the assessing authority to grant such refund. Therefore, the interest liability accrued upon lapse of thirty days from the order dated 16.04.2010. Last, it has been submitted, the revenue having retained the money without any authority of law, it is liable to compensate the petitioner with interest for such an illegal act. Reliance has been placed on a decision of a Supreme Court in **Union of India Vs. Tata Chemicals Ltd., (2014) 6 SCC 335**.

9. Opposing the writ petition, Sri C.B. Tripathi, learned Special Counsel placed heavy reliance on the provision of section 29 of the Erstwhile Act and the earlier division bench decisions of this Court in **M/S Indodan Milk Products Ltd. Vs. State of U.P. & Anr. (supra) and P.P.G. Asian Paints Pvt. Ltd. Vs. Deputy Commissioner, Commercial Tax & Ors. (supra).** That view is asserted to have been affirmed by the Full Bench of this Court in **Lucent Technology (P) Ltd. Vs. Commissioner, Trade Tax U.P. Lucknow (supra)** that is consistent to the ratio of the decision of the Supreme Court in **Commissioner of Sales Tax, U.P. Vs. Hind Lamps Ltd. (supra).** Carrying his submission further, Sri Tripathi, would submit, in the present facts, no amount was found refundable either by this Court or the Supreme Court. Therefore, a specific order of refund was necessary to be passed before any amount may have been refunded to the petitioner. The order quantifying the refund was passed on 29.06.2020. Thereafter, that refund amount was adjusted against other demands of interest on entry tax, on 07.07.2020. Thus, it cannot be said that any refund remained pending beyond the statutory period of thirty days from the order of refund being passed. Consequently, no interest liability was incurred by the respondent-State authorities.

10. At the first instance, we record our utter dismay at the approach adopted by the revenue. The present writ petitions and Writ Tax no.748 of 2020 were listed together on 16.11.2021. All five petitions had arisen from common facts and orders. Subject to time availability, all petitions would have been heard and decided on the same day. Yet, the revenue chose to adopt different stance as to the applicable law, in the two sets of petitions that have come into existence only by pure chance. Writ Tax 748 of 2020 was heard and oral order

was passed thereon on 16.11.2021. Thereafter, the present batch of petitions were heard. Hearing could not conclude due to paucity of time. Hence these four petitions are listed today. In such circumstances, there exists an inconsistent duality in the stand adopted by the revenue.

11. In any case, the earlier writ petition being Writ Tax No.748 of 2020 was confined to the issue whether the liability of interest on entry tax could be adjusted against any other refund of trade tax found due to the petitioner. On the other hand, here the issue is to the entitlement of interest on the refund of trade tax that became due upon the earlier order of this Court dated 16.04.2010. We have allowed the revenue to advance submissions that are at variance with the submissions advanced by it in the earlier writ (already decided by us vide order dated 16.11.2021), more out of helplessness, and not out of choice.

12. Having thus heard learned counsel for the parties and having perused the record, in the first place, we may take note of the certain statutory provisions. Under the Erstwhile Act, the provision of refund existed in the shape of section 29 of that Act. A slightly different provision existed in the shape of section 40 of the VAT Act. It would be useful to our discussion, to extract in tabular form the provisions of sections 29 of the Erstwhile Act and 40 of the VAT Act, as below :

Section 29. Refund	**40. Refund and adjustment**
(1) The assessing authority shall, in the manner prescribed, refund to a dealer any amount of tax, fees or other dues paid in excess of the amount due from him under this Act: Provided that the amount found to be refundable shall first be adjusted towards the tax or any other amount outstanding against the dealer under this Act or under the Central Sales Tax Act, 1956 (Act 74 of 1956), and only the balance, if any, shall be refunded. (2) If the amount found to be refundable in accordance with sub-section (1) is not refunded as aforesaid within three months from the date of order of refund passed by the Assessing Authority or, as the case may be, from the date of receipt by him of the order of refund, if such order is passed by any other competent authority or	(1) Subject to other provisions of this Act, the assessing authority shall in the manner prescribed, refund to the dealer an amount of tax, fee, or other dues paid in excess of the amount due from him under this Act. Provided that amount found to be refundable shall first be adjusted towards tax or any other amount outstanding against the dealer under this Act or under The Central Sales Tax Act 1956 or under the erstwhile Act and only the balance if any shall be refunded. Provided further that refund, of excess amount of input tax credit, shall, without prejudice to other conditions, be subject to conditions and restrictions of section 15. (2) Where amount found refundable in accordance with the provisions under sub-section (1), is not refunded within thirty days from the date of order of refund passed by the assessing authority or where order giving rise to refund is passed by any other

Court, the dealer shall be entitled to simple interest on such amount at the rate of twelve percent per annum **[For Uttaranchal:** simple interest on such amount at the rate of twelve per cent per annum] from the date of such order or, as the case may be, the date of receipt of such order of refund passed by the Assessing Authority to the date of the refund: Provided that for calculation of interest in respect of any period after the 26th day of May, 1975, the sub-section shall have effect as if for the words six months the words three months were substituted and for the words six percent the words twelve percent were substituted.	authority or court, from the date of receipt of such order by the assessing authority by due process, the dealer shall be entitled to simple interest on such amount at the rate of twelve percent per annum from the date of such order passed by the assessing authority or from the date of receipt of the order giving rise to refund passed by any other authority or Court, till the date refund is made. Provided that where refund relating to excess amount of input tax credit due on the basis of returns filed by the dealer, is not allowed within the time prescribed under section 15, the dealer shall be entitled to simple interest on such amount at the rate of twelve percent per annum from the date on which refund becomes due and till the date refund is made.
(3) Notwithstanding any judgment, decree or order of any Court or authority, no refund shall be allowed of any tax or fee due under this Act on the turnover of sales or purchases or both, as the case may be, admitted by the dealer in the returns filed by him or at any stage in any proceedings under this Act. Explanation I: The date of refund shall be deemed to be the date on which intimation regarding preparation of the refund voucher is sent to the dealer in the manner prescribed. Explanation II: The expression 'refund' includes any adjustment under the proviso to sub-section (1) [See Rules 89 to 104]	(3) Notwithstanding any judgment, decree or order of any Court or authority, no refund shall be allowed of any tax or fee due under this Act on the turnover of sales or purchases or both, as the case may be, admitted by the dealer in the returns filed by him or at any stage in any proceedings under this Act, whichever is higher.
(4) Notwithstanding anything contained in sub-sections (1), (2) and (3), where the tax has been paid by a dealer on purchase of certain goods and the value of goods	(4) Where a dealer has requested the assessing authority for withholding any amount refundable to him for adjustment towards his future liabilities either under this Act or under the Central Sales Tax Act, 1956, the dealer shall not be entitled for interest. (5) Where any amount of tax has been deducted from any dealer under section 34 as tax payable by him for any assessment year, for the purpose of sub-section (3), amount deducted shall be deemed to be tax due under this Act and shall not be refunded to the dealer where the dealer - (a) has neither submitted returns of

manufactured out of such goods is inclusive of such tax and the State Government remits the tax liability on such purchases retrospectively, the dealer shall not be entitled to refund of tax paid on purchases of such goods unless he proves to the satisfaction of the Assessing Authority that he has not passed on the liability of such tax to any third party as a result of any sale or otherwise.

Section 29-A - Procedure for disbursement of amount wrongly realised by dealer as tax

(1) Where any amount is realised from any person by any dealer, purporting to do so by way of realisation of tax on the sale or purchase of any goods, in contravention of the provisions of sub-section (2) of Section 8-A, such dealer shall deposit the entire amount so realised in such manner and within such period, as may be prescribed.

(2) Any amount deposited by any dealer under sub-section (1) shall, to the extent it is not due as tax, be held by the State Government in trust for the person from whom it was realised by the dealer, or for his legal representatives, and the deposit shall discharge such dealer of the liability in respect thereof to the extent of the deposit.

(3) Where any amount is deposited by any dealer under sub-section (1), such amount or any part thereof shall, on a claim being made in that behalf be refunded, in the manner prescribed, to the person from

turnover and tax for all tax periods nor has submitted annual return for the assessment year in which sales are made; and

(b) has been assessed exparte for the assessment year in which sales are made.

(6) Where in respect of sale of any goods, any amount of tax has been realized by a registered dealer from -

(a) any official or personnel of-

(i) any foreign diplomatic mission or consulate in India; or

(ii) the United Nations or any other similar International body, entitled to privileges under any convention to which India is a party or any other law for the time being in force; or

(b) any consular or diplomatic agent of any mission, the United Nations or any other body referred to in sub-clause (i) or sub-clause (ii) of clause (a), and where such official, personnel, consulate or agent has purchased goods for himself or for the purpose of such mission, United Nations, or any other body, then if such official, personnel, agent, United Nations or body, after producing tax invoice referred to in sub-section(1) of section 22 or the sale invoice referred to in sub-section (3) of the said section, as may be applicable, in the prescribed manner, claims refund of the amount of tax realised from him, the Commissioner or the officer authorised by him in this behalf, shall refund such amount to such official, personnel, consular or agent of such mission, United Nations or body, as the case may be.

(7) Refund, under any provisions of this Act, may be given by refund voucher or cheque:

Provided that where a dealer submits e-tax return, refund of any amount found refundable to him may be allowed through e-cheque.

whom such dealer had actually realised such amount or part, or to his legal representatives; and to no other person:
Provided that no such claim shall be entertained after the expiry of three years from the date of the order of assessment or one year from the date of the final order on appeal, revision or reference, if any, in respect thereof, whichever is later.
Explanation. - The expression "final order on appeal, revision or reference," includes an order passed by the Supreme Court under Article 32, Article 132, Article 133, Article 136 or Article 137 or by the High Court under Article 226 or Article 227 of the Constitution.
[See Rules 105 to 110]
Section 29-B - Reimbursement in respect of

Explanation- For the purposes of this Act, prescribed date shall be deemed to be the date of refund.
(8) The amount refundable under the erstwhile Act may be adjusted against the amount of tax or penalty or any other dues under this Act."
40-A. Withholding of refund in certain cases (1) Notwithstanding anything to the contrary contained in any other provision of this Act or in any judgment, decree or order of any Court, Tribunal or other authority, where after giving reasonable opportunity of being heard to the dealer or the person concerned, the Commissioner is satisfied on the report of the assessing authority that,-
(a) the dealer has submitted false return of the turnover or has concealed particulars of his turnover or has deliberately furnished inaccurate particulars of such turnover or has prevented the

declared goods
(1) Where any tax has been levied under this Act in respect of the sale or purchase of any goods referred to in Section 14 of the Central Sales Tax Act, 1956, and such goods are subsequently sold in the course of inter-State trade or commerce, and tax has been paid under the said Central Act in respect of the sale of such goods in the course of inter-State trade or commerce, the tax levied under this Act may, on an application being made in writing to the Assessing Authority within six months from the date on which the tax was so paid or the date of commencement of the Uttar Pradesh Sales Tax (Amendment) Act, 1973, whichever is later, be reimbursed to the person making such sale in the course of inter-

assessing authority or any other competent authority from making inspection and examination of books, accounts or documents maintained or goods shown to be held in stock by such dealer or obstructed any competent authority in performing his functions under this Act; or
(b) any purchase in respect of which input tax credit in any return has been claimed, is not verifiable; or
(c) the dealer has obtained tax invoices without making actual purchase of goods; or
(d) the dealer has failed to furnish any security demanded from him under any provision of this Act or the Central Sales Tax Act, 1956; or
(e) the circumstances exist involving fraud, and where the Commissioner is of the opinion that if refund is allowed, it may not be possible to realize any amount of tax or penalty likely to be levied, he may permit the assessing authority to

State trade or commerce. (2) where the Assessing Authority is satisfied that the application is maintainable under sub section (1), it shall in the manner prescribed reimburse to the applicant the amount of such tax and, in any other case, shall reject the application: Provided that no such application shall be rejected wholly or in part except after the applicant has been given a reasonable opportunity of being heard: Provided further that the amount found to be reimbursable shall first be applied towards the tax on any other amount outstanding against the applicant under this Act and only the balance, if any, shall be reimbursed. [See Rules 77, 89, 104 and 105]	pass an order for withholding, as a security, such amount of refund as would be sufficient to cover the amount of tax or penalty or both, as the case may be, likely to be levied, for a period as may be determined by the Commissioner. (2) Where the assessing authority finds that the circumstances mentioned in sub-section (1) exist and sufficient material is available on the record, it shall send a report to the Commissioner along with the material for seeking the permission to withhold the amount of refund. (3) The assessing authority shall complete the proceeding for assessment or penalty or both, pending before him within such period as may be determined by the Commissioner. Provided that if the Commissioner is satisfied that the circumstances exist which would prevent the assessing authority to complete the assessment or penalty proceeding within the determined period, he may extend the period not exceeding 90 days. (4) After the completion of the proceeding withheld amount shall be adjusted against demand created due to assessment or penalty proceeding and the balance if any shall be refunded along with interest at the rate of twelve percent per annum from the date on which refund has become due, in the manner provided under this Act and the rules made there under. Explanation: For the purposes of this section refund includes the refund of input tax credit."

13. The Erstwhile Act was repealed by the VAT Act w.e.f. 01.01.2008. section 81 of the VAT Act reads as under :-

*"**81. Repeal and saving** . - (1) The Uttar Pradesh Trade Tax Act, 1948 (U.P.*

Act No. XV of 1948) (hereinafter in this section referred to as the repealed enactment) is hereby repealed.

(2) Notwithstanding such repeal, -

(a) any notification, rule, regulation, order or notice issued, or any appointment or declaration made, or confiscation made, or any penalty or fine imposed, any forfeiture, cancellation or any other thing done or any action taken under the repealed enactment, and in force immediately before such commencement shall, so far as it is not inconsistent with the provisions of this Act, be deemed to have been issued, made granted, done or taken under the corresponding provisions of this Act.

(b) any right, privilege, obligation or liability acquired, accrued or incurred under the repealed Act, shall not be affected and (manufacturing units) enjoying facility of moratorium for payment of tax under section 8 (2-A) of the said Act shall be entitled to claim moratorium for payment of tax in accordance with provisions of section 42.

(3) Any officer, authorised by the Commissioner under the repealed enactment, to exercise powers under section 10-B and sub-section(6) of section 13-A thereof, shall be deemed to have been authorised by the Commissioner to exercise such powers under section 56 and sub-section(7) of section 48 respectively.

(4) Any order made or direction issued by the State Government or by the Commissioner under the repealed Act, for carrying out purposes thereof, to the extent the same are not inconsistent with the provisions of this Act, shall be deemed to have been issued under the provisions of this Act.

(5) Any security or additional security, furnished under the provisions of the repealed Act, shall be deemed valid for the purposes under this Act only upon furnishing an undertaking from the surety to this effect in the prescribed form and manner within thirty days from the date of the commencement of this Act.

Provided that, in appropriate cases, the assessing authority may extend the time for furnishing undertaking from sureties.

(6) The mention of particular matters in this section shall not be held to prejudice or affect general application of section 6 of the Uttar Pradesh General Clauses Act, 1904, with regard to the effect of repeals."

14. Pertinent to our discussion, section 6 of the UP General Clauses Act, 1904 reads as under :-

*"**6. Effect of repeal**. - Where any [Uttar Pradesh] Act repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not -*

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or

(e) affect any remedy or any investigation or legal proceeding commenced before the repealing Act shall have come into operation in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid;

and any such remedy may be enforced and any such investigation or legal

proceeding may be continued and concluded, and any such penalty, forfeiture or punishment imposed as if the repealing Act had not been passed.

15. Section 81(2)(d) of the VAT Act preserves any right, privilege, obligation or liability acquired, accrued, or incurred under the repealed Act. On the date of repeal of the Erstwhile Act, the statutory law on rebate claimed by the petitioner under Erstwhile Act did not exist, by virtue of the repeal made. The challenge raised by the petitioner to the notification dated 14.10.2004 issued by the State Government in exercise of its powers under section 5 of the Erstwhile Act was pending consideration in Misc. Bench No. 6176 of 2004. That writ petition came to be decided on 16.04.2010.

16. Since, on the date of repeal, the earlier rebate notification dated 27.02.1998 stood withdrawn and only a challenge thereto was pending before this Court (under Article 226 of the Constitution of India), it may never be said that any right or privilege as to rebate had been acquired or had accrued in favour of the petitioner as may have been protected or saved under section 81(2)(b) of the VAT Act.

17. By way of effect caused by the repeal of the Erstwhile Act and by virtue of section 6(e) of the UP General Clauses Act, 1904, any remedy or legal proceeding if it had been commenced before the repeal (with respect to any right, privilege etc.) would remain intact. However, the proceeding here being a constitutional remedy availed by the petitioner, the same may even otherwise have survived the repeal. In any case, that remedy remained wholly untouched and/or unblemished by the repeal of the Erstwhile Act. It was availed by the petitioner by filing the earlier Writ Petition no. Misc. Bench No. 6176 of 2004. It was allowed on 16.04.2010. Plainly, the petitioner became entitled to claim refund under the Erstwhile Act, subject to normal/just exceptions, including a negative satisfaction as to unjust enrichment.

18. It may be noted, the principle of unjust enrichment may have dis-entitled a refund claim irrespective of its absence - as a statutory principle incorporated in that enactment itself. It being a judicially evolved principle, unjust enrichment would find its applicability to all cases of indirect taxation - wherever an assessee/claimant was found to have passed on the disputed tax liability to another, while resisting its imposition qua the State.

19. At the same time, there is no direct provision under the VAT Act or the UP General Clauses Act, 1904 as may be read to dis-entitle the petitioner to claim interest on refund under the Erstwhile Act. More importantly, there is no positive provision of law under the VAT Act either by virtue of language used in Sections 40 or 81 of that Act as may have allowed the petitioner to claim interest on refund of trade tax under the provisions of the VAT Act.

20. Reliance placed by learned Senior Counsel for the petitioner on the decision of the Supreme Court in **National Engineering Industries Vs. Commissioner of Central Excise, Jaipur (supra)** is wholly misplaced. In that case, the refund had been claimed for the tax period 1976-1977 to 1978-79. The quantum dispute was decided in favour of National

Engineering Industries by the CEGAT. The claim for refund filed pursuant thereto was taken up for consideration in year 1993. By that time section 11B of the Central Excise Act, 1994 stood amended. By that amendment the principle of unjust enrichment stood statutorily incorporated in section 11B of the Central Excise Act, 1944. Applying that principle, the refund claim was rejected. In that context, with respect to the refund claim made under the same enactment, the Supreme Court held- the law prevalent at the time of refund had to be applied.

21. The aforesaid ratio is wholly inapplicable to the present facts. Present is not a case of amendment of section 29 of the Erstwhile Act but of repeal and replacement of the Erstwhile Act itself by a completely new enactment namely - VAT Act. Section 40(1) of the VAT Act only provides for refund of any amount paid by an assessee "in excess of the amount due from him under this Act". Since the disputed amount of trade tax had not been paid by the present petitioner by virtue of any notification and/or provision or proceeding under the VAT Act and, in fact, that deposit was made and the dispute arising therefrom, pre-dated the enforcement of the VAT Act section 40(1) of the VAT Act has absolutely no application to the present facts.

22. Since section 40(1) of the VAT Act is found to be wholly inapplicable viz-a-viz the claim for refund of trade tax for the A.Ys. 2004-04 to 2007-08, the language of section 40(2) of the VAT Act is of no help to the petitioner. That provision of law providing for interest on delayed payment of refund would apply to only those cases that fall under the purview of section 40(1) of the VAT Act, and to no other. That is the plain effect of sub-section (2) of section 40 of the VAT Act.

23. As noted above, neither section 81 of the VAT Act nor section 6 of the U.P. General Clauses Act, 1904, offer any assistance to the petitioner. They do not make applicable the provisions of the subsequent Act (VAT Act) to proceedings or dispute that may have arisen under the earlier Act (Erstwhile Act). They also do not contain any statutory principle that may allow the petitioner to claim interest in accordance with the provisions of the VAT Act.

24. Thus, we find, though the petitioner became entitled to the claim refund upon its earlier writ petition - Misc. Bench No. 6176 of 2004 being allowed, at the same time, it cannot rely on any statutory provision of the VAT Act to claim interest from the date of that order. Only two courses were available to the petitioner on 16.04.2010 to either pursue his claim of refund under section 29 of the Erstwhile Act or to have pressed before this Court to provide for payment of interest on the refund as the Erstwhile Act stood repealed on that date. Neither before this Court nor before the Supreme Court, the petitioner made a prayer for payment of interest on the refund of trade tax claimed by it.

25. Examined in that light, the direction of the Supreme Court to the revenue authorities to consider the refund claims made by the petitioner on the touchstone of just exceptions such as unjust enrichment, may not lead us anywhere. That observation was made in the interest of revenue. The principle - interest is a natural accretion on capital, is a general principle we find difficult to invoke in the present facts, in the face of the statutory

provisions of section 29 of the Erstwhile Act and the earlier decision of this Court dated 16.04.2010 and the decision of the Supreme Court dated 12.11.2019.

26. It may have been open to the petitioner to claim other-than-statutory interest in the first leg of litigation when it had challenged the notification dated 14.10.2004 whereby the earlier rebate notification dated 27.02.1998 issued under section 5 of the Erstwhile Act had been withdrawn. The petitioner having failed to make that prayer then, it is too late in the day to allow that prayer. The same may remain barred on the principle of constructive res judicata.

27. In any case, we also find it difficult to grant such a prayer in face of the clear language of section 29 of the Erstwhile Act that has been conclusively interpreted in favour of the revenue in a series of decisions in **M/S Indodan Milk Products Ltd. Vs. State of U.P. & Anr. (supra); P.P.G. Asian Paints Pvt. Ltd. Vs. Deputy Commissioner, Commercial Tax & Ors. (supra); Lucent Technology (P) Ltd. Vs. Commissioner, Trade Tax U.P. Lucknow (Full Bench) (supra)** and; the Supreme Court decision in **Commissioner of Sales Tax, U.P. Vs. Hind Lamps Ltd. (supra).**

28. In the present case, the order of refund was passed on 29.6.2020 whereas the refund was adjusted against the demand of entry tax on 07.07.2020 i.e. within the statutory period of thirty (30) days. The merits of that decision apart (considered in our earlier decision dated 16.11.2021 in Writ Tax No. 748 of 2021), for both reasons noted above, the petitioner is found not entitled to interest on the amount of refund of trade tax Rs. 17,90,61,418/-, up to the date 07.07.2020.

29. As to the interest for the subsequent period, we have already provided for that payment at the rate equal to the statutory rate of interest. Such direction (though obtained on an unreconciled concession made by the revenue in that case), may remain referable to the inherent powers of this Court in exercise of jurisdiction under Article 226 of the Constitution of India where, in exercise of equity jurisdiction, interest awarded may be quantified with reference to a statutory provision.

30. Accordingly, all the writ petitions are **dismissed.**

31. No order as to costs.

(2022)01ILR A1043
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 04.01.2022

BEFORE

THE HON'BLE RAJESH BINDAL, C.J.
THE HON'BLE JASPREET SINGH, J.

Special Appeal No. 497 of 2021

Durgawati Singh & Ors. ...Petitioners
Versus
Deputy Registrar, Firms, Societies & Chits Lucknow & Ors. ...Respondents

Counsel for the Petitioners:
Mr. Sharad Pathak

Counsel for the Respondents:
Mr. Sudeep Kumar

A. Civil Law-Challenge to-Election of the Society-elections held by private respondents with only 22 members whereas the appellants were conveniently ignored and not permitted to participate in the elections of Committee of Management-matter –the Deputy Registrar found that General body was got fraudulently registered on the basis of improper and manufactured documents-the order challenged, and the court remitted the matter to the Deputy Registrar for fresh consideration-the appellants were not heard nor they noticed at the stage of passing of order-no real prejudice has been caused to the appellants merely because they have not heard by the learned Single Judge does not render the order bad in the eyes of law-Where procedural or substantive provisions of law embody the principles of natural justice, their infraction per se does not lead to invalidity of orders passed-the breach of the audi alterm partem rule cannot by itself, without more, lead to the conclusion that prejudice is thereby caused.(Para 1 to 37)

The appeal is dismissed. (E-6)

List of Cases cited:

1. Ins. of C. A. of India Vs L.K. Ratna & ors., (1986) 4 SCC 537

2. Dharampal Satyapal Ltd. Vs Dy. Commr. of Centrel Excise, Gauhati & ors. (2015) 8 SCC 519

3. S.L. Kapoor Vs Jagmohan (1980) 4 SCC 379

4. K.L tripathi Vs S.B.I. (1984) 1 SCC 43

5. MD, ECIL Vs B . Karnakumar (1993) 4 SCC 727

6. St. of Bank of Patiala Vs S.K. Sharma (1996) 3 SCC 364

7. Canara Bank Vs V.K. Awasthy (2005) 6 SCC 321

8. P.D. Agrawal Vs S.B.I. (2006) 8 SCC 776

9. U.O.I. Vs Alok Kumar (2010) 5 SCC 349

10. St. of U.P. Vs Sudhir Kumar & ors. (2020) SCC OnLine 847

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

01. More often that not the Courts are faced with the dilemma over the breach of Rules of natural justice and the Court's discretion to refuse relief, even though Rules of natural justice have been breached, on the ground that no real prejudice is caused to the affected party. This is the core issue involved in the instant intracourt appeal.

02. Shri Sharad Pathak, learned counsel for the appellants has moved Civil Misc. Application No.165247 of 2021 seeking leave to prefer this intracourt appeal under Chapter VIII Rule 5 of the Allahabad High Court Rules, 1952 challenging the order passed by the learned Single Judge dated 08.10.2021 in Writ Petition No.36672 (M/S) of 2018 on the ground that an issue regarding the validity of the membership of Shri Saraswati Vidyalaya Samiti was before the Deputy Registrar, Firms, Societies and Chit, Lucknow (hereinafter referred to as "Deputy Registrar"), who after hearing the matter, passed an order dated 07.12.2018 upholding the list of the members of the society which included the names of the present appellants.

03. This order dated 07.12.2018 passed by the Deputy Registrar was challenged by Shri Ajit Kumar Jaiswal in his individual capacity in Writ Petition No.36672 (M/S) of 2018. The learned Single Judge, after hearing the parties, allowed the writ petition by means of the impugned order dated 08.10.2021, as a result, the membership of the appellants which was upheld by the Deputy Registrar, has been set aside and this has caused prejudice as the learned Single Judge passed the order without affording any

opportunity of hearing to the appellants and they were not even impleaded as parties in the writ petition and thus, the impugned order has been passed behind the back of the appellants. Since, the appellants were not parties to the writ petition and they are aggrieved by the impugned order, hence, the leave to appeal is being sought.

04. The leave to appeal is granted and the Court has proceeded to hear the learned counsel for the parties on merits of the appeal.

05. The contention of the learned counsel for the appellants is that they are bonafide members of the Society namely Shri Saraswati Vidyalaya Samiti, Khiro, Raebareli. They had deposited their requisite membership fee and are entitled to exercise their membership rights including to participate in the elections of Committee of Management.

06. It is urged that election of the Society was held by the private-respondents with only 22 Members whereas the appellants were conveniently ignored and not permitted to participate and in the aforesaid backdrop the said elections were challenged.

07. The matter was considered by the Deputy Registrar and vide order dated 07.12.2018, 22 Members which were inducted by Shri Udai Bhan Mishra were found to be bonafide members and it was held that the list of General Body for the year 2018-19 presented by Shri Ajit Kumar Jaiswal was got fraudulently registered on the basis of improper and manufactured documents.

08. It is further urged that the said order dated 07.12.2018 passed by the Deputy Registrar was assailed by Ajit Kumar Jaiswal in his individual capacity before this Court in Writ Petition No.36672 (M/S) of 2018. Two other writ petitions bearing Writ Petition No.8273 (M/S) of 2019, titled as "Committee of Management, Sri Saraswati Vidyalaya Samiti v. State of U.P. and others", and Writ Petition No.12551 (M/S) of 2021, titled as "Udai Bhan Mishra v. State of U.P. and others", were also connected and all the three writ petitions were disposed by means of the impugned order dated 08.10.2021 and the entire matter of membership has been remitted to the Deputy Registrar to be decided afresh and this order has caused prejudice as the same has been passed without affording an opportunity of hearing to the appellants.

09. In support of his submissions, learned counsel for the appellants has relied upon the decision of the Apex Court in **Institute of Chartered Accountant of India v. L.K. Ratna and others, (1986) 4 SCC 537,** wherein it has been held that an opportunity of hearing must be given to a party before an order is passed which affects his rights.

10. Per contra, Shri Sudeep Kumar, learned counsel appearing for the respondents No.3 and 4 has submitted that no prejudice has been caused to the present appellants. The emphasis is that the appellants are not the members of the Society, hence, they were not entitled to any hearing. Moreover, the issue regarding the membership has not been finally decided and the matter has been remitted to the Deputy Registrar for its fresh

consideration, hence, in absence of any final decision, at this stage, it cannot be said that the appellants have been prejudiced.

11. It is further urged that insofar as the order dated 07.12.2018 passed by the Deputy Registrar is concerned, the appellants were not noticed nor heard by the Deputy Registrar at the stage of passing of the order. The issue was primarily between the answering respondents and Udai Bhan Mishra. Udai Bhan Mishra had contested the proceedings before the learned Single Judge and by a reasoned order, the learned Single Judge has remitted the matter to the Deputy Registrar for deciding the issue of membership afresh after affording an opportunity of hearing to the parties concerned. If at all the appellants have any grievance, they have a right to appear before the Deputy Registrar and raise all their grievances which can be suitably considered by the fact finding authority and as such no real prejudice has been caused and for the aforesaid reasons merely because the appellants were not heard, the order passed by the learned Single Judge may not be interfered with. Accordingly, the appeal deserves to be dismissed.

12. Learned counsel for the answering respondents has relied upon the decision of the Apex Court in the case **Dharampal Satyapal Limited v. Deputy Commissioner of Central Excise, Gauhati and others (2015) 8 SCC 519** to contend that principles of natural justice are flexible and in absence of real prejudice mere non grant of a hearing shall not affect the order.

13. The Court has heard learned counsel for the parties and also perused the record.

14. In order to appreciate the submissions of the learned counsel for the parties, few facts relevant, for adjudicating the issue involved in the instant appeal are being noticed hereinafter.

15. Writ Petition No.36672 (M/S) of 2018 was filed by Ajit Kumar Jaiswal and Committee of Management, Sri Saraswati Vidyalaya Samiti through its Manager assailing the order dated 07.12.2018 passed by the Deputy Registrar, by means of which, the dispute of membership of the Society was decided. The aforesaid writ petition was connected with two other writ petitions bearing Writ Petition No.8273 (M/S) of 2019 and Writ Petition No.12551 (M/S) of 2021.

16. Writ Petition No.8273 (M/S) of 2019 was filed against the order dated 06.03.2019 by which the Deputy Registrar directed for holding the elections. The other Writ Petition, bearing No.12551 (M/S) of 2021 was preferred by Udai Bhan Mishra challenging the order dated 01.10.2020 passed by the Additional Director, Secondary Education, Government of U.P., and the consequential order dated 25.05.2021 passed by the Joint Director of Education, 6th Region, U.P., Lucknow. By the order dated 01.10.2020, the Additional Director, Secondary Education set aside the order dated 13.08.2020 of the Regional Committee appointing an authorized controller in the institution and remanded the matter to the Joint Director of Education and by the consequential order dated 25.05.2021, the Joint Director of Education had directed for maintaining the status-quo as was existing prior to passing of the order dated 13.08.2020.

17. Since, all the three writ petitions, as mentioned above, were relating to the

membership, management and affairs of Shri Saraswati Vidyalaya Samiti, Khiro, Raebareli, hence they were connected and heard together and disposed of by the learned Single Judge by means of the order dated 08.10.2021.

18. The learned Single Judge while considering Writ Petition No.36672 (M/S) of 2018 found that the Deputy Registrar had not considered the version of the respondents herein and also did not consider the documentary evidence, hence, without entering into the merits it had set aside the order dated 07.12.2018 and directed the Deputy Registrar to consider the issue of membership afresh and also whether the issue would be decided by the Deputy Registrar or it is required to be referred to be Prescribed Authority.

19. Since, the issue in the other Writ Petition No.8273 (M/S) of 2019 was based primarily on the order dated 07.12.2018 which had been set aside and the impugned order being in consequence thereto, hence, the same was also set aside. Considering the third writ petition preferred by Udai Bhan Mishra, the learned Single Judge held that since the order dated 07.12.2018 had been set aside and all other orders were consequential including the order passed by the Additional Director dated 30.09.2020 and the consequential order dated 25.05.2021 and, if it were to set aside the said orders it would result in reviving an illegal order dated 13.08.2021, which is not legally permissible. Thus, with the aforesaid observations and directions, all the three writ petitions were disposed of.

20. At the outset, it will be relevant to notice the order dated 08.10.2021 passed by the learned Single Judge in relation to the Writ Petition No.36672 (M/S) of 2018 and in Paragraphs 12 and 18, it observed as under:-

"12. Be it as it may, it is apparent that all the aforesaid relevant aspect are not considered by the Deputy Registrar in his impugned order dated 07.12.2018. In view thereof, without further going into the merits of the case or on the issue as to whether the Deputy Registrar had power under Section 25 of the Societies Registration Act to pass the impugned order dated 07.12.2018, the impugned order being passed without taking into consideration the relevant aspects of the matter, is set aside. It shall be open for the Deputy Registrar to proceed afresh and pass appropriate order with regard to elections of the Society strictly in accordance with law by giving proper opportunity of hearing to the parties concerned. The question as to whether the matter should be decided by the Deputy Registrar or be referred by him to the prescribed authority is also left open to be decided by the Deputy Registrar."

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"18. The entire matter of membership is remanded to the Deputy Registrar who shall decide the same in accordance with law after giving proper opportunity of hearing to the parties concerned on merits, including on issue whether the dispute is required to be referred to the Prescribed Authority, under Section 25 of the Societies Registration Act. The entire exercise should be concluded by the Deputy Registrar within a period of two months from the date a certified copy of this order is placed before him."

21. In the aforesaid backdrop, if the contention of the learned counsel for the parties is examined, certain undisputed facts which emerge are, that the question regarding the membership is primarily a question of fact which requires scrutiny of documents, resolutions and other piece of evidence. It is also undisputed that the appellants before the Court were not noticed by the Deputy Registrar at the time when the impugned order dated 07.12.2018 was passed. At the time of hearing and passing of the order dated 07.12.2018, the only two parties present were also available before the learned Single Judge, namely the respondents No.3 and 4, who preferred Writ Petition No.36672 (M/S) of 2018 and the respondents No.1 and 2, who were the respondents in the aforesaid writ petitions.

22. The learned Single Judge found that the contentions raised by the parties were not properly considered nor the effect of the documents was examined by the authority. It also found that the nature of the controversy involved could be resolved by considering various documents, vouchers, resolutions including certain letters which were available with the bank which have been ignored. Thus, in the aforesaid circumstances, the order dated 07.12.2018 was set aside and the matter has been remanded to the said authority to decide the matter afresh after giving an opportunity of hearing to the parties concerned. It is not disputed that the issue of membership is open before the Deputy Registrar and the appellants being 'the party concerned' have a right to appear and raise all their contentions before the said authority.

23. In the backdrop of the aforesaid factual matrix, the core contention of the learned counsel for the appellants is that since the order dated 07.12.2018 had approved the membership of the appellants which has been set aside by the learned Single Judge, this in fact has cast a cloud over the membership and the order is visited with civil consequences. Hence, such an order could not be passed by the learned Single Judge without affording an opportunity of hearing to the appellants, thus, they have suffered grave prejudice.

24. The issue whether not granting a hearing in itself is a prejudice and violation of principles of natural justice and sufficient to grant relief to a party without showing actual prejudice caused to such a party has been the subject matter of judicial discourse and consideration, and its evolution over the decades can be seen with the help of the decisions of the Apex Court noticed hereinafter.

25. In some of the early judgments of the Apex Court, the non-observance of natural justice was said to be prejudice in itself to the person affected, and proof of prejudice, independent of proof of denial of natural justice, was held to be unnecessary. The only exception to this rule is where, on "admitted or indisputable" facts only one conclusion is possible, and under the law only one penalty is permissible. In such cases, a Court may not issue its writ to compel the observance of natural justice, not because it is not necessary to observe natural justice, but because Courts do not issue writs which are "futile" - [see **S.L. Kapoor v. Jagmohan (1980) 4 SCC 379 at paragraph 24].**

26. In ***K.L. Tripathi v. State Bank of India*** **(1984) 1 SCC 43,** the Apex Court held:

"29. ... We are in agreement with the basic submission of Mr. Garg in this respect, but we find that the relevant rules which we have set out hereinbefore have

been complied with even if the rules are read that requirements of natural justice were implied in the said rules or even if such basic principles of natural justice were implied, there has been no violation of the principles of natural justice in respect of the order passed in this case. In respect of an order involving adverse or penal consequences against an officer or an employee of Statutory Corporations like the State Bank of India, there must be an investigation into the charges consistent with the requirements of the situation in accordance with the principles of natural justice as far as these were applicable to a particular situation. So whether a particular principle of natural justice has been violated or not has to be judged in the background of the nature of charges, the nature of the investigation conducted in the background of any statutory or relevant rules governing such enquiries. Here the infraction of the natural justice complained of was that he was not given an opportunity to rebut the materials gathered in his absence.

xxx xxx xxx

32. The basic concept is fair play in action administrative, judicial or quasi-judicial. The concept of fair play in action must depend upon the particular lis, if there be any, between the parties. If the credibility of a person who has testified or given some information is in doubt, or if the version or the statement of the person who has testified, is, in dispute, right of cross-examination must inevitably form part of fair play in action but where there is no lis regarding the facts but certain explanation of the circumstances there is no requirement of cross-examination to be fulfilled to justify fair play in action. When on the question of facts there was no dispute, no real prejudice has been caused to a party aggrieved by an order, by absence of any formal opportunity of cross-examination per se does not invalidate or vitiate the decision arrived at fairly. This is more so when the party against whom an order has been passed does not dispute the facts and does not demand to test the veracity of the version or the credibility of the statement.

33. The party who does not want to controvert the veracity of the evidence from record or testimony gathered behind his back cannot expect to succeed in any subsequent demand that there was no opportunity of cross-examination specially when it was not asked for and there was no dispute about the veracity of the statements. Where there is no dispute as to the facts, or the weight to be attached on disputed facts but only an explanation of the acts, absence of opportunity to cross-examination does not create any prejudice in such cases."

(emphasis supplied)

27. In the Constitution Bench decision in **Managing Director, ECIL v. B. Karnakumar, (1993) 4 SCC 727,** the Apex Court, after discussing the constitutional requirement of a report being furnished under Article 311(2), held thus:

"30[v] ... The theory of reasonable opportunity and the principles of natural justice have been evolved to uphold the rule of law and to assist the individual to vindicate his just rights. They are not incantations to be invoked nor rites to be performed on all and sundry occasions. Whether in fact, prejudice has been caused to the employee or not on account of the denial to him of the report, has to be considered on the facts and circumstances of each case. Where, therefore, even after the furnishing of the report, no different consequence would have followed, it would be a perversion of

justice to permit the employee to resume duty and to get all the consequential benefits. It amounts to rewarding the dishonest and the guilty and thus to stretching the concept of justice to illogical and exasperating limits. It amounts to an "unnatural expansion of natural justice" which in itself is antithetical to justice.

31. Hence, in all cases where the enquiry officer's report is not furnished to the delinquent employee in the disciplinary proceedings, the Courts and Tribunals should cause the copy of the report to be furnished to the aggrieved employee if he has not already secured it before coming to the Court/Tribunal and give the employee an opportunity to show how his or her case was prejudiced because of the non-supply of the report. If after hearing the parties, the Court/Tribunal comes to the conclusion that the non-supply of the report would have made no difference to the ultimate findings and the punishment given, the Court/Tribunal should not interfere with the order of punishment. The Court/Tribunal should not mechanically set aside the order of punishment on the ground that the report was not furnished as is regrettably being done at present. The courts should avoid resorting to short cuts. Since it is the Courts/Tribunals which will apply their judicial mind to the question and give their reasons for setting aside or not setting aside the order of punishment, (and not any internal appellate or revisional authority), there would be neither a breach of the principles of natural justice nor a denial of the reasonable opportunity. It is only if the Court/Tribunal finds that the furnishing of the report would have made a difference to the result in the case that it should set aside the order of punishment.

(emphasis supplied)"

28. In **State Bank of Patiala v. S.K. Sharma, (1996) 3 SCC 364**, the Apex Court distinguishing between "adequate opportunity" and "no opportunity at all", held that the "prejudice" exception operates more especially in the latter case. This judgment also speaks of procedural and substantive provisions of law which embody the principles of natural justice which, when infracted, must lead to prejudice being caused to the litigant in order to afford him relief, and it held as under:-

32. Now, coming back to the illustration given by us in the preceding para, would setting aside the punishment and the entire enquiry on the ground of aforesaid violation of sub-clause (iii) be in the interests of justice or would it be its negation? In our respectful opinion, it would be the latter. Justice means justice between both the parties. The interests of justice equally demand that the guilty should be punished and that technicalities and irregularities which do not occasion failure of justice are not allowed to defeat the ends of justice. Principles of natural justice are but the means to achieve the ends of justice. They cannot be perverted to achieve the very opposite end. That would be a counter-productive exercise.

33. We may summarise the principles emerging from the above discussion. (These are by no means intended to be exhaustive and are evolved keeping in view the context of disciplinary enquiries and orders of punishment imposed by an employer upon the employee):

(1) An order passed imposing a punishment on an employee consequent upon a disciplinary/departmental enquiry in violation of the rules/regulations/statutory provisions governing such enquiries should not be set aside automatically. The Court or the Tribunal should enquire whether (a) the

provision violated is of a substantive nature or (b) whether it is procedural in character.

(2) A substantive provision has *normally* to be complied with as explained hereinbefore and the theory of substantial compliance or the test of prejudice would not be applicable in such a case.

(3) In the case of violation of a procedural provision, the position is this: procedural provisions are generally meant for affording a reasonable and adequate opportunity to the delinquent officer/employee. They are, generally speaking, conceived in his interest. Violation of any and every procedural provision cannot be said to automatically vitiate the enquiry held or order passed. Except cases falling under -- "no notice", "no opportunity" and "no hearing" categories, the complaint of violation of procedural provision should be examined from the point of view of prejudice, viz., whether such violation has prejudiced the delinquent officer/employee in defending himself properly and effectively. If it is found that he has been so prejudiced, appropriate orders have to be made to repair and remedy the prejudice including setting aside the enquiry and/or the order of punishment. If no prejudice is established to have resulted therefrom, it is obvious, no interference is called for. In this connection, it may be remembered that there may be certain procedural provisions which are of a fundamental character, whose violation is by itself proof of prejudice. The Court may not insist on proof of prejudice in such cases. As explained in the body of the judgment, take a case where there is a provision expressly providing that after the evidence of the employer/government is over, the employee shall be given an opportunity to lead defence in his evidence, and in a given case, the enquiry officer does not give that opportunity in spite of the delinquent officer/employee asking for it. The prejudice is self-evident. No proof of prejudice as such need be called for in such a case. To repeat, the test is one of prejudice, i.e., whether the person has received a fair hearing considering all things. Now, this very aspect can *also* be looked at from the point of view of directory and mandatory provisions, if one is so inclined. The principle stated under (4) hereinbelow is only another way of looking at the same aspect as is dealt with herein and not a different or distinct principle.

(4)(a) In the case of a procedural provision which is not of a mandatory character, the complaint of violation has to be examined from the standpoint of substantial compliance. Be that as it may, the order passed in violation of such a provision can be set aside only where such violation has occasioned prejudice to the delinquent employee.

(b) In the case of violation of a procedural provision, which is of a mandatory character, it has to be ascertained whether the provision is conceived in the interest of the person proceeded against or in public interest. If it is found to be the former, then it must be seen whether the delinquent officer has waived the said requirement, either expressly or by his conduct. If he is found to have waived it, then the order of punishment cannot be set aside on the ground of the said violation. If, on the other hand, it is found that the delinquent officer/employee has not waived it or that the provision could not be waived by him, then the Court or Tribunal should make appropriate directions (include the setting aside of the order of punishment), keeping

in mind the approach adopted by the Constitution Bench in *B. Karunakar* [(1993) 4 SCC 727 : 1993 SCC (L&S) 1184 : (1993) 25 ATC 704] . The ultimate test is always the same, viz., test of prejudice or the test of fair hearing, as it may be called.

(5) Where the enquiry is not governed by any rules/regulations/statutory provisions and the only obligation is to observe the principles of natural justice -- or, for that matter, wherever such principles are held to be implied by the very nature and impact of the order/action -- the Court or the Tribunal should make a distinction between a total violation of natural justice (rule of *audi alteram partem*) and violation of a facet of the said rule, as explained in the body of the judgment. In other words, a distinction must be made between "no opportunity" and no *adequate opportunity*, i.e., between "no notice"/"no hearing" and "no fair hearing". (a) In the case of former, the order passed would undoubtedly be invalid (one may call it "void' or a nullity if one chooses to). In such cases, normally, liberty will be reserved for the Authority to take proceedings afresh according to law, i.e., in accordance with the said rule (*audi alteram partem*). (b) But in the latter case, the effect of violation (of a facet of the rule of *audi alteram partem*) has to be examined from the standpoint of prejudice; in other words, what the Court or Tribunal has to see is whether in the totality of the circumstances, the delinquent officer/employee did or did not have a fair hearing and the orders to be made shall depend upon the answer to the said query. [It is made clear that this principle (No. 5) does not apply in the case of rule against bias, the test in which behalf are laid down elsewhere.]

(6) While applying the rule of *audi alteram partem* (the primary principle of natural justice) the Court/Tribunal/Authority must always bear in mind the ultimate and overriding objective underlying the said rule, viz., to ensure a fair hearing and to ensure that there is no failure of justice. It is this objective which should guide them in applying the rule to varying situations that arise before them.

(7) There may be situations where the interests of State or public interest may call for a curtailing of the rule of *audi alteram partem*. In such situations, the Court may have to balance public/State interest with the requirement of natural justice and arrive at an appropriate decision."

29. In **Canara Bank v. V.K. Awasthy, (2005) 6 SCC 321**, the Apex Court held as under:-

"10. The adherence to principles of natural justice as recognised by all civilised 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. These principles are well settled. The first and foremost principle is what 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 apprise the party determinatively of 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 such 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. This is one of the most important principles of

natural justice. It is after all an approved rule of fair play. The concept has gained significance and shades with time. When the historic document was made at Runnymede in 1215, the first statutory recognition of this principle found its way into the "Magna Carta". The classic exposition of Sir Edward Coke of natural justice requires to "vocate, interrogate and adjudicate". In the celebrated case of *Cooper v. Wandsworth Board of Works* [(1863) 143 ER 414 : 14 CBNS 180 : (1861-73) All ER Rep Ext 1554] the principle was thus stated: (ER p. 420)

"[E]ven God himself did not pass sentence upon Adam before he was called upon to make his defence. "Adam' (says God), "where art thou? Hast thou not eaten of the tree whereof I commanded thee that thou shouldest not eat?' "

Since then the principle has been chiselled, honed and refined, enriching its content. Judicial treatment has added light and luminosity to the concept, like polishing of a diamond.

11. 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.

12. What is meant by the term "principles of natural justice" is not easy to determine. Lord Summer (then Hamilton, L.J.) in *R. v. Local Govt. Board* [(1914) 1 KB 160 : 83 LJKB 86] (KB at p. 199) described the phrase as sadly lacking in precision. In *General Council of Medical Education & Registration of U.K. v.Spackman* [1943 AC 627 : (1943) 2 All ER 337 : 112 LJKB 529 (HL)] Lord Wright observed that it was not desirable to attempt "to force it into any Procrustean bed" and mentioned that one essential requirement was that the Tribunal should be impartial and have no personal interest in the controversy, and further that it should give "a full and fair opportunity" to every party of being heard.

13. Lord Wright referred to the leading cases on the subject. The most important of them is the *Board of Education v. Rice* [1911 AC 179 : 80 LJKB 796 : (1911-13) All ER Rep 36 (HL)] where Lord Loreburn, L.C. observed as follows: (All ER p. 38 C-F)

"Comparatively recent statutes have extended, if they have not originated, the practice of imposing upon departments or officers of State the duty of deciding or determining questions of various kinds. ... It will, I suppose, usually be of an administrative kind; but sometimes it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and listen fairly to both sides, for that is a duty lying upon everyone who decides anything. But I do not think that they are bound to treat such a question as though it were a trial. ... The Board is in the nature of the arbitral tribunal, and a court of law has no jurisdiction to hear appeals from their determination, either upon law or upon fact. But if the court is satisfied either that the Board have not acted judicially in the way which I have described, or have not determined the question which they are required by the Act to determine, then there is a remedy by mandamus and certiorari."

Lord Wright also emphasised from the same decision the observation of

the Lord Chancellor that the Board can obtain information in any way they think best, always giving a fair opportunity to those who are parties to the controversy for correcting or contradicting any relevant statement prejudicial to their view. To the same effect are the observations of the Earl of Selbourne, L.C. in *Arthur John Spackman v. Plumstead Distt. Board of Works* [(1885) 10 AC 229 : 54 LJMC 81 : 53 LT 151] where the learned and noble Lord Chancellor observed as follows:

"No doubt, in the absence of special provisions as to how the person who is to decide is to proceed, law will imply no more than that the substantial requirements of justice shall not be violated. He is not a judge in the proper sense of the word; but he must give the parties an opportunity of being heard before him and stating their case and their view. He must give notice when he will proceed with the matter and he must act honestly and impartially and not under the dictation of some other person or persons to whom the authority is not given by law. There must be no malversation of any kind. There would be no decision within the meaning of the statute if there were anything of that sort done contrary to the essence of justice."

Lord Selbourne also added that the essence of justice consisted in requiring that all parties should have an opportunity of submitting to the person by whose decision they are to be bound, such considerations as in their judgment ought to be brought before him. All these cases lay down the very important rule of natural justice contained in the oft-quoted phrase "justice should not only be done, but should be seen to be done".

14. 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. The 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.

15. Natural justice has been variously defined by different Judges. A few instances will suffice. In *Drew v. Drew and Leburn* [(1855) 2 Macq 1 : 25 LTOS 282 (HL)] (Macq at p. 8) Lord Cranworth defined it as "universal justice". In *James Dunber Smith v. R.* [(1878) 3 AC 614 (PC)] (AC at p. 623) Sir Robert P. Collier, speaking for the Judicial Committee of the Privy Council, used the phrase "the requirements of substantial justice", while in *Arthur John Spackman v. Plumstead Distt. Board of Works* [(1885) 10 AC 229 : 54 LJMC 81 : 53 LT 151] (AC at p. 240), the Earl of Selbourne, S.C. preferred the phrase "the substantial requirement of justice". In *Vionet v. Barrett* [(1885) 55 LJRD 39] (LJRD at p. 41), Lord Esher, M.R. defined natural justice as "the natural sense of what is right and wrong". While, however, deciding *Hopkins v. Smethwick Local Board of Health* [(1890) 24 QBD 712 : 59 LJQB 250 : 62 LT 783 (CA)] Lord Fasher, M.R. instead of using the definition

given earlier by him in *Vionet case* [(1885) 55 LJRD 39] chose to define natural justice as "fundamental justice". In *Ridge v. Baldwin* [(1963) 1 QB 539 : (1962) 1 All ER 834 : (1962) 2 WLR 716 (CA)] (QB at p. 578), Harman, L.J., in the Court of Appeal countered natural justice with "fair play in action", a phrase favoured by Bhagwati, J. in *Maneka Gandhi v. Union of India* [(1978) 1 SCC 248 : (1978) 2 SCR 621] . In HK (an infant), In re [(1967) 2 QB 617 : (1967) 2 WLR 962 : (1967) 1 All ER 226] (QB at p. 530), Lord Parker, C.J., preferred to describe natural justice as "a duty to act fairly". In *Fairmount Investments Ltd. v. Secy. of State for Environment* [(1976) 1 WLR 1255 : (1976) 2 All ER 865 (HL)] Lord Russell of Willowan somewhat picturesquely described natural justice as "a fair crack of the whip" while Geoffrey Lane, *L.J. in R. v. Secy. of State for Home Affairs,* ex p Hosenball [(1977) 1 WLR 766 : (1977) 3 All ER 452] preferred the homely phrase "common fairness".

16. How then have the principles of natural justice been interpreted in the courts and within what limits are they to be confined? 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"* as stated in (1605) 12 Co. Rep. 114 [Earl of Derby's case, (1605) 12 Co Rep 114 : 77 ER 1390] that is, *"no man shall be a judge in his own cause"*. Coke used the form *"aliquis non debet esse judex in propria causa, quia non potest esse judex et pars"* (Co. Litt. 1418), that is, "no man ought to be a judge in his own case, because he cannot act as judge and at the same time be a party". The form *"nemo potest esse simul actor et judex"*, that is, "no one can be at once suitor and judge" is also at times used. The second rule is "*audi alteram partem*", that is, "hear the other side". At times and particularly in continental countries, the form *"audietur at altera pars"* is used, meaning very much the same thing. A corollary has been deduced from the above two rules and particularly the *audi alteram partem* rule, namely *"qui aliquid statuerit parte inaudita altera, aequum licet dixerit, haud aequum fecerit"* that is, "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" (see *Bosewell case*[(1605) 6 Co Rep 48-b, 52-a]) or in other words, as it is now expressed, "justice should not only be done but should manifestly be seen to be done". 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 open. All that is done is to vacate the order assailed by virtue of its inherent defect, but the proceedings are not terminated.

17. What is known as "useless formality theory" has received consideration of this Court in *M.C. Mehta v. Union of India* [(1999) 6 SCC 237] . It was observed as under: (SCC pp. 245-47, paras 22-23)

"22. Before we go into the final aspects of this contention, we would like to state that cases relating to breach of natural justice do also occur where all facts are not admitted or are not all beyond dispute. In

the context of those cases there is a considerable case-law and literature as to whether relief can be refused even if the court thinks that the case of the applicant is not one of "real substance' or that there is no substantial possibility of his success or that the result will not be different, even if natural justice is followed. See *Malloch v. Aberdeen Corpn.* [(1971) 2 All ER 1278 : (1971) 1 WLR 1578 (HL)] (per Lord Reid and Lord Wilberforce), *Glynn v. Keele University*[(1971) 2 All ER 89 : (1971) 1 WLR 487] , *Cinnamond v. British Airports Authority*[(1980) 2 All ER 368 (CA)] and other cases where such a view has been held. The latest addition to this view is *R. v. Ealing Magistrates' Court, ex p Fannaran*[(1996) 8 Admn LR 351] (Admn LR at p. 358) (see de Smith, Suppl. p. 89) (1998) where Straughton, L.J. held that there must be *"demonstrable beyond doubt'* that the result would have been different. Lord Woolf in *Lloyd v.McMahon* [(1987) 1 All ER 1118 : 1987 AC 625 : (1987) 2 WLR 821 (CA)] (WLR at p. 862) has also not disfavoured refusal of discretion in certain cases of breach of natural justice. The New Zealand Court in *McCarthy v. Grant* [1959 NZLR 1014] however goes halfway when it says that (as in the case of bias), it is sufficient for the applicant to show that there is "real likelihood -- not certainty -- of prejudice'. On the other hand, *Garner Administrative Law* (8th Edn., 1996, pp. 271-72) says that slight proof that the result would have been different is sufficient. *On the other side* of the argument, we have apart from *Ridge v. Baldwin* [1964 AC 40 : (1963) 2 All ER 66 : (1963) 2 WLR 935 (HL)] , *Megarry, J. in John v. Rees* [(1969) 2 All ER 274 : 1970 Ch 345 : (1969) 2 WLR 1294] stating that there are always "open and shut cases' and no absolute rule of proof of prejudice can be laid down. Merits are not for the court but for the authority to consider. Ackner, J. has said that the "useless formality theory' is a dangerous one and, however inconvenient, natural justice must be followed. His Lordship observed that "convenience and justice are often not on speaking terms'. More recently, Lord Bingham, has deprecated the "useless formality' theory in *R. v. Chief Constable of the Thames Valley Police Forces, ex p Cotton* [1990 IRLR 344] by giving six reasons. (See also his article "Should Public Law Remedies be Discretionary?' 1991 PL, p. 64.) A detailed and emphatic criticism of the "useless formality theory' has been made much earlier in "Natural Justice, Substance or Shadow' by Prof. D.H. Clark of Canada (see 1975 PL, pp. 27-63) contending that *Malloch* [(1971) 2 All ER 1278 : (1971) 1 WLR 1578 (HL)] and *Glynn* [(1971) 2 All ER 89 : (1971) 1 WLR 487] were wrongly decided. Foulkes (*Administrative Law*, 8th Edn., 1996, p. 323), Craig (*Administrative Law*, 3rd Edn., p. 596) and others say that the court cannot prejudge what is to be decided by the decision-making authority. De Smith (5th Edn., 1994, paras 10.031 to 10.036) says courts have not yet committed themselves to any one view though discretion is always with the court. Wade (*Administrative Law*, 5th Edn., 1994, pp. 526-30) says that while futile writs may not be issued, a distinction has to be made according to the nature of the decision. Thus, in relation to cases other than those relating to admitted or indisputable facts, there is a considerable divergence of opinion whether the applicant can be compelled to prove that the outcome will be in his favour or he has to prove a case of substance or if he can prove a "real likelihood' of success or if he is entitled to relief even if there is some remote chance of success. We may, however, point out that even in cases where

the facts are not all admitted or beyond dispute, there is a considerable unanimity that the courts can, in exercise of their *"discretion'*, refuse certiorari, prohibition, mandamus or injunction even though natural justice is not followed. We may also state that there is yet another line of cases as in *State Bank of Patiala v. S.K. Sharma* [(1996) 3 SCC 364 : 1996 SCC (L&S) 717], *Rajendra Singh v. State of M.P*. [(1996) 5 SCC 460] that even in relation to statutory provisions requiring notice, a distinction is to be made between cases where the provision is intended for individual benefit and where a provision is intended to protect public interest. In the former case, it can be waived while in the case of the latter, it cannot be waived.

23. We do not propose to express any opinion on the correctness or otherwise of the "useless formality' theory and leave the matter for decision in an appropriate case, inasmuch as, in the case before us, *"admitted and indisputable'* facts show that grant of a writ will be in vain as pointed out by Chinnappa Reddy, J."

(emphasis in original)"

30. The Apex Court in **P.D. Agrawal v. State Bank of India (2006) 8 SCC 776**, however observed that the statement of the law as noticed above in S.L. Kapoor (supra) has undergone a "sea change"and the relevant para reads as follows:

"39. Decision of this Court in *S.L. Kapoor v. Jagmohan* [(1980) 4 SCC 379] whereupon Mr. Rao placed strong reliance to contend that non-observance of principle of natural justice itself causes prejudice or the same should not be read "as it causes difficulty of prejudice", cannot be said to be applicable in the instant case. The principles of natural justice, as noticed hereinbefore, have undergone a sea change. In view of the decisions of this Court in *State Bank of Patiala v. S.K. Sharma* [(1996) 3 SCC 364] *and Rajendra Singh v. State of M.P.* [(1996) 5 SCC 460] the principle of law is that some real prejudice must have been caused to the complainant. The Court has shifted from its earlier concept that even a small violation shall result in the order being rendered a nullity. To the principle/doctrine of *audi alteram partem*, a clear distinction has been laid down between the cases where there was no hearing at all and the cases where there was mere technical infringement of the principle. The Court applies the principles of natural justice having regard to the fact situation obtaining in each case. It is not applied in a vacuum without reference to the relevant facts and circumstances of the case. It is no unruly horse. It cannot be put in a straitjacket formula."

(emphasis supplied)

31. In **Union of India v. Alok Kumar, (2010) 5 SCC 349,** the Apex Court, after eschewing a hyper-technical approach, held that prejudice must not merely be the apprehension of a litigant, but should be a definite inference of the likelihood of prejudice flowing from the refusal to follow natural justice in following words:-

"83. Earlier, in some of the cases, this Court had taken the view that breach of principles of natural justice was in itself a prejudice and no other "de facto" prejudice needs to be proved. In regard to statutory rules, the prominent view was that the violation of mandatory statutory rules would tantamount to prejudice but where

the rule is merely directory the element of de facto prejudice needs to be pleaded and shown. With the development of law, rigidity in these rules is somewhat relaxed. The instance of de facto prejudice has been accepted as an essential feature where there is violation of the non-mandatory rules or violation of natural justice as it is understood in its common parlance. Taking an instance, in a departmental enquiry where the department relies upon a large number of documents majority of which are furnished and an opportunity is granted to the delinquent officer to defend himself except that some copies of formal documents had not been furnished to the delinquent. In that event the onus is upon the employee to show that non-furnishing of these formal documents have resulted in de facto prejudice and he has been put to a disadvantage as a result thereof."

32. In **Dharampal Satyapal Ltd., (supra),** the Apex Court after noticing the concept of natural justice and its jurisprudential evolution over the years in light of the previous decisions has noticed as under:-

"20. Natural justice is an expression of English Common Law. Natural justice is not a single theory--it is a family of views. In one sense administering justice itself is treated as natural virtue and, therefore, a part of natural justice. It is also called *"naturalist"* approach to the phrase *"natural justice"* and is related to *"moral naturalism"*. Moral naturalism captures the essence of commonsense morality--that good and evil, right and wrong, are the real features of the natural world that human reason can comprehend. In this sense, it may comprehend virtue ethics and virtue jurisprudence in relation to justice as all these are attributes of natural justice. We are not addressing ourselves with this connotation of natural justice here.

21. In Common Law, the concept and doctrine of natural justice, particularly which is made applicable in the decision-making by judicial and quasi-judicial bodies, has assumed a different connotation. It is developed with this fundamental in mind that those whose duty is to decide, must act judicially. They must deal with the question referred both without bias and they must give *(sic* an opportunity) to each of the parties to adequately present the case made. It is perceived that the practice of aforesaid attributes in mind only would lead to doing justice. Since these attributes are treated as natural or fundamental, it is known as *"natural justice"*. The principles of natural justice developed over a period of time and which is still in vogue and valid even today are: (i) rule against bias i.e. *nemo debet esse judex in propria sua causa*; and (ii) opportunity of being heard to the party concerned i.e. *audi alteram partem*. These are known as principles of natural justice. To these principles a third principle is added, which is of recent origin. It is the duty to give reasons in support of decision, namely, passing of a *"reasoned order"*.

22. Though the aforesaid principles of natural justice are known to have their origin in Common Law, even in India the principle is prevalent from ancient times, which was even invoked in Kautilya's *Arthasastra*. This Court in *Mohinder Singh Gill v. Chief Election Commr.* [(1978) 1 SCC 405 : AIR 1978 SC 851] explained the Indian origin of these principles in the following words: (SCC pp. 432-33, para 43)

"43. Indeed, natural justice is a pervasive facet of secular law where a spiritual touch enlivens legislation, administration and adjudication, to make

fairness a creed of life. It has many colours and shades, many forms and shapes and, save where valid law excludes, it applies when people are affected by acts of authority. It is the hone **[Ed**.: The word "hone" is usually used as a verb, meaning "to sharpen". Rarely, it is also used a noun, as here, meaning "whetstone".] of healthy government, recognised from earliest times and not a mystic testament of Judge-made law. Indeed from the legendary days of Adam--and of Kautilya's *Arthasastra*--the rule of law has had this stamp of natural justice which makes it social justice. We need not go into these deeps for the present except to indicate that the roots of natural justice and its foliage are noble and not new-fangled. Today its application must be sustained by current legislation, case law or other extant principle, not the hoary chords of legend and history. Our jurisprudence has sanctioned its prevalence even like the Anglo-American system."

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38. ... The principles of natural justice are very flexible principles. They cannot be applied in any straitjacket formula. It all depends upon the kind of functions performed and to the extent to which a person is likely to be affected. For this reason, certain exceptions to the aforesaid principles have been invoked under certain circumstances. For example, the courts have held that it would be sufficient to allow a person to make a representation and oral hearing may not be necessary in all cases, though in some matters, depending upon the nature of the case, not only full-fledged oral hearing but even cross-examination of witnesses is treated as a necessary concomitant of the principles of natural justice. Likewise, in service matters relating to major punishment by way of disciplinary action, the requirement is very strict and full-fledged opportunity is envisaged under the statutory rules as well. On the other hand, in those cases where there is an admission of charge, even when no such formal inquiry is held, the punishment based on such admission is upheld. It is for this reason, in certain circumstances, even post-decisional hearing is held to be permissible. Further, the courts have held that under certain circumstances principles of natural justice may even be excluded by reason of diverse factors like time, place, the apprehended danger and so on.

39. ... While emphasising that the principles of natural justice cannot be applied in straitjacket formula, the aforesaid instances are given. We have highlighted the jurisprudential basis of adhering to the principles of natural justice which are grounded on the doctrine of *procedural fairness*, accuracy of outcome leading to general social goals, etc. Nevertheless, there may be situations wherein for some reason--perhaps because the evidence against the individual is thought to be utterly compelling--it is felt that a fair hearing *"would make no difference"*--meaning that a hearing would not change the ultimate conclusion reached by the decision-maker--then no legal duty to supply a hearing arises. Such an approach was endorsed by Lord Wilberforce in *Malloch v. Aberdeen Corpn.* [(1971) 1 WLR 1578 : (1971) 2 All ER 1278 (HL)] , who said that: (WLR p. 1595 : All ER p. 1294)

"... A breach of procedure ... cannot give [rise to] a remedy in the courts, unless behind it there is something of substance which has been lost by the failure. The court does not act in vain."

Relying on these comments, Brandon L.J. opined in *Cinnamond v.*

British Airports Authority [(1980) 1 WLR 582 : (1980) 2 All ER 368 (CA)] that: (WLR p. 593 : All ER p. 377)

"... no one can complain of not being given an opportunity to make representations if such an opportunity would have availed him nothing."

In such situations, fair procedures appear to serve no purpose since the *"right"* result can be secured without according such treatment to the individual.

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44. At the same time, it cannot be denied that as far as courts are concerned, they are empowered to consider as to whether any purpose would be served in remanding the case keeping in mind whether any prejudice is caused to the person against whom the action is taken. This was so clarified in*ECIL* [(1993) 4 SCC 727 : 1993 SCC (L&S) 1184 : (1993) 25 ATC 704] itself in the following words: (SCC p. 758, para 31)

"31. Hence, in all cases where the enquiry officer's report is not furnished to the delinquent employee in the disciplinary proceedings, the courts and tribunals should cause the copy of the report to be furnished to the aggrieved employee if he has not already secured it before coming to the court/tribunal and given the employee an opportunity to show how his or her case was prejudiced because of the non-supply of the report. If after hearing the parties, the court/tribunal comes to the conclusion that the non-supply of the report would have made no difference to the ultimate findings and the punishment given, the court/tribunal should not interfere with the order of punishment. The court/tribunal should not mechanically set aside the order of punishment on the ground that the report was not furnished as is regrettably being done at present. The courts should avoid resorting to short cuts. Since it is the courts/tribunals which will apply their judicial mind to the question and give their reasons for setting aside or not setting aside the order of punishment, (and not any internal appellate or revisional authority), there would be neither a breach of the principles of natural justice nor a denial of the reasonable opportunity. It is only if the court/tribunal finds that the furnishing of the report would have made a difference to the result in the case that it should set aside the order of punishment."

33. Lately, the **Apex Court in State of U.P. v. Sudhir Kumar and others, 2020 SCC OnLine 847** had the occasion to consider the issue once again and after noticing a large number of authorities and previous decisions, culled out the following principles noted in Para 39, which reads as under:-

"39. An analysis of the aforesaid judgments thus reveals:

(1) Natural justice is a flexible tool in the hands of the judiciary to reach out in fit cases to remedy injustice. The breach of the *audi alteram partem* rule cannot by itself, without more, lead to the conclusion that prejudice is thereby caused.

(2) Where procedural and/or substantive provisions of law embody the principles of natural justice, their infraction per se does not lead to invalidity of the orders passed. Here again, prejudice must be caused to the litigant, except in the case of a mandatory provision of law which is conceived not only in individual interest, but also in public interest.

(3) No prejudice is caused to the person complaining of the breach of natural justice where such person does not dispute the case against him or it. This can happen by reason of estoppel, acquiescence, waiver and by way of non-challenge or non-denial

or admission of facts, in cases in which the Court finds on facts that no real prejudice can therefore be said to have been caused to the person complaining of the breach of natural justice.

(4) In cases where facts can be stated to be admitted or indisputable, and only one conclusion is possible, the Court does not pass futile orders of setting aside or remand when there is, in fact, no prejudice caused. This conclusion must be drawn by the Court on an appraisal of the facts of a case, and not by the authority who denies natural justice to a person.

(5) The "prejudice" exception must be more than a mere apprehension or even a reasonable suspicion of a litigant. It should exist as a matter of fact, or be based upon a definite inference of likelihood of prejudice flowing from the non-observance of natural justice."

34. Applying the principles as extracted above to the facts of the present case, it would indicate that the appellants herein were not heard nor they participated before the Deputy Registrar at the time of passing of the order dated 07.12.2018. The dispute before the Deputy Registrar as well as before the learned Single Judge was primarily between Udai Bhan Misra and Ajit Kumar Jaiswal, Committee of Management. As held by the learned Single Judge that the order passed by the Deputy Registrar was without considering the relevant documents before it and the matter is to be decided afresh after affording opportunity to the parties concerned.

35. In the aforesaid circumstances, the appellants being covered by the phrase "parties concerned" as used by the learned Single Judge have full rights to appear before the said authority and furnish all its documents and evidence in order to establish their membership which shall be considered by the authority concerned. In view of the aforesaid, the Court is of the considered view that no real prejudice has been caused to the appellants and merely because they have not been heard by the learned Single Judge does not render the order dated 08.10.2021 bad in the eyes of law.

36. Accordingly, this Court does not find any merit in the appeal and it is liable to be dismissed. However, it shall be open for the appellants to appear and participate in the proceedings before the Deputy Registrar, who shall also consider the version of the appellants, if filed and decide it in accordance with law in light of the observations made by the learned Single Judge after affording full opportunity of hearing to the parties.

37. Resultantly, the appeal is dismissed, however, there shall be no order as to costs.

(2022)01ILR A1061
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.12.2021

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.

Writ A No. 5913 of 2021
Connected with
Writ A No. 15066 of 2021 and other cases

Vikash Tiwari & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:

Sri Jai Singh Yadav, Sri Akash Yadav, Sri Radha Kant Ojha (Senior Adv.), Sri Ashok Khare (Senior Adv.)

Counsel for the Respondents:
C.S.C., Sri Siddharth Singhal

A. Service Law - Constitution of India, 1950-Article 226-Challenge to-Cancellation of recruitment- The Commission conducted the examination with a collaboration of a private Agency in which fairness and transparency is eliminated-The report of SIT disclosed that large scale manipulation happened-Variation in the marks of nearly 70% shortlisted candidates clearly puts a big question mark upon the fairness of entire written examination itself-Segregation of candidates not possible because variation between the OMR sheet is not just limited to few candidates as per conclusion drawn by the SIT- Therefore, the decision to cancel recruitment is based upon a bona-fide assessment of materials placed on record, which cannot be said to be arbitrary-Where a recourse to unfair means has taken place on a systematic scale, it may be difficult to segregate the tainted from the untainted participants in the process.(Para 1 to 45)

The writ petition is dismissed. (E-6)

List of Cases cited:

Sachin Kumar & ors. Vs DSSSB & ors. (2021) 4 SCC 631

(Delivered by Hon'ble Ashwani Kumar Mishra, J.)

1. Since the controversy raised in all the above mentioned writ petitions are identical they have been heard together and are being disposed off finally vide this judgment. Writ-A No. 5913 of 2021 (Vikas Tiwari and others vs. State of U.P. and others) is treated as the lead case.

2. Petitioners in this bunch of writ petitions are aggrieved by the decision of Examination Controller, U.P. Subordinate Services Selection Commission, Lucknow (hereinafter referred to as "the Commission'), dated 24.03.2021, cancelling the recruitment exercise undertaken by the Commission vide advertisement no.2 of 2018 for combined examination to the posts of Gram Panchayat Adhikari, Gram Vikas Adhikari (Samaj Kalyan) and Samaj Kalayan Supervisor, for which examination was held on 22nd and 23rd December, 2018. Prayer consequently has been made to quash the decision taken on 24.03.2021 and command the respondents to proceed with petitioners' document verification and issue orders of appointment to them, as they have already been shortlisted, for appointment to the advertised posts.

3. The Commission has published advertisement no.2 of 2018 inviting applications for appointment to 1527 permanent posts of Gram Panchayat Adhikari, 362 temporary posts of Gram Vikas Adhikari (Samaj Kalyan) and 64 permanent posts of Samaj Kalyan Supervisor. Registration pursuant to above advertisement was to commence online on 30.06.2018 and deposit of online fee was to start on 01.06.2018. Last date for registration was 25.06.2018; whereas last date for deposit of online fee was 27.06.2018. The last date for submission of application was 29.06.2018. Provision for Vertical and Horizontal reservation; specification of age of candidate and their qualification etc. were specified in the advertisement. Clause 11 of the advertisement provided that the basis of selection in the recruitment is written examination. Clause 12 specified the scheme of examination and its syllabus. The examination itself was to be of

objective type with only one paper of 300 marks. This paper was to be in three parts, namely Hindi Knowledge and Writing Ability; Mental Aptitude; and General Knowledge, consisting of 50 questions each in all three parts. Each question carried 2 marks, totalling 300 marks. All the questions had to be attempted in 2 hours. Advertisement also provided for negative marks to be awarded against a wrong answer.

4. The Commission notified on 17.10.2018 that the examination pursuant to advertisement in question would be conducted in two shifts at 1572 centres in 16 districts of the State on 22nd and 23rd December, 2018 between 10-12 AM and 03-05 PM, respectively.

5. It is admitted to the parties that the task of conducting written examination was outsourced to M/s Tata Consultancy Services (hereinafter referred to as "Agency') by the Commission. According to petitioners full proof measures were taken to maintain fairness, transparency and confidentiality in the conduct of examination and the candidates were allowed entry in the examination centre only after their biometric identification and the examination was also conducted under surveillance of CCTV cameras.

6. The examination was of objective type and each question contained four answers, one of which was correct. The candidates were required to darken the circle against the correct answer in the OMR Sheet. As per the examination scheme each candidate was provided with three copies of OMR sheets. The darkening of correct answer was required on the first OMR Sheet and its impressions got copied on the remaining two OMR Sheets. The first OMR Sheet was to be utilised for evaluating the score of candidate while the second copy was to be kept in a safe custody of Treasury. The candidate could retain the third copy with himself.

7. Certain allegations appear to have surfaced in several newspapers highlighting various illegalities and irregularities in the conduct of aforesaid examination. This resulted in initiation of different inquiries/investigations into the complaints at different levels. A First Information Report was also lodged against 136 candidates, who were prima facie found guilty of tampering their OMR sheets.

8. A communication was issued by the Commission on 28.10.2019, declaring a list of 1952 successful candidates in the written test to be called for document verification and examination of their eligibility. The list contained roll numbers of candidates in different categories. By a separate order of the same date the Commission declared the cut-off marks for different categories of candidates as per their vertical and horizontal reservation category. 136 candidates against whom police report was lodged under Section 154 Cr.P.C. were excluded in the process. These 136 candidates moreover were expelled from all future recruitment conducted by the Commission for a period of three years. The respective examination centres of these 136 candidates have also been debarred from holding any other examination of Commission.

9. The apparent reason for action against 136 candidates was that the marks obtained by

them, on the basis of their first OMR Sheet varied from the marks awarded to them in the second OMR sheet kept in the Treasury of concerned district. Since the first copy of OMR Sheet was scanned by the Commission and the second OMR sheet merely contained impressions of the first OMR copy, therefore, the marks could not have varied in the two OMR Sheets, as had admittedly occurred in the case of 136 candidates. This clearly established manipulation in the OMR Sheets of these candidates.

10. On 29.02.2020 the Commission issued yet another notification and called upon the candidates to appear for document verification on different dates between 12.03.2020 to 02.06.2020, in the office of Commission, as per the dates fixed.

11. Petitioners further contend that apart from various newspaper report etc. the Cabinet Minister of the Department of Village Development also sent a letter to the Chief Minister of Uttar Pradesh highlighting large scale manipulation in holding of examination which led to the formation of a special investigation team (SIT) to investigate the allegations made in the conduct of examination.

12. On 18.03.2020 the Commission stayed the ongoing process of document verification on account of Covid-19 pandemic and the shortlisted candidates were directed to download their entry ticket for document verification and a separate date was to be notified to them for the conduct of document verification. By a separate notice of Commission, dated 27.03.2020, the process of document verification was stayed until further orders.

13. The Commission on 20.06.2020 notified that since a special investigation team was constituted by State to probe the allegations of manipulation in conduct of examination in question, therefore, the Commission in its meeting held on 29.05.2020 resolved to await the outcome of investigation by Special Investigating Team (SIT) and to proceed in the matter only thereafter. The process of recruitment therefore was kept in abeyance till conclusion of investigation by SIT.

14. The State Government received the report of SIT upon conclusion of its investigation on 31.12.2020. A meeting was held on 18.1.2021 to consider the report and a Government Order dated 24.02.2021 followed to this effect.

15. The SIT in its report, dated 31.12.2020, has opined that on the basis of oral and documentary evidence collected during investigation it has found illegality in the holding of examination as also tampering with original OMR sheets. Recommendation also came to be made to transfer case crime no.584 of 2019, registered at Police Station Vibhuti Khand, Lucknow to the SIT. This recommendation apparently was considered by the State Government and ultimately a decision was taken to accept the recommendation made by the SIT in the matter. It is thereafter that the Commission has resolved to cancel the recruitment vide order impugned dated 24.03.2021. Aggrieved by such decision the petitioners are before this Court.

16. A counter affidavit has been filed on behalf of Social Welfare Department of State, which appears to be formal in nature. The Commission has filed its counter affidavit according to which more than 14 lac applications were received against the advertisement no. 2 of 2018 and 9,53,000 candidates approximately appeared in the

written examination. In para 8 it is stated that a conscious decision was taken on 28.01.2019 that before declaring result of written examination held on 22 & 23rd December, 2018 the original OMR sheet of candidate in the ratio of 1:10 to the available posts be compared with copy of OMR sheets kept in the Treasury. As per the Commission each candidate was supplied three copies of OMR sheet in the written examination. The main copy was taken by the nominated Agency for scanning and evaluating marks while second copy was kept in the Treasury of concerned district where examination itself was conducted. The Commission accordingly compared OMR sheets of candidates in the ratio of 1:10 and found that there was discrepancy of more than 10% in the marks obtained in the two OMR Sheets of 136 candidates. The Commission accordingly lodged a first information report against these 136 candidates and also debarred them from participating in future examinations to be conducted by the Commission for a period of three years, apart from blacklisting the examination centres of these candidates from holding any future examination to be conducted by the Commission. In para 13 it is asserted that the evaluation of two OMR sheets was got conducted from an Agency other than the Agency which had scanned OMR sheets earlier. In para 15 it is asserted that the exercise revealed that 83 candidates from the list of successful candidates showed discrepancy of more than 5% marks between two respective OMR sheets. A decision was taken then to offer an opportunity to these 83 plus 136 candidates in the matter. The Commission thereafter came to know about State's decision to have the investigation carried out by SIT and Commission, therefore, deferred the process. An interim report is said to have been submitted by SIT doubting the role of Agency entrusted with task of holding examination. The Commission appears to have taken a further decision not to allot any further work to the Agency entrusted with the task of holding examination and other examinations assigned to such Agency were also resolved to be stayed.

17. On 19.07.2021 this Court directed the respondents to produce report of the SIT. Again on 29.07.2021 the respondents were directed to obtain instructions with respect to petitioners' contention that at best candidature of 136 candidates be cancelled but the entire recruitment ought not be cancelled in the absence of any adverse material existing against other candidates. On 07.09.2021 this Court further directed the Commission to bring on record the agreement/guidelines, if any, entered between the Commission and Agency for conduct of the examination.

18. In compliance of above orders the Commission has filed a supplementary counter affidavit. It is disclosed therein that the Commission entered into an agreement for providing services by the Agency, effective from 14.07.2018, copy whereof is Annexure-1 to the aforesaid affidavit. The scope of work as per the agreement is contained in Schedule-II which inter alia included "setting and printing of question paper, OMR Answer Sheet designing, printing and supply and also processing of OMR Answer Sheets, Scanning, Evaluation and objection resolution. Apart from such duties the Agency was further conferred the responsibility of conducting the examination including selection of well

equipped and reputed examination centers and also deployment of Supervisors, Managers, Invigilators and other Staff at each center". In para 5 the Commission has stated that the OMR sheets were required to be packed and transported to Lucknow by the Agency and the opening, sorting, scanning and processing of answer sheets were required to be done exclusively at the Commission's premises. The Agency was also required to arrange manpower, equipment and hardware and other material at the Commission's office. The instruction booklet issued by the Commission is also annexed with the supplementary counter affidavit which contains procedure for collection and transportation of OMR sheets by Agency from Treasury to centers and back to Treasury and also to the office of the Commission. The Commission apparently has taken the stand that it acted with due diligence to secure fairness in examination process and only when it got established in the SIT enquiry that large scale manipulation was caused in holding of the recruitment that it resolved to cancel the examination process.

19. A rejoinder affidavit has been filed stating that the petitioners have qualified the test on the strength of their merit, without any manipulation or illegality attributed to them and, therefore, merely because in respect of 136 candidates discrepancy to the extent of 10% was observed between two OMR sheets it would not justify cancellation of entire recruitment process itself.

20. The report of SIT has also been produced before the Court in a sealed envelop and has been perused by the Court. Relevant passages from the SIT report have been allowed to be perused by the Senior Counsels for the petitioners, Sri Ashok Khare and Sri R. K. Ojha in the presence of Sri Ajeet Kumar Singh, learned Additional Advocate General for the State.

21. Sri Ashok Khare and Sri R. K. Ojha, learned Senior Counsels for the petitioners alongwith other counsels appearing in the connected writ petitions have strenuously urged that decision of the Commission to cancel the entire recruitment exercise in the facts and circumstances is wholly irrational, arbitrary and unsustainable. With respect to materials placed on record it is sought to be urged that irregularities, if any, have been found only in respect of specified number of candidates and action against them have been initiated with lodging of police report and the matter is pending investigation. It is urged that the Commission can very well segregated the cases of candidates in respect of whom irregularities/ illegalities/manipulation have been found/ established during the course of investigation and that cancellation of entire recruitment was not necessary. By emphasising upon the process undertaken by the Commission for holding of recruitment it is suggested that out of three copies of OMR sheets available in respect of each candidate, who appeared in the examination, the first copy of OMR sheet has been scanned to ascertain merit of each candidate and the finding of variation in respect of 10% is based on its comparison with other set of OMR sheet maintained in the respective Treasury of 16 districts where the examination itself was conducted. The argument is that the OMR sheet maintained in the Treasury is absolutely unadulterated nor any material during the course of investigation has surfaced which may doubt the credibility of such OMR sheet and, therefore, the Commission could have proceeded by

tallying the OMR sheet of selected candidate with the copy of OMR sheet maintained in the Treasury concerned and the selection of those candidates about whom no discrepancy is found ought to have been processed with appointment letters issued to them. The decision to cancel the recruitment is accordingly challenged on the ground of it being wholly irrational, unfounded and based on no material justifying such action. Various judgments have also been relied upon in respect of petitioners' claim which shall be dealt with, later.

22. Sri Ajeet Kumar Singh, learned Additional Advocate General assisted by Sri Amit Manohar Sahai for the State and Sri Siddharth Singhal, learned counsel for the Commission submits, on the contrary, that the evidence collected during the investigation by the SIT reveals existence of large scale manipulation in the conduct of written examination which has rendered the entire recruitment process unworthy of reliance and vitiated in law and that the decision to cancel the recruitment suffers from no error and requires no interference by this Court.

23. Heard Sri Ashok Khare, learned Senior Counsel assisted by Sri Akash Yadav for petitioners, Sri Radha Kant Ojha, learned Senior Counsel assisted by Sri Jai Singh Yadav for petitioners, Sri Ajeet Kumar Singh, learned Additional Advocate General assisted by Sri Amit Manohar Sahai, learned Additional Chief Standing Counsel for the State and Sri Siddharth Singhal, learned counsel for the respondent Commission and have perused the materials brought on record.

24. The Commission is established by the State Government pursuant to a notification issued under section 5(1) of the Uttar Pradesh Subordinate Services Selection Act, 2014 (hereinafter referred to as "Act of 2014'). The Commission is vested with the powers to conduct examination, hold interview, make selection of candidates by virtue of section 15(1) of the Act of 2014. Direct recruitment to all posts in the grade pay of Rs.4600 or below in the employment of the State is required to be made by the Commission in view of the notification dated 15.12.2014.

25. Uttar Pradesh Direct Recruitment to Group C Posts (Mode and Procedure) Rules, 2015 (hereinafter referred to as "Rules of 2015') have also been framed by the State vide notification dated 11.05.2015, in exercise of powers conferred under the proviso to Article 309 of the Constitution of India. Rule 8 of the Rules of 2015 specifies the procedure for direct recruitment to Group "C' posts in the State including the syllabus, marks in the written examination/interview and further provides that the rules relating thereto shall be such as is prescribed by the "Commission', from time to time, with approval of the Government. The Commission in the Rules of 2015 is defined in rule 4(b) of Rules of 2015 to mean Uttar Pradesh Subordinate Services Selection Commission.

26. In exercise of powers conferred by section 16 and 23 of the Act of 2014 the State has also notified the Uttar Pradesh Subordinate Services Selection Commission (Procedure and Conduct of Business) Regulation, 2015 (hereinafter referred to as "Regulation of 2015'). Regulation 7 thereof lays down the

procedure for conduct of objective type test which reads as under:-

"7. (1) To faciliate the use of computer technique for conducting the examination, preliminary examination or screening test, the Commission may get the objective type of question paper - cum - answer sheets preapred by drawing upon its own Question Bank or through the organization working in the field of recruitment or eminent and reliable psychometric institutes, expert bodies or expert in the field of psychometric education and objective type of question papers - cum- answer sheets prepared according to the syllabus of different examinations to be conducted by the Commission.

(2) The Secretary or the Controller of Examination cum Joint Secretary as nominated by the Chairperson shall draw a list of the reputed and reliable psychometric institutes, expert bodies and experts of relevant fields including computer agencies and organizations functional in the field of recruitment, for the approval of the Commission. Computer agencies shall be required for the evaluation of answer sheets and compilation of examination results.

(3) The Chairperson may select any one or more among psychometric institutes, expert bodies and organizations functional in the field of recruitment or one or more experts as per the requirement of the case from the list prepared under sub-rule (2) to prepare question paper-cum-answer sheets. He is free to select any computer agency for the evaluation of answer sheets and compilation of examination results.

(4) (a) If a particular instiute or expert body is selected for preparing of question papers-cum-answer sheet for a particular examination, the Secretary or the Controller of the Examination cum Joint Secretary nominated by the Chairperson shall get prepared three sets of every question paper and having received them in separate sealed envelopes keep them in his custody.

(b) The Secretary or the Controller of the Examination cum Joint Secretary nominated by the Chairperson shall submit to the Chairperson three sealed envelopes in separate identical envelopes specifically designed for this purpose without marking any mark of identification on the envelopes after having appended his signatures thereon at the place therefor.

(c) The Chairperson may choose any one of the three sealed and signed envelopes without opening it and handover it to the Secretary or the Controller of the Examination cum Joint Secretary and keep last two envelopes in his safe custody till the examination is over.

(d) The Secretary or the Controller of the Examination cum Joint Secretary nominated by the Chairperson shall send the sealed envelopes so chosen by the Chairperson to the particular institute, expert body or press, as the case may be, for printing question paper-cum-answer sheets. Particular institute, expert body or press, as the case may be, shall be responsible for printing, proof reading and preparation of their packets for different examination centers as also for Commission's reserve under its seal in accordance with the direction furnished to it by the Secretary or the Controller of the Examination cum Joint Secretary.

(5) (i) In case the Chairperson decides to utilize the Question Bank of the Commission wholly or partly for preparing the question paper, every such paper or part thereof, as the case may be, shall be prepared by three different experts.

(ii) In case, the three question papers are wholly prepared by drawing on the question bank of the Commission, the question papers so prepared shall be sealed in three different identical envelopes which shall be kept by the Secretary or the Controller of the Examination cum Joint Secretary nominated by the Chairperson in his safe custody. In case, the three question papers cannot be prepared wholly by drawing on Qeustion Bank of the Commission, service of one or more experts will be utilized to prepare three different sets of part question papers. One set prepared by drawing on Question Bank and the other two sets prepared otherwise out of Question Bank. These sets of part question papers shall be handed over to the Secretary or the Controller of the Examination cum Joint Secretary against signed receipt in sealed envelopes for safe custody, cleraly indicating the part of the syllabus covered in each set of the part question papers.

(iii) The two sets of question papers so prepared under clause (ii) shall thereafter be entrusted to different experts or set of experts, as the case may be, for moderation, after merging the two sets of part question papers so as to cover the syllabus fully. The expert shall place them in three separate envelopes under his seal without making any mark of identification on the envelopes and hand them over to the Secretary or the Controller of the Examination cum Joint Secretary as the case may be.

(iv) The Secretary or the Controller of the Examination cum Joint Secretary nominated by the Chairperson shall keep each of the three sealed envelopes in two separate but identical envelopes specifically designed for this purpose without making any mark of identification on the envelopes and convey his signatures thereon at the place reserved therefor and submit the same to the Chairperson.

(v) The Chairperson may choose any one of the three sealed and signed envelopes without operning it shall hand over the same to the Secretary or the Controller of the Examination cum Joint Secretary and retain the other two envelopes in his safe custody till the examinations are over.

(6) (i) In case the Chairperson decides to take the services of an expert for preparing the question papers, every paper shall be prepared by three different expert or set of experts and handed over to the Secretary or the Controller of the Examination cum Joint Secretary as nominated by the Chairperson.

(ii) Sealed envelopes so received from the experts shall be handed over by the Secretary or the Controller of the Examination cum Joint Secretary nominated by the Chairperson to one or more different experts, as per specific requirement in each case, approved by the Chairperson out of the list prepared under sub-regulation (20 against their signed and dated receipt, for moderation.

(iii) The experts shall moderate all the two sets of question papers, place them in separate envelopes under their seal without making any mark of identification on the envelopes and hand them over to the Secretary or the Controller of the Examination cum Joint Secretary as nominated.

(iv) The Secretary or the Controller of the Examination cum Joint Secretary nominated by the Chairperson shall keep each of the three sealed envelopes specifically designed for this purpose without making any mark of

identification on the envelopes and append his signatures thereon at the place reserved therefor and submit the same to the Chairperson.

(v) The Chairperson may choose any one of three sealed and signed envelopes without opening it, shall hand over the same to the Secretary or the Controller of the Examination cum Joint Secretary and retain the other two envelopes in his safe custody till the examinations are over.

(7) The Secretary or the Controller of the Examination cum Joint Secretary send the envelopes so chosen by the Chairperson under clause (v) of sub-regulation (5) or under clause (v) of sub-regulation (6) to an approved press which shall be responsible for printing of question paper-cum-answer sheets including proof reading and for preparing their packet for different examination centers as also towards Commission's reserves under its seal in accordance with the information furnished and directions given to it by the Secretary or the Controller of the Examination cum Joint Secrtary.

(8) (i) as per the direction of the Chairperson, Secretary or the Controller of the Examination cum Joint Secretary shall prepare a list of reliable presses for printing question paper-cum-answer sheets for the approval of the Chairperson.

(ii) The Secretary shall choose any one of the presses aproved by the Chairperson under sub-regulgation (i) for printing question paper-cum-anshwer sheets for any particular examination.

(iii) The office nominated by the Chairperson shall have access to the computer Agency with a view to ensuring that there is no mistake in the evaluation of answer sheets and the preparation of results.

(iv) The Chairperson or his nominee will be associated with the moderation of questions.

(v) The institute expert body or the press, as the case may be, shall be responsible for maintaining the secrecy of the question papers and the Secretary or the Controller of the Examination cum Joint Secretary shall issue necessary directions and take necessary precautions to ensure such secrecy."

27. The scheme for holding of objective type test, as per the above Regulation 7 clearly obligates the Commission to get objective type question paper-cum-answer sheets prepared by drawing upon its own Question Bank or through the organization working in the field of recruitment or eminent and reliable psychometric institutes, expert bodies or expert in the field of psychometric education and objective type of question papers-cum-answer sheets prepared according to the syllabus of different examinations to be conducted by the Commission. The Secretary or the Controller of Examination is expected to draw list of reputed and reliable psychometric institutes, expert bodies and experts of relevant fields including computer agencies and organizations functional in the field of recruitment, for the approval of the Commission. Engagement of computer agencies is permissible for evaluation of answer sheets and compilation of examination results. Final authority in the matter of selection is the Chairperson of the Commission. The scheme for objective type testing system to be followed by the Commission, therefore, permits engagement of outside agency for the limited purposes, in the manner specified in the Regulations. The primary responsibility under the Act of 2014 as also

the Regulations of 2015 to conduct examination, hold interview and make selection however vests exclusively with the Commission. This, however, does not appear to have actually happened in the present recruitment.

28. The supplementary counter affidavit filed by the Commission would go to show that the Commission entered into an agreement with the Agency and virtually all functions relating to conduct of recruitment was entrusted to the Agency itself. The scope of services to be provided has been specified in clause 2 of the agreement, which reads as under:

"2. Scope of Services:

2.1 Services: The scope of Services to be provided by TCS to Customer is as described in Schedule 2. TCS will host on TCS's Services Environment at TCS designated location(s) and/or deploy on designated Customer systems at Customer designated location(s) identified in Schedule 2, the TCS Application System, for provision of such Services. TCS reserves the right to modify the Services Environment without impacting the Services. The Services may commence on the Service Commencement Date identified in Schedule 1, unless the Parties otherwise agree. If the Parties desire to modify the Scope of Services in Schedule 2 in any manner, the Parties agree that such change to Schedule 2 and tis corresponding change to other Schedules hereto shall be implemented in accordance with the Change Control Procedure defined in Schedule 5 hereto.

2.2 Permitted Use of Services: Customers use of TCS Application System shall always be subject to the Use Terms stipulated in Schedule 3. In case the TCS Application System includes a third party software (identified in Schedule 2), and where such third party licensor requires Customer to sign a license agreement, the Customer agrees to execute such third party software license agreement, which shall prevail upon any conflicting provisions herein. Such third party software license agreement shall become a part of this agreement."

29. Exhibit A to the agreement is the definition clause which has various schedules appended to it. Part A of Schedule-2 provides that Agency was responsible for setting and printing of question papers, designing printing and supplying OMR sheets, processing of OMR sheets including scanning evaluation and objection resolution. Preparation of merit list and uploading it on the website was also left to be Agency. Part B of Schedule-2 describes the other works to be performed by the Agency and is extracted hereinafter:-

PART-B

S.No.	Description	Details at
1.	Conduct of Examination-	Includes selection of well-equipped and reputated examination center, supply of examination centers management kits, Biometric capturing of each candidates finger print and photograph with their roll number. Deployment of static center supervisor and center manager, invigilator and other staff at each center. Providing instruction to examination centers.

30. Annexure-5 to Schedule-2 deals with conduct of examination and is extracted hereinafter:-

"Annexure-5: Conduct of Examination

(Including providing well equipped centre, supply of examination Centre management kits, Biometric Capturing of candidates, deployment of static centre supervisor & centre manager and other staff at each center, providing instruction to the examination centers. Inviting of objection from the candidates and their resolution by the TCS through a software)

A) Proviiding well equipped examination centers

a. Examination centres shall be finalized at least 30 days in advance in consultation wit UPSSSC. So that it may be checked before hand and local administrative authority are informed in advance

b. The centre should be well connected to railway station and bus stands

c. The Centres should be preferably government colleges/schools

d. It should be neat and clean secured place with proper ventilation, light and fan, fresh drinking water, proper sitting arrangement, fire-fighting instrument in working condition, firt aid box and other basic amenities

e. It should have safe and secure place adequately guarded for keeping the examination papers and other related material

B) Supply of Examination Centre Management Kits

a. List of candidates with roll numbers appearing at each examination centre

b. Seating Plan

c. Room wise attendance sheets with roll numbers, photograph and signatures of candidate, with provision for pasting of a fresh colour

d. Room wise desk slips

e. Supply of various report forms which are to be filled by the centre in-charge

f. Supply of tamper proof packing material for the packing of Attendance Sheets and other materials comprising labelled envelopes for easy handling and administration

C) Frisking and Biometrics

a. Frisking of all candidates shall be ensured before entering in the examination centres.

b. TCS shall capture the finger prints and photograph of all candidates appearing in examination which will be used to cross check the identity of the candidates at the next stage of examination

D) Co-ordination for Conduct of Examination

1. The TCS shall deploy city head in each district or as required depends on number of centres, centre manager in each centre or as required depends on number of candidates, invigilator-01 per 25 candidates & other staff at each centre as required

2. TCS would conduct centre preparedness exercise a day before the exam with centre officials and representative of the Commission

3. TCS shall prepare standard examination procedure in consulation with UPSSSC. For this purpose, TCS is required to prepare an examination manual, standard format for capturing information

4. The TCS shall coordinate examination preparation at each venue, which will be include traiining, briefing, putting up signages and other administrative arrangements

5. Ensure packing of answer sheets as per direction of the Commission"

31. Instructions manual for conduct of recruitment in question has been published by the Commission, which is Annexure-2 to the

supplementary counter affidavit. It contains detailed instructions about plan of examination; general instructions in respect of recruitment; sitting plan etc. etc. The manner in which OMR sheets are to be brought to the examination centers; manner in which it would be opened and distributed amongst candidates as also the manner in which such OMR sheets would be collected from candidates and then sent to the Treasuries has been specified. The actual functions as per the above instructions, however, were already entrusted to be performed by the Agency.

32. The detailed procedure which is noted above would go to show that the Agency was virtually entrusted with entire function of holding examination from the stage of setting question paper; preparation of OMR sheets; its dispatch to centers; providing invigilators etc. for conduct of examination and also included collection of OMR sheet from candidates and bringing it to the Treasury as also having delivered it to the Commission's premises at Lucknow. The Commission appears to have entirely delegated its authority vested under the Statute to the Agency itself.

33. After the examination was conducted and the main OMR sheet was brought to Commission's office by following the procedure specified in the agreement and the instructions issued by the Commission, the OMR sheets were got scanned by the Agency. The evaluation process was accordingly concluded. It is at this stage that the Commission appears to have taken a decision on 28.01.2019 of getting first OMR sheet compared with the second copy of OMR sheet kept in the Treasury in the ratio of 1:10. As per the procedure followed the first copy/main OMR sheet was to be utilized for scanning and evaluating performance of a candidate while second copy was to be kept in the Treasury and third copy to be given to the candidate. It is only when OMR sheets on random basis were compared with the respective OMR sheets maintained in the Treasury in the ratio 1:10 to the available posts that discrepancy came to be noticed in respect of 136 candidates. The difference between the two OMR sheets was more than 10%. It is thereafter that first information came to be lodged and later the SIT was assigned the job to investigate the allegations made in the conduct of examination.

34. The report of SIT has been produced before the Court. The SIT in its report has observed that 2256 original OMR sheets have been compared/matched with 1926 shortlisted candidates and it has been found that marks in the two OMR Sheets varied in respect of 1229 candidates. SIT after adding 136 candidates previously identified for difference in marks upon comparison of two OMR sheets has returned a clear finding that there exits variation in the OMR sheets of 1365 candidates out of 2256 OMR sheets compared with the corresponding OMR sheet maintained in the Treasury. The conclusion drawn by the SIT on the basis of above material is that variation between OMR sheet is not just limited to 136 candidate, as is sought to be suggested on behalf of petitioners, but is actually 1365 out of 2000 odd OMR sheets. Variation in the marks of nearly 70% of shortlisted candidates clearly puts a big question mark upon the fairness of entire written examination itself. The finding that there was manipulation with the original OMR sheet in the recruitment process therefore is clearly based on definite material existing on record and it cannot be argued that the

cancellation of recruitment is not based upon any cogent material.

35. Although various judgments have been cited at the bar on the scope of recruitment Agency to cancel the examination, as a whole, in such circumstances, but I am not required to refer to all of them in view of the recent decision of the Supreme Court on the point in Sachin Kumar and others vs. Delhi Subordinate Services Selection Board and others, (2021) 4 SCC 631. Almost all judgments relied upon by the parties have been extensively dealt with in Sachin Kumar's case (supra). After elaborately examining the judgment the Court observed as under in para 66 of the judgement:-

"66. Recruitment to public services must command public confidence. Persons who are recruited are intended to fulfil public functions associated with the functioning of the Government. Where the entire process is found to be flawed, its cancellation may undoubtedly cause hardship to a few who may not specifically be found to be involved in wrong-doing. But that is not sufficient to nullify the ultimate decision to cancel an examination where the nature of the wrong-doing cuts through the entire process so as to seriously impinge upon the legitimacy of the examinations which have been held for recruitment. Both the High Court and the Tribunal have, in our view, erred in laying exclusive focus on the report of the second Committee which was confined to the issue of impersonation. The report of the second Committee is only one facet of the matter. The Deputy Chief Minister was justified in going beyond it and ultimately recommending that the entire process should be cancelled on the basis of the findings which were arrived at in the report of the first Committee. Those findings do not stand obliterated nor has the Tribunal found any fault with those findings. In this view of the matter, both the judgments of the Tribunal and the High Court are unsustainable."

36. This takes the Court to the next argument of Sri Khare that instead of cancelling the recruitment as a whole the authorities could have segregated cases of those candidates in respect of whom adverse material had surfaced and candidatures of remaining candidates could have been processed after having their OMR sheets tallied from the copies of OMR sheets maintained in the Treasury. This argument is advanced on the premise that there exists no interpolation or manipulation in the second copy of OMR sheets retained in the Treasury and its result being unadulterated, could be relied upon. It is also urged that the respondents have also proceeded on the premise that second copy of OMR Sheet contains the correct score.

37. The argument in that regard though appears attractive at the outset but does not merit any serious consideration once the facts of this case are evaluated in its entirety. First and foremost, it is to be observed that not just 136 candidates, but in respect of nearly 70% candidates shortlisted by the Commission, there is a difference in the marks secured by them as per OMR sheets maintained in the Treasury vis-a-vis their original OMR sheets on which the initial evaluation has been done. The difference in the marks of majority of candidates, whose copies are tallied, virtually renders the results of other candidates also highly suspect inasmuch as the shortlisting has been done only on the strength of first OMR sheet which is highly

disputed and does not correctly reflect the inter se merit of all candidates who have had a shot at the exam. In large number of candidates the difference in the marks is more than 10% between the marks secured in two OMR sheets. In a competitive examination of present kind where more than 9 lac candidates have appeared, even 1 or 2 percent variation in the marks would make great differences in the actual merit of candidates. Since the short-listing of petitioners is based only upon scanning of first copy of OMR Sheet, which itself is not found reliable, the entire process culminating in petitioners' shortlisting for their consideration for appointment is found flawed.

38. The premise that the OMR sheets maintained in the Treasury contains no error and is worthy of reliance also needs to be examined in order to better appreciate petitioners' contention.

39. The Commission in its counter affidavit has annexed the agreement executed by it with the Agency which would clearly indicated that the work of collecting OMR sheets from candidates and its dispatch to the Treasury was performed by the Agency itself. Annexure-5 providing for conduct of examination would go to show that providing of examination centers; supply of examination centers management kit; fixing biometrics and coordination for conduct of examination was all left to be performed by the Agency. Ensuring packing of OMR sheets was also a work to be performed by the Agency. The instructions issued by Commission are also placed on record by way of supplementary counter affidavit which specifies the process to be followed for dispatch of confidential parcels (to be kept in sealed boxes) to Commission in following words:-

"परीक्षा समाप्ति पर ओएमआर एवम् परीक्षा पुस्तिका का एकत्रित करनाः-

- पांचवी घंटी के बाद कक्ष अंतरीक्षक घोषणा करेगा कि परीक्षा समाप्ति में केवल दस मिनट शेष है और परीक्षा कक्ष के दरवाजे बंद कर दो।

- छठी घंटी के बाद कक्ष अंतरीक्षक घोषणा करें कि समय समाप्त हो गया है लिखना बंद करे। ओएमआर शीट एवं प्रश्न पुस्तिका को एकत्रित करें।

- अभ्यर्थियों से प्रवेश पत्र एकत्रित नहीं किया जाएगा।

- कक्ष अंतरीक्षक ओएमआर की मूलप्रति, प्रश्न पुस्तिका एवं ओएमआर की आफिस कापी एवं अभ्यर्थियों की अटेंडेंस शीट पर उपस्थिति का आपस में मिलान करना सुनिश्चित करें। मिलान के पश्चात अभ्यर्थी को ओएमआर की कैंडीडेट कापी वापस कर दें।

- अगर अनुचित साधनों का प्रयोग करता हुआ अभ्यर्थी पाया जाता है तो अनफेयर मिन्स सर्टीफिकेट पर केंद्र पर्यवेक्षक के हस्ताक्षर होने के उपरांत ही अभ्यर्थी को परीक्षा कक्ष से जाने की अनुमति देना सुनिश्चित करें।

- प्रत्येक अभ्यर्थी से मूल ओएमआर, आफिस कापी ओएमआर, प्रश्न पुस्तिका एवं अटेंडेंस शीट एकत्रित करना सुनिश्चित करें।

- रोल नं० के क्रम में मूल ओएमआर, आफिस कापी ओएमआर, प्रश्न पुस्तिका एवं अटेंडेंस शीट की गणना करके केंद्र पर्यवेक्षक को सौंपना सुनिश्चित करें।

- यदि कोई अभ्यर्थी अपनी मूल ओएमआर, प्रश्न पुस्तिका या ओ.एम.आर. की आफिस कॉपी ले जाता है तो उसकी जिम्मेदारी कक्ष अंतरीक्षक की होगी।

- किसी भी संक्रामक बीमारी से पीडित कोई अभ्यर्थी जैसे स्माल पॉक्स, फ्लू आदि को अन्य अभ्यर्थियों के साथ कमरे में बैठने की अनुमति नहीं दी जानी चाहिए। इस तरह के मामले में संदेह है तो उसकी सूचना तत्काल केंद्र पर्यवेक्षक को देनी चाहिए। ताकि उसके बैठने की व्यवस्था एक अलग कक्ष में की जा सके।

- किसी भी अन्य परिस्थितियों में केंद्र पर्यवेक्षक द्वारा दिये गये निर्देशों का ही पालन करना चाहिए।"

40. The Commission for the conduct of examination apparently envisioned a scheme for collaboration with Agency to conduct the recruitment in such a manner that possibility of manipulation etc. is eliminated and fairness and transparency in conduct of examination is maintained. However, from the admitted materials on record it is apparent that large scale manipulation has happened and out of about 2000 OMR sheets evaluated on the basis of OMR sheets maintained at two different places there exists a difference in the case of nearly 70%. A definite finding is yet to be returned as to at which stage the manipulation has occurred. It is also not clear that as to who exactly is responsible for allowing such large scale manipulation to occur particularly when a full proof process was otherwise thought of. The possibility of manipulation in the OMR sheets maintained in the Treasuries also cannot be ruled out since the process for collection of OMR sheets and its dispatch to the Treasuries also had active participation of the Agency engaged in the process. The Court is thus not convinced with the argument of petitioners that OMR sheets maintained in the Treasury are sacrosanct or could exclusively be relied upon for declaration of result.

41. In the examination of present kind where more than 9 lac candidates have appeared the disparity in marks have surfaced for nearly 70% candidates when cross-checking of OMR sheets is resorted to for about 2000 candidates. The evidence leaves no room of doubt that irregularities in the process have taken place at a systemic level which vitiates the sanctity of the recruitment/examination. The entire examination is highly suspect. At this stage of the investigation only this much can be said with certainty that the examination lacked fairness and transparency and large scale manipulations have actually happened. The decision taken in the circumstances to cancel the entire recruitment, therefore, cannot be said to be without any basis, arbitrary or unreasonable.

42. The Commission being statutory authority has been enjoined with responsibility of conducting public examination and detailed procedure have been laid down for exercise of such statutory responsibility by it. Though in modern times when the processes have gone complex the engagement of private agencies for specified purposes cannot be taken as anathema but placing entire responsibility upon the private agency does not appear to be in keeping with the object for which the Commission itself has been constituted. The Commission ought to have been more circumspect in delegating its essential functions to an outside agency inasmuch as control which otherwise is expected to be exercised by statutory body would be lost. The manner in which Commission has virtually abdicated all its function to a private Agency, therefore, requires serious deliberations at the level of the Commission and the State Government.

43. The Court hopes and trusts that being statutory authority and armed with the experience of present kind the Commission would do well to seriously ponder and reconsider the mechanism to be followed for holding future examinations.

44. Our country is having large population of unemployed youth who work tirelessly to secure public employment. Their faith in the impartiality of recruitment must be maintained at all costs. Since in the facts and circumstances of the present case this Court finds that the decision to cancel recruitment is based upon a bona fide assessment of materials placed on record, which cannot be said to be arbitrary or malafide, therefore, no interference by this Court is warranted in the decision taken by the Commission to discontinue the recruitment exercise.

45. Though it may happen that some of the candidates may suffer but where large scale irregularities are suggestive of malice eroding credibility of the process itself, the cancellation of recruitment by a competent body is not required to be interfered with lightly. Para 35 of the judgment in the case of Sachin Kumar (supra) aptly considers this aspect and this Court deems it appropriate to refer to it and is reproduced hereinafter:-

"35. In deciding this batch of SLPs, we need not re-invent the wheel. Over the last five decades, several decisions of this Court have dealt with the fundamental issue of when the process of an examination can stand vitiated. Essentially, the answer to the issue turns upon whether the irregularities in the process have taken place at a systemic level so as to vitiate the sanctity of the process. There are cases which border upon or cross-over into the domain of fraud as a result of which the credibility and legitimacy of the process is denuded. This constitutes one end of the spectrum where the authority conducting the examination or convening the selection process comes to the conclusion that as a result of supervening event or circumstances, the process has lost its legitimacy, leaving no option but to cancel it in its entirety. Where a decision along those lines is taken, it does not turn upon a fact-finding exercise into individual acts involving the use of mal-practices or unfair means. Where a recourse to unfair means has taken place on a systemic scale, it may be difficult to segregate the tainted from the untainted participants in the process. Large scale irregularities including those which have the effect of denying equal access to similarly circumstanced candidates are suggestive of a malaise which has eroded the credibility of the process. At the other end of the spectrum are cases where some of the participants in the process who appear at the examination or selection test are guilty of irregularities. In such a case, it may well be possible to segregate persons who are guilty of wrong-doing from others who have adhered to the rules and to exclude the former from the process. In such a case, those who are innocent of wrong-doing should not pay a price for those who are actually found to be involved in irregularities. By segregating the wrong-doers, the selection of the untainted candidates can be allowed to pass muster by taking the selection process to its logical conclusion. This is not a mere matter of administrative procedure but as a principle of service jurisprudence it finds embodiment in the constitutional duty by

which public bodies have to act fairly and reasonably. A fair and reasonable process of selection to posts subject to the norm of equality of opportunity under Article 16(1) is a constitutional requirement. A fair and reasonable process is a fundamental requirement of Article 14 as well. Where the recruitment to public employment stands vitiated as a consequence of systemic fraud or irregularities, the entire process becomes illegitimate. On the other hand, where it is possible to segregate persons who have indulged in mal-practices and to penalise them for their wrong-doing, it would be unfair to impose the burden of their wrong-doing on those who are free from taint. To treat the innocent and the wrong-doers equally by subjecting the former to the consequence of the cancellation of the entire process would be contrary to Article 14 because unequals would then be treated equally. The requirement that a public body must act in fair and reasonable terms animates the entire process of selection. The decisions of the recruiting body are hence subject to judicial control subject to the settled principle that the recruiting authority must have a measure of discretion to take decisions in accordance with law which are best suited to preserve the sanctity of the process. Now it is in the backdrop of these principles, that it becomes appropriate to advert to the precedents of this Court which hold the field. "

46. For the reasons and deliberations, aforesaid, this bunch of writ petitions fail and are dismissed. No order is passed as to costs.

(2022)01ILR A1078
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 24.01.2022

BEFORE

THE HON'BLE ABDUL MOIN, J.

Writ-A No. 349 of 2022

Dr. Imtiyaz Ahmad & Ors. ...Petitioners
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioners:
Ram Raj, Hanumant Lal Srivastava, Risabh Raj

Counsel for the Respondents:
C.S.C., Ashok Shukla

A. Service Law - Constitution of India, 1950-Article 226-challenge to-notice of rejection to candidature-petitioners had been appeared in the screening exam-Thereafter they informed about rejection of candidature for interview due to lesser marks in the category-on the basis of concession given by learned counsel for the Commission, the court held that in the event of rejection of candidature, petitioners are entitled to file an appeal and during the pendency of appeal the petitioners can be permitted to appear in the interview-the judgments rendered on the basis of the concession given by the learned counsel appearing for the Commission of the candidates having a remedy of appeal in terms of Rules 2011 would not be of any help to the petitioners-It is settled proposition of law that a concession against law or wrong concession of law would not be binding-There can be no estoppel against a statute or regulations having a statutory effect-Generally admissions of fact by counsel are binding, neither the client nor the court is bound by admissions as to matters of law or legal conclusions.(Para 1 to 26)

The writ petition is dismissed. (E-6)

List of Cases cited:

1. Dr. Atiya Khan Vs St. of U.P & anr. W.P. No. 8548 of 2019

2. Dr. Mohd. Khursheed Alam Vs St. of U.P. & anr. W.P. No. 29326 of 2021

3. The Employees' St. Ins. Corpn. Vs U.O.I. & ors. Civil Appeal No. 152 of 2022

4. Himalayan Coop. Group Housing Society Vs Balwan Singh (2015) 7 SCC 373

5. Dir. of Elementary Edu.,Odisha Vs Pramod Kumar Sahoo (2019) 10 SCC 674

(Delivered by Hon'ble Abdul Moin, J.)

1. Heard learned counsel for the petitioners and learned counsel for the respondents.

2. The instant writ petition has been filed praying for the following main relief(s):

"i. Issue a writ, order or direction in the nature of mandamus commanding the opposite party no. 2/Uttar Pradesh Public Service Commission to permit the petitioners to appear in the interview for the post of Medical Officer, S-11/07 in Government Unani Medical Colleges of U.P. (General Recruitment), which is slated for 24.01.2022 and 25.01.2022.

ii. Issue a writ, order or direction in the nature of mandamus restraining the opposite parties from detaining/debarring the petitioners from appearing in the interview for the post of Medical Officer, S-11/07 in Government Unani Medical Colleges of U.P. (General recruitment), scheduled for 24.01.2022 and 25.01.2022, without following the provisions contained in the Uttar Pradesh Public Service Commission (Procedure and Conduct of Business) Rules, 2011."

3. The case set forth by the petitioners is that an advertisement had been issued by the Uttar Pradesh Public Service Commission (hereinafter referred to as Commission) inviting applications for various posts including the post of Medical Officer in Government Unani Medical Colleges of the State. A copy of the advertisement is annexure 3 to the petition. The selection required a two stage process namely a written examination for the purpose of screening followed by an interview of the eligible candidates. The petitioners appeared in the screening examination and claim to have qualified the same. Thereafter the commission issued a notice dated 12.10.2021, a copy of which is annexure 7 to the petition whereby the candidates who had qualified in the screening examination were to be called for interview. It was specifically provided in the said notice that the candidates shall be called for an interview on the basis of the marks obtained in the screening examination.

4. The petitioners were sanguine in the belief that they would be called for interview which was scheduled to he held on 24.01.2022 and 25.01.2022 but the Commission issued a notice dated 17.01.2022, a copy of which is annexure 2 to the petition whereby the petitioners alongwith several other candidates were informed that the marks obtained by them in the screening examination were less than the cut off marks in their category. It is contended that as the roll numbers of the petitioners figure in the said notice dated 17.01.2022 whereby it has been contended that the cut off marks are less in their category as such they would not be called for interview scheduled on 24.01.2022 and

25.01.2022 and hence the petitioners are before this Court.

5. Reliance has been placed on the Uttar Pradesh Public Service Commission (Procedure and Conduct of Business) Rules, 2011 (hereinafter referred as Rules 2011) a copy of which is annexure 1 to the petition, more particularly on Rule 31 of the Rules 2011 to contend that the petitioners should have been informed individually about the rejection of the application for being called in the said interview. This has not been done by the Commission. It is contended that against the order rejecting the applications of the petitioners the petitioners have remedy of filing an appeal before the date of the interview and the commission should allow the petitioners to appear in the interview during the pendency of the appeal.

6. Reliance in this regard has been placed on two judgments of this Court passed in **Writ Petition no. 8548 (Service Single) of 2019 in re: Dr. Atiya Khan vs State of U.P. and another** decided on 03.04.2019 and **Writ Petition no. 29326 (Service Single) of 2021 in re: Dr. Mohd. Khursheed Alam vs State of U.P. and another** decided on 14.12.2021, copies of which are cumulatively annexed as annexure 13 to the petition to contend that Rule 31 of Rules 2011 has been interpreted by this Court and it has been held on the basis of concession given by the learned counsel for the Commission that in the event of rejection of their candidature, the petitioners are entitled to file an appeal and during pendnecy of the appeal the petitioners can be permitted to appear in the interview.

7. Placing reliance on Rules 2011 learned counsel for the petitioners argues that once the Rules 2011 are categoric and the candidature of the petitioners has been rejected by the Commission vide order dated 17.01.2022 as such keeping in view the Rules 2011 the petitioners are entitled to file an appeal against the said rejection order and as the time is short, this Court may permit the petitioners to appear provisionally in the interview scheduled to be held on 24.01.2022 and 25.01.2022.

8. On the other hand, learned counsel appearing for the respondents argues that it is not the case of candidature of the petitioners having been rejected rather it is a case where the petitioners have failed to make the cut off on the basis of marks in their category and as such a conscious decision has been taken by the Commission vide order dated 17.01.2022 of not calling the petitioners and other candidates who have failed to make the cut off marks, for interview. Thus, it is argued that once the petitioners have failed to make the cut off as such there would not be any occasion for calling them for interview.

9. As regards non-communication of the rejection of candidature to the petitioners individually it is argued that the Rules 2011 itself provide that the rejection order can be uploaded on the website of the commission and in fact the notice dated 17.01.2022 has been uploaded on the website of the Commission and as such there was no requirement of giving individual notice to the candidates including the petitioners.

10. As regards the judgments of this Court in the case of **Dr. Atiya (Supra)** and **Dr. Khursheed Alam (Supra),** learned counsel for the Commission argues that a wrong concession of law has been given by the learned counsel for the Commission of

the candidates having an alternative remedy of appeal in as much as it is where the application of a candidate is rejected that he is entitled to file an appeal against the said rejection but in the instant case as the petitioners have failed to qualify and make the cut off marks in the screening examination as such the remedy of appeal would not be available to them.

11. It is also argued that the petitioners have failed to challenge the notice dated 17.01.2022 whereby they have not been found eligible for being called in the interview and hence the petition deserves to be dismissed.

12. Heard learned counsel for the parties and perused the record.

13. From perusal of record it is apparent that the petitioners had appeared in the screening examination in pursuance of the advertisement issued by the Commission for the post of Medical Officer. Admittedly the examination was in two parts namely screening examination and thereafter the qualified candidates were to appear in the interview.

14. The Commission issued a notice on 17.01.2022 whereby the petitioners alongwith several others were notified that the marks obtained by them in the screening examination are less than the cut off for the purpose of being called in the interview. The argument of learned counsel for the petitioners that the petitioners have not been informed individually about rejection of their applications merits outright rejection in as much as even if for the sake of arguments it is accepted that an individual notice of rejection of candidature was to be given the same would suffice once the said information is given on the Commissions' website as per Rule 31(iv) of the Rules 2011. Admittedly, the notice dated 17.01.2022 is available on the Commissions' website and thus there was no requirement of any individual notice to the petitioners.

15. The question which arises is that once the petitioners have not been found eligible for being called for the interview on the basis of having obtained lesser marks than the cut off in the screening examination then whether they are entitled to be called for the interview after filing of an appeal in terms of Rule 31 of the Rules 2011?

16. As reliance has been placed on Rules 2011, more particularly, Rule 31, for the sake of convenience the same is reproduced below:

"31. (i) No candidate shall be admitted to the examination unless he has duly applied on the prescribed form in the prescribed manner and has deposited the prescribed application/examination fee within the prescribed time,

(ii) No application received or submitted after last date fixed for receipt/submission of applications shall be accepted;

Provided that in case more than one mode have been provided the application sent by registered post/speed post shall be at the risk of candidate and shall not be accepted after the last date of receipt mentioned in the advertisement;

Provided that except in case of on-line form submission if the aforesaid last date is a non-working day, applications received on the next working day shall be deemed to be within time;

Provided further that if a doubt arises as to whether the application was received within time, the decision of the Committee constituted for the purpose shall be conclusive and final.

Provided further that Application form partially wrongly filled shall not be allowed to be corrected after it has been received by the Commission. It shall also be applicable to online applications.

(iii) An application not accompanied by proof of having deposited the application/examination fees or not giving full details regarding the optional papers offered shall be liable to rejection.

(iv) A rejection memo shall be sent to the candidates stating the reasons for rejection either through mail or through Commission's website;

Provided that an information regarding rejection of an application, as shown on the web-site of the commission with regard to any examinations including preliminary examination or Screening test of such examination, shall be deemed to be a rejection - memo for the purposes of this rule and publication thereof on the website shall be deemed as if the rejection-memo has been properly served upon the applicant concerned.

(v) The candidate may file appeal against the memo of rejection imperatively before the date of examination or interview, as the case may be, and the same would be decided expeditiously by the committee of members constituted for the purpose. Subject to the final decision in the appeal, the Commission may allow the candidate to appear at the examination or the interview, as the case may be, provisionally during the pendency of the appeal."

17. A bare perusal of the said rule would indicate that the same pertains to the application of a candidate to an examination for which he has applied. The said rules provides that no candidate shall be admitted to an examination unless he has applied on the prescribed format in the prescribed manner and has deposited the prescribed application/examination fees and that no application received after the last date fixed for receipt shall be accepted. The Commission has been given the power to remove doubts as to whether the application has been received within time or not. In these circumstances, in case an application form is rejected, a rejection memo is to be sent to the candidate stating the reasons for rejection either through mail or uploaded on Commissions' website. A candidate has been given the power to file an appeal against the memo of rejection and, subject to final decision of the appeal, the Commission has been given power to allow the candidate to appear in the examination or interview, as the case may be.

18. The controversy or doubt arises with the words used in Rule 31(v) of the Rules 2011 namely:

"(v) The candidate may file appeal against the memo of rejection imperatively before the date of examination or interview, as the case may be, and the same would be decided expeditiously by the committee of members constituted for the purpose. Subject to the final decision in the appeal, ***the Commission may allow the candidate to appear at the examination or the interview****, as the case may be, provisionally during the pendency of the appeal."*

19. At first blush, when Rule 31(v) is read in isolation and as per the arguments of learned counsel for the parties, it comes out that if a candidate is not being permitted to appear in an interview despite

his **candidature** having been rejected then, upon filing of appeal the commission may permit the candidate to appear in the interview.

20. However, Rule 31(v) of the Rules 2011 has to be read in entirety alongwith Rule 29, 30, 32 & 33 of the Rules 2011, which for the sake of convenience, are reproduced below:

"29 (i) The Commission shall conduct examinations for the various posts to be filled by competitive examinations;

(ii) The Commission may hold combined competitive examination for selection to various posts under its purview.

(iii) In cases of direct selection through interview only, if the proportion of candidates to the number of posts is high, the Commission may, after having considered feasibility, expediency and other aspects to hold examinations, decide to hold preliminary examination/ screening test of the candidates.

30 (i) The Commission shall advertise the vacancies through the Print media, or electronic media or both and invite applications from eligible candidates. Manner of inviting applications forms includes "on-line' submission of application forms through internet as prescribed by the Commission in it's website.

(ii) Applications received in response to advertisement shall be scrutinised by the office in the manner prescribed by the Commission on it's website.

32 (1) All eligible candidates shall, subject to the provisions of the above rules, be admitted to the examination.

(2) A candidate at any stage of examination/selection which shall include final selection and sending recommendation thereof or during the course of examination or any selection process conducted or being conducted may be debarred from an examination or future examinations or his candidature may be cancelled, w.e.f. the date as decided by the Commission, if he or she-

(i) produces a false or forged document, the discovery of which may disqualify him or her from appearing at any examination or interview;

(ii) conceals any material fact or information, or flouts any instruction, guidelines, terms and conditions given through advertisement, instructions or communicated in any manner;

(iii) uses any unfair means at the time of examination or interview, or during the selection process;

(iv) misbehaves with any functionary at the time of examination centre or the Commission;

(v) has ever been rusticated, convicted for any offence, dismissed from any service under the Government, or has concealed deliberately any such information the disclosure of which would otherwise render him/her disqualified for the post which he/she had applied for;

(vi) has been debarred earlier on the above mentioned grounds or on the grounds of moral turpitude by the Union Public Service Commission or any state public service commission including this Commissions also;

Provided that action of debarring and cancellation of candidature shall not be done unless the candidate is served upon with a show cause notice and is provided an opportunity of being heard by the committee constituted for the purpose;

Provided further that the order of debarring or cancellation of candidature shall be passed only after the committee of the members constituted for the purpose

has considered the matter and approved the proposed punishment of debarring the candidate or cancellation of his candidature.

(3) An appeal against the order passed under sub-rule 2 of rule 32 shall lie to the Commission.

33 (i) Notwithstanding anything to the contrary contained in relevant service rules of Government Orders regarding recruitment, the Commission may hold preliminary examination/screening test for finding out suitable candidates for admission to main examination or interview, as the case may be;

(ii) Preliminary examination shall ***mean screening test*** *to be conducted by the Commission with the purpose of finding out suitable candidates in required proportion as fixed by the Commission in each category, reserved or unreserved, for admission to the main examination or interview, as the case may be;*

(iii) Preliminary examination shall be conducted in the manner prescribed by the Uttar Pradesh Direct Recruitment through Public Service Commission Preliminary Examination Rule, 1986 as amended from time to time. The marks obtained by the candidates in the preliminary examination/screening test shall not be counted for determining final order of merit.

(iv) The Commission shall fix the place, dates and time of examination which includes preliminary examination/screening test and main examination, as the case may be.

(v) The centers of examination shall be fixed with prior approval of the Chairman/Examination Committee.

(vi) All arrangements for such examinations shall be made by the Controller of Examination in consultation with the Secretary and in accordance with such directions as may be issued by the Commission in that behalf."

21. Rule 29 of the Rules 2011 categorically provides that a competitive examination for selection to fill various posts under the purview of the Commission can be through examination or through interview only. Rule 30 further provides that the Commission shall advertise a vacancy and invite **applications**. Rule 31 pertains to the matter in which the **applications** are to be scrutinized. Rule 32 provides that all **eligible candidates** shall, subject to the provisions of the rules, be admitted to the examinations. Rule 33 provides that the Commission may hold preliminary examination/screening test for finding out suitable candidates and that the preliminary examinations shall mean screening test to be conducted by the Commission. Thus once the examination by the Commission can be by way of written examination for the purpose of screening or by way of an interview only as such Rule 31(v) which provides that upon rejection of the application a **candidate** can file an appeal and the Commission may permit the candidate to appear in the examination or the interview **as the case may be** would have to be read as rejection of an application of a candidate prior to appearing in the written examination or interview and not **after** the candidate has failed to qualify in the examination either by way of not obtaining the cut off marks or having miserably failed to even obtain the bare minimum marks. Any other interpretation of Rule 31(v) would render chaos in as much as all candidates who fail in written examination would be filing appeals before the Commission and staking their claim for appearing in the interview. This would also be amply clear from the perusal of the Rule 32 which specifically

provides that all eligible candidates subject to provisions of the rules to be admitted to the examination meaning thereby that the said rule pertains to giving a way to the rejected candidates to file an appeal which would imply and mean a "candidate' **prior** to appearing in the screening examination/ preliminary examination or interview and not **subsequent** to having appeared in such examination/interview. This also stands clarified in Rule 33 whereby the preliminary examination has been indicated to be the screening test. Thus, the interpretation which the petitioners are trying to place over Rule 31(v) of the Rules 2011 is an interpretation which does not come out from a complete perusal of the Rules and thus merits outright rejection.

22. Admittedly the petitioners having failed to make the cut off marks in the screening examination as per the notice dated 17.01.2022 would not be entitled to appear in the interview which the commission has correctly proceeded to restrain them alongwith others.

23. As regards the judgments of this Court in the case of **Dr. Atiya and Dr. Khursheed Alam (Supra)** suffice it to say that both the judgments were rendered on the basis of the concession given by the learned counsel appearing for the Commission of the candidates having a remedy of appeal in terms of the Rules 2011. Thus, both the judgments would not be of any help to the petitioners.

24. It is settled proposition of law that a concession against law or wrong concession of law would not be binding.

25. In this regard, the Court may refer to a recent judgment of Hon'ble the Apex Court dated 20.01.2022 passed in **Civil Appeal No. 152 of 2022 in re: The Employees' State Insurance Corporation vs Union of India & others.** For the sake of convenience relevant paragraphs of the aforesaid judgment is reproduced are under:

"23. The contesting Respondents submitted that the Appellant is estopped from urging that the DACP Scheme is not applicable to the Teaching Cadre at the ESIC since they have taken this stance before the CAT and in its writ petition before the High Court. While this Court expresses its disapproval at the lack of proper instructions being tendered to the Counsel of the Appellant, ***there can be no estoppel against a statute or regulations having a statutory effect.*** *In Nedunuri Kameswaramma v. Sampati Subba Rao AIR 1963 SC 884 a three-judge Bench of this Court decided a central point of the dispute in favour of a party, irrespective of the concession of its Counsel since it was on a point of law. Justice M. Hidayatullah (as the learned Chief Justice then was), speaking on behalf of the Court observed:*

20. From the above analysis of the documents, it is quite clear that the documents on the side of the Appellant established that this was a Karnikam service inam, and the action of the Zamindar in resuming it as such, which again has a presumption of correctness attaching to it, clearly established the Appellant's case. ***Much cannot be made of a concession by counsel that this was a Dharmilainam, in the trial court, because it was a concession on a point of law, and it was withdrawn. Indeed, the central point in the dispute was this, and the concession appears to us to be due to some mistake or possibly ignorance not binding***

on the client. *We are thus of opinion that the decision of the two courts below which had concurrently held this to be jeroyti land after resumption of the Karnikam service inam, was correct in the circumstances of the case, and the High Court was not justified in reversing it. (emphasis supplied)*

24. In Himalayan Coop. Group Housing Society v. Balwan Singh (2015) 7 SCC 373 a three-judge Bench of this Court clarified the law of agency with respect to client-lawyer relationships. ***The Court held that while generally admissions of fact by counsel are binding, neither the client nor the court is bound by admissions as to matters of law or legal conclusions:***

32. ***Generally, admissions of fact made by a counsel are binding upon their principals as long as they are unequivocal; where, however, doubt exists as to a purported admission, the court should be wary to accept such admissions until and unless the counsel or the advocate is authorised by his principal to make such admissions. Furthermore, a client is not bound by a statement or admission which he or his lawyer was not authorised to make. A lawyer generally has no implied or apparent authority to make an admission or statement which would directly surrender or conclude the substantial legal rights of the client unless such an admission or statement is clearly a proper step in accomplishing the purpose for which the lawyer was employed. We hasten to add neither the client nor the court is bound by the lawyer's statements or admissions as to matters of law or legal conclusions.*** *Thus, according to generally accepted notions of professional responsibility, lawyers should follow the client's instructions rather than substitute their judgment for that of the client. We may add that in some cases, lawyers can make decisions without consulting the client. While in others, the decision is reserved for the client. It is often said that the lawyer can make decisions as to tactics without consulting the client, while the client has a right to make decisions that can affect his rights. (emphasis supplied)*

25. Recently, a two-judge Bench of this Court in Director of Elementary Education, Odisha v. Pramod Kumar Sahoo (2019) 10 SCC 674 observed that ***a concession on a question of law concerning service Rules would not bind the State:***

11. The concession given by the learned State Counsel before the Tribunal was a concession in law and contrary to the statutory rules. Such concession is not binding on the State for the reason that there cannot be any estoppel against law. *The Rules provide for a specific grade of pay, therefore, the concession given by the learned State Counsel before the Tribunal is not binding on the Appellant.*

The concession of the Counsel for the Appellant before the CAT does not preclude the finding on the law that is arrived at by this Court.

(Emphasis by the Court)"

26. Keeping in view the aforesaid discussion no case for interference is made out. Accordingly, the writ petition is **dismissed.**

(2022)01ILR A1086
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.12.2021

BEFORE

THE HON'BLE ALOK MATHUR, J.

Writ-A No. 15542 of 2021

Revan Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:

Sri Abhinav Gaur, Sri Vibhu Rai, Sri Anoop Trivedi (Sr. Adv.)

Counsel for the Respondents:
C.S.C.

A. Service Law - Constitution of India, 1950-Article 226-challenge to-chargesheet and departmental enquiry-the petitioner made complaints against his superior, the Jail Superintendent-He repeatedly made complaints to all higher authorities due to personal grudge-petitioner violated the service rules in his official capacity-no details disclosed by the petitioner as to how his superior is responsible for proceedings initiated against the petitioner –Merely because in his official capacity as District Magistrate, the respondent taken cognizance of an incident occurred in the jail premises, cannot be concluded that respondent has become inimical to the petitioner-petitioner failed to show how the respondent had acted malafide-Neither the disciplinary proceedings nor the charge-sheet can be quashed at an initial stage-Gravity of alleged misconduct is a relevant factor to be taken into consideration –The petitioner cannot claim the status of a whistleblower as the same has not been in bonafide manner as he himself been found to be implicated in the irregularities which he himself brought to fore.(Para 1 to 32)

B. One of the basic requirements of a person being accepted as a "whistle blower" is that his primary motive for the activity should be in furtherance of public good. The activity has to be undertaken in public interest, exposing illegal activities of a public organization or authority. The conduct of the petitioner does not fall within the high moral and ethical standard that would be required of a bonafide "whistle blower".

The writ petition is dismissed. (E-6)

List of Cases cited:

1. Ajay Kumar Chaudhary Vs U.O.I. thru its Secy. Civil Appeal No. 1912 of 2015

2. Ratnagiri Gas & Power (P) Ltd. Vs RDS Projects Ltd. (2013) 1 SCC 524

3. Rajneesh Khajuria Vs Wockhardt Ltd.,(2020) 3 SCC 86

4. St. of Bih. Vs P.P Sharma (1992) Supp (1) SCC 222: 1992 SCC (Cri) 192

5. St. of Har. Vs Bhajan (1992) Supp (1) SCC 335 :1992 SCC (Cri) 426

6. Prabodh Sagar Vs Punj. SEB (2000) 5 SCC 630 : 2000 SCC (L& S) 731

7. HMT Ltd.Vs Mudappa (2007) 9 SCC 768

8. St. of A.P. Vs Goverdhanlal Pitti (2003) 4 SCC 739

9. U.O.I. Vs Ashok Kumar (2005) 8 SCC 760: 2006 SCC (L&S) 47

10. S. Pratap Singh Vs St. of Punj. (1964) 4 SCR 733: AIR 1964 SC 72

11. E.P. Royappa Vs St. of T.N.(1974) 4 SCC 3: 1974 SCC (L&S) 165

12. Indian Rly. Cons. Co. Ltd. Vs Ajay Kumar (2003) 4 SCC 579

13. Mstry. of Defence Vs Prabhash Chandra Mirdha (2012) 11 SCC 565

14. St. of Punj. Vs Ajit Singh (1997) 11 SCC 368

15. Manoj H. Mishra Vs U.O.I. & ors. (2013) 6 SCC 313

(Delivered by Hon'ble Alok Mathur, J.)

1. Heard Sri Anoop Trivedi, Senior Advocate assisted by Sri Vibhu Rai for the petitioner as well as learned Additional Chief Standing counsel Sri Shrawan Kumar dubey for the respondents.

2. By means of present writ petition the petitioner has assailed the charge sheet dated 27.7.2021 issued by Director General (Jail Administration and Reforms).

3. The brief conspectus necessary for adjudication of the present controversy is that the petitioner was initially appointed on the post of Deputy Jailer in 1994 and was promoted to the post of Jailer in 1999 and subsequently to the post of Jail Superintendent in 2010 but was reverted to the post of Jailer after the judgment of Hon'ble Supreme Court in the year 2015.

4. At the time when the petitioner was posted as Jailer in District Jail, Meerut sometime in October, 2000 an incident of rioting took place between two groups of jail inmates in the intervening night of 11/12 October, 2000 in Barack No.3-B, subsequent to which a First Information Report was lodged against the petitioner. It is submitted by learned counsel for the petitioner that the entire proceedings including filing of the First Information Report were malafide at the behest of the then District Magistrate, Meeut who presently is holding the office of Principal/Additional Chief Secretary, Jail Administration and Reforms, U.P., Lucknow. It has been stated that the arrest of the petitioner was stayed pursuant to the aforesaid First Information Report, the petitioner had made a complaint against the then District Magistrate before National Commission for S.C./S.T. on 26.12.2000 where the proceedings were initiated and respondent No.1 was also called for personal appearance and since then it is stated that he is inimical towards the petitioner. It is further submitted that in the year 2017 the departmental proceedings were sought to be initiated against the petitioner and he was placed under suspension by means of order dated 3.11.2017. Aggrieved by the aforesaid order the petitioner preferred a writ petition before this Court and this Court stayed the suspension by means of order dated 16.11.2017 in Writ A No.5472 of 2017. He challenged the charge sheet and the departmental inquiry before this Court by means of Writ petition No.16313 of 2018 and by means of order dated 18.8.2018 this Court had stayed the further proceedings in pursuance of the said charge sheet. It is stated that the petitioner was again placed under suspension by means of order dated 30.4.2020 and this Court after adverting to the orders passed in all earlier writ petitions preferred by the petitioner provided that no coercive action shall be taken against the petitioner passed in Writ A No.4947 of 2020. Subsequently the said writ petition was finally allowed by means of the judgment and order dated 22.9.2021 relying upon the judgment of Hon'ble Supreme Court in the case of ***Ajay Kumar Chaudhary Vs. Union of India through its Secretary (Civil Appeal No.1912 of 2015***) where Hon'ble Supreme Court had observed that *"the currency of a Suspension Order should not extend beyond three months if within this period the Memorandum of Charges/Chargesheet is not served on the delinquent officer/employee; if the Memorandum of Charges/Chargesheet is served a reasoned order must be passed for the extension of the suspension."*

5. It has been further submitted that in the meanwhile the petitioner made several representations against Mr. Umesh Singh, Jail Superintendent, District Jail, Moradabad and also preferred a writ petition before this Court being writ petition No.2998 of 2021 praying for expeditious disposal of the inquiry on the

basis of the multiple complaints made by the petitioner.

6. In pursuance to the complaints made by the petitioner the respondents instituted an inquiry, which was conducted by Deputy Inspector General of Police (Jail) Agra/Meerut Zone. The enquiry was conducted on the basis of the complaint submitted by the petitioner and in the exhaustive 81 page report dated 9.3.2021 was submitted finding the petitioner to be involved in certain acts of misconduct apart from other officials. All the allegations made by the petitioner have been duly enquired into and all the documents in this regard have been considered and the allegations against Umesh Singh, the then Superintendent of Jail District Jail, Moradabad were found proved with regard to not properly maintaining the Superintendent Order Book, did not look after the maintenance of administration and security of the Jail, did not properly look into the recommendations made by the doctors, did not take interest in sending regular reports to the office of Inspector General Of Police (Jail) etc. while the petitioner along with Umesh Singh, Superintendent of Jail have been found to be involved in taking money from the Jail inmates for exempting them from assigining hard duties, money was taken to give the inmates the benefit of independent sleeping place in light of the overcrowding, not taking care to allot the duties of the Jail Warder, and despite being overall in charge of Jail the petitioner did not take care to stop the illegal activities.

7. A perusal of the enquiry report indicates that the enquiry was conducted on the basis of complaints made by the petitioner, and even during the enquiry he was associated and also produced documents along with his letter dated 26/09/2020 before the enquiry officer. His statement was also recorded during the said enquiry. A number of under trial prisoners have deposed before the enquiry where they have said that they had to pay money for being allotted a new Barrack having less number of prisoners, gambling was prevalent in the Jail for which money was paid, money was taken for meeting the prisoners by the relatives, the attitude of the officers were extremely bad and the under trial prisoners were regularly abused.

8. It has also been taken note that the District Judge when visited the Jail on 23/05/2020 has recorded that the petitioner was not present during the said visit, and no cooperation was given by him and therefore recorded that he should improve his work.

9. The enquiry report further indicates that there are serious allegations against the petitioner which deserves a regular enquiry. The details and the manner in which the enquiry officer has considered the charges belies the allegations with regard to the proceedings being malafide. There are statements of various inmates who have deposed before the enquiry officer and supported the allegations made therein. Various documents have been looked into and findings recorded, and it cannot be said that the said enquiry was a sham or has been done in an objective to implicate the petitioner.

10. The impugned charge sheet dated 27/07/2021 contains 3 charges against the petitioner, the first charge relates to Jailer Report Book, which according to the Jail manual should have been handed over to

his successor, but the same was not done by him as informed by his successor in his statement, and consequently he has been charged with delerection of official duty and the same is also violative of the service rules governing the conduct of the petitioner. In support of the said charges and the statement of his successor Mritunjaya Panday and the statement of the petitioner himself recorded in the said enquiry has been relied.

11. In the charge No.2 it has been alleged that the jail authorities used to recieve illegal gratification from the jail inmates for showing favour for not to imposing any punishment while those who could not pay had to suffer punishment, and the petitioner did nothing to stop this corrupt practice. In evidence of the said charges various documents maintained and the Jail are said to be the evidence of the aforesaid charge.

12. That third charge relates to the posting of two Bandirakshaks to the canteen of the jail, and money was extorted by them from the inmates for providing canteen services and the petitioner, who was incharge had posted the two persons and, therefore, was deliberately negligent in his duties.

13. In the present writ petition the prayer has been made for quashing charge sheet as well as all the proceedings in pursuance of the charge sheet dated 27/07/2021.

14. It was submitted by the counsel of the petitioner that the charge sheet deserves to be set aside inasmuch as the copy of the report has neither been furnished to the petitioner nor the petitioner was afforded an opportunity before submission of the said report. The argument raised by the petitioner is misconceived, apart from being contrary to the facts on record. There is no provision in the service rules, nor any legal provision could be shown by the counsel of the petitioner that there is the requirement of handing over of the preliminary enquiry report to the delinquent employee before submission of the charge sheet. The documents required by the petitioner can be sought from the enquiry officer during inquiry subject to his demonstrating that the said documents are necessary and relevant for his defence. Considering the fact that the petitioner participated in the preliminary enquiry and adduced evidence which has been duly considered by the enquiry officer it cannot be said that the enquiry has been done behind his back or that he has not been given any opportunity, coupled with the fact that a copy of the enquiry report is already annexed along with the writ petition it cannot be pleaded that he was not supplied with a copy of the said report and hence the argument of the petitioner in this regard are without merit and hance rejected.

15. The second argument raised was that the entire proceedings are vitiated in as much as they have been initiated at the behest of Principal Secretary/Additional Chief Secretary (Jail Administration and Reform Service Uttar Pradesh again. It is the case of the petitioner that whenever departmental proceedings have been initiated against the petitioner the same have been initiated at the behest of respondent no.1 while no material is placed before us so as to indicate as to how respondent No.1 was responsible for the same so as to conclude that he was responsible for initiation of the said Department proceedings. In order to sustain

an allegation of malafide there should exist suficient evidence in this regard clearly pointing out towards his conduct, which can demonstate that he has acted malafidely. Merely, alleging that a person has acted malafidely is not sufficient to sustain any such allegation.

16. The subsequent disciplinary proceedings were also subjected to challenge before this court and by means of an order dated 29/06/2005 passed in writ petition No.4656 of 2005 and interim protection was granted to the petitioner. A perusal of the said order indicates that the Court considered the fact that similar proceedings/inquiry have culminated in favour of the petitioner earlier and no opportunity was given to the petitioner before reinitiating the proceedings. A perusal of the previous orders of this Court indicates that the grounds of malafide against respondent no.1, were neither pleaded nor considered and it seems that whenever disciplinary proceedings were initiated against the petitioner he has raised the bogey of malafide referring to the incident occuring in the year 2000 when respondent No.1 was posted as District Magistrate, Meerut where the petitioner was also posted as Jailer. There is no details disclosed by the petitioner as to how respondent No.1 is responsible for the proceedings initiated against the petitioner.

17. In the present case, this Court has perused the repeated complaints made by the petitioner against his superior, the Jail Superintendent. He did not move just one complaint, but repeatedly continued to make such complaints to all the higher authorities, which clearly indicates that the petitioner has a personal grudge against him, which he wanted to vindicate, rather than uphold the rule of law.

18. Presently, undoubtedly respondent no.1 is posted as Principal Secretary, Additional Chief Secretary (Jail Administration and Reform Services) and signed the impugned charge sheet, but Avnish Kumar Awasthi has not been made a party in the writ petition which is the foundation of such allegation, is missing in the writ petition and consequently, they cannot be as such considered. In this regard as per the judgement of the Hon'ble Supreme Court in the case of ***Ratnagiri Gas and Power (P) Ltd. v. RDS Projects Ltd. [Ratnagiri Gas and Power (P) Ltd. v. RDS Projects Ltd., (2013) 1 SCC 524]*** , it was held that when allegations of mala fides are made, the persons against whom the same are levelled need to be impleaded as parties to the proceedings to enable them to answer the charge. A judicial pronouncement declaring an action to be mala fide is a serious indictment of the person concerned that can lead to adverse civil consequences against him. The Court held as under: (SCC p. 538, para 27):

"27. There is yet another aspect which cannot be ignored. As and when allegations of mala fides are made, the persons against whom the same are levelled need to be impleaded as parties to the proceedings to enable them to answer the charge. In the absence of the person concerned as a party in his/her individual capacity it will neither be fair nor proper to record a finding that malice in fact had vitiated the action taken by the authority concerned. It is important to remember that a judicial pronouncement declaring an action to be mala fide is a

serious indictment of the person concerned that can lead to adverse civil consequences against him. Courts have, therefore, to be slow in drawing conclusions when it comes to holding allegations of mala fides to be proved and only in cases where based on the material placed before the Court or facts that are admitted leading to inevitable inferences supporting the charge of mala fides that the Court should record a finding in the process ensuring that while it does so, it also hears the person who was likely to be affected by such a finding."

19. Despite the fact that respondent no.1 personally has not been made a party, there was no requirement of further examination of the contention of the petitioner with regard to the malafide, but this Court on persuation by the counsel for the petitioner has considered the said allegations and it is noticed that respondent no.1 was summoned by the National Commission for SC/ST at the behest of the petitioner, but there is no mention in the entire writ petition as to whether any adverse comments were made by the said Commission on respondent No.1 or that he suffered on account of being summoned by the said Commission. Merely because a person is summoned by a Commission cannot by itself have any adverse effects on the said person unless some observations are made against him by the Commission. It was also very well known that Commission are also vested with powers of enquiry, and in exercise of the said power they are routinely required to summon officials to produce documents or record their statements with regard to any incident. Merely because a person is summoned at the behest of any individual, it cannot be said that the person so summoned would become inimical to the person at who's instance he was summoned. There is no averment in the entire petition that respondent No.1 subsequent to the year 2000 has taken any steps, or passed any orders against the petitioner so as to conclude that he has developed inimical relations to the petitioner, and would take all steps necessary to harm his career. Merely because in his official capacity as District Magistrate, the respondent No.1 has lodged an FIR and taken cognizance of an incident which occurred in the year 2000 in the premises of the Jail, which was clearly his responsibility, it cannot be concluded that respondent no.1 has become inimical to the petitioner. There is no averment that he had personally intimidated the petitioner, or any other fact has been brought on record indicating how respondent no.1 acted beyond the colour of his office so as to show that he had acted malafide against the petitioner. The test laid down by the Hon'ble Supreme Court for considering the allegations of malafide/personal bias has to be considered on the facts and circumstances of each case. In the case of ***Rajneesh Khajuria v. Wockhardt Ltd., (2020) 3 SCC 86*** this aspect of the matter was considered and observed:-

"16. The act of transfer can be unfair labour practice if the transfer is actuated by mala fide. The allegations of mala fides have two facets -- one malice in law and the other being malice in fact. The challenge to the transfer is based upon malice in fact as it is an action taken by the employer on account of two officers present in Conference. In a judgment in State of Bihar v. P.P. Sharma [State of Bihar v. P.P. Sharma, 1992 Supp (1) SCC 222 : 1992 SCC (Cri) 192] , this Court held that mala fide means want of good faith, personal bias, grudge, oblique or improper motive or ulterior purpose. The plea of mala fides

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. As far as second aspect is concerned, there is a power of transfer vested in the employer in terms of letter of appointment. Even in terms of the provisions of the Act, the transfer by itself cannot be said to be an act of unfair labour practice unless it is actuated by mala fides. Therefore, to sustain a plea of mala fides, there has to be an element of personal bias or an oblique motive. This Court held as under: (SCC pp. 260 & 264-65, paras 50-51 & 59)

"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 fides 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.

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59. Malice in law could be inferred from doing of wrongful act intentionally without any just cause or excuse or without there being reasonable relation to the purpose of the exercise of statutory power. Malice in law is not established from the omission to consider some documents said to be relevant to the accused. Equally reporting the commission of a crime to the Station House Officer, cannot be held to be a colourable exercise of power with bad faith or fraud on power. It may be honest and bona fide exercise of power. There are no grounds made out or shown to us that the first information report was not lodged in good faith. State of Haryana v. Bhajan Lal [State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426] is an authority for the proposition that existence of deep seated political vendetta is not a ground to quash the FIR. Therein despite the attempt by the respondent to prove by affidavit evidence corroborated by documents of the mala fides and even on facts as alleged no offence was committed, this Court declined to go into those allegations and relegated the dispute for investigation. Unhesitatingly, I hold that the findings of the High Court [Prem Prakash Sharma v. State of Bihar, 1990 SCC OnLine Pat 105 : (1990) 2 PLJR 404 (2)] that FIR gets vitiated by the mala fides of the Administrator and the charge-sheets are the results of the mala fides of the informant or investigator, to say the least, is fantastic and obvious gross error of law."

19. In another judgment in ***Prabodh Sagar v. Punjab SEB [Prabodh***

Sagar v. Punjab SEB, (2000) 5 SCC 630 : 2000 SCC (L&S) 731] , it was held by this Court that the mere use of the expression "mala fide" would not by itself make the petition entertainable. The Court held as under: (SCC p. 640, para 13)

"13. ... Incidentally, be it noted that the expression "mala fide" is not meaningless jargon and it has its proper connotation. Malice or mala fides can only be appreciated from the records of the case in the facts of each case. There cannot possibly be any set guidelines in regard to the proof of mala fides. Mala fides, where it is alleged, depends upon its own facts and circumstances. We ourselves feel it expedient to record that the petitioner has become more of a liability than an asset and in the event of there being such a situation vis-à-vis an employee, the employer will be within his liberty to take appropriate steps including the cessation of relationship between the employer and the employee. The service conditions of the Board's employees also provide for voluntary (sic compulsory) retirement, a person of the nature of the petitioner, as more fully detailed hereinbefore, cannot possibly be given any redress against the order of the Board for voluntary retirement. There must be factual support pertaining to the allegations of mala fides, unfortunately there is none. Mere user of the words "mala fide" by the petitioner would not by itself make the petition entertainable. The Court must scan the factual aspect and come to its own conclusion i.e. exactly what the High Court has done and that is the reason why the narration has been noted in this judgment in extenso. ..."

20. In a judgment in ***HMT Ltd. v. Mudappa [HMT Ltd. v. Mudappa, (2007) 9 SCC 768]*** , quoting from earlier judgment of this Court in *State of A.P. v. Goverdhanlal Pitti [State of A.P. v. Goverdhanlal Pitti, (2003) 4 SCC 739*] , it was held that "legal malice" or "malice in law" means "something done without lawful excuse". It is an act done wrongfully and wilfully without reasonable or probable cause, and not necessarily an act done from ill feeling and spite. The Court held as under: **(HMT Ltd. case [HMT Ltd. v. Mudappa, (2007) 9 SCC 768] , SCC pp. 775-76, para 24)**

"24. The Court also explained the concept of legal mala fides. By referring to Words and Phrases Legally Defined, 3rd Edn., London Butterworths, 1989 the Court stated: (Goverdhanlal case [State of A.P. v. Goverdhanlal Pitti, (2003) 4 SCC 739] , SCC p. 744, para 12)

"12. The legal meaning of malice is "ill will or spite towards a party and any indirect or improper motive in taking an action". This is sometimes described as "malice in fact". "Legal malice" or "malice in law" means "something done without lawful excuse". In other words, "it is an act done wrongfully and wilfully without reasonable or probable cause, and not necessarily an act done from ill feeling and spite. It is a deliberate act in disregard of the rights of others."'

It was observed that where malice was attributed to the State, it could not be a case of malice in fact, or personal ill will or spite on the part of the State. It could only be malice in law i.e. legal mala fides. The State, if it wishes to acquire land, could exercise its power bona fide for statutory purpose and for none other. It was observed that it was only because of the decree passed in favour of the owner that the proceedings for acquisition were necessary and hence, notification was issued. Such an action could not be held mala fide."

21. In a judgment in *Union of India v. Ashok Kumar [Union of India v. Ashok Kumar, (2005) 8 SCC 760 : 2006 SCC (L&S) 47]* , it has been held that allegations of mala fides are often more easily made than proved, and the very seriousness of such allegations demands proof of a high order of credibility. The Court held as under: (SCC p. 770, para 21)

"21. Doubtless, he who seeks to invalidate or nullify any act or order must establish the charge of bad faith, an abuse or a misuse by the authority of its powers. While the indirect motive or purpose, or bad faith or personal ill will is not to be held established except on clear proof thereof, it is obviously difficult to establish the state of a man's mind, for that is what the employee has to establish in this case, though this may sometimes be done. The difficulty is not lessened when one has to establish that a person apparently acting on the legitimate exercise of power has, in fact, been acting mala fide in the sense of pursuing an illegitimate aim. It is not the law that mala fides in the sense of improper motive should be established only by direct evidence. But it must be discernible from the order impugned or must be shown from the established surrounding factors which preceded the order. If bad faith would vitiate the order, the same can, in our opinion, be deduced as a reasonable and inescapable inference from proved facts. (S. Pratap Singh v. State of Punjab [S. Pratap Singh v. State of Punjab, (1964) 4 SCR 733 : AIR 1964 SC 72] .) It cannot be overlooked that the burden of establishing mala fides is very heavy on the person who alleges it. The allegations of mala fides are often more easily made than proved, and the very seriousness of such allegations demands proof of a high order of credibility. As noted by this Court in E.P. Royappa v. State of T.N. [E.P. Royappa v. State of T.N., (1974) 4 SCC 3 : 1974 SCC (L&S) 165] courts would be slow to draw dubious inferences from incomplete facts placed before them by a party, particularly when the imputations are grave and they are made against the holder of an office which has a high responsibility in the administration. (See Indian Railway Construction Co. Ltd. v. Ajay Kumar, (2003) 4 SCC 579."

22. *The allegation in the complaint is that the transfer was actuated for the reason that the employee had raised voice against removal of Shri Khare from the venue of a Conference. The officers present in the said Conference were the Regional Manager or Sales Manager, whereas order of transfer was passed by Mr Suresh Srinivasan, General Manager-HR. It is an admitted fact that there is power of transfer with the employer. The allegations are against the persons present in the Conference but there is no allegation against the person who has passed the order of transfer. None of the named persons including the person present in the Conference have been impleaded as parties to rebut such allegations. Since the order of transfer is in terms of the letter of appointment, therefore, the mere fact that the employee was transferred will per se not make it mala fide. The allegations of mala fides are easier to levy than to prove.*

23. *Therefore, the allegation that the transfer of the appellant was an act of unfair labour practice without impleading the person who is said to have acted in a mala fide manner is not sustainable.*

24. The other aspect which deserves due consideration is the fact that the petitioner has challenged the charge sheet,

which is akin to a show cause notice, inasmuch as the person has liberty to reply to the charges framed against him and only subsequently after consideration of the evidence and other material produced by the delinquent employee, the disciplinary authority proceeds to consider the veracity of the charges and gives his finding whether the charges are proved or not. Charge sheet by itself does not have any adverse inference to the delinquent employee and does not invite any civil consequences and consequently as such, without there being any jurisdictional issue, a challenge to the charge sheet would not normally not lie and this Court would not interfere in exercise of the powers under article 226 of the Constitution of India.

In the case of ***Ministry of Defence v. Prabhash Chandra Mirdha***, **(2012) 11 SCC 565** : it has been held as under:-

24. Ordinarily a writ application does not lie against a charge-sheet or show-cause notice for the reason that it does not give rise to any cause of action. It does not amount to an adverse order which affects the right of any party unless the same has been issued by a person having no jurisdiction/competence to do so. A writ lies when some right of a party is infringed. In fact, charge-sheet does not infringe the right of a party. It is only when a final order imposing the punishment or otherwise adversely affecting a party is passed, it may have a grievance and cause of action. Thus, a charge-sheet or show-cause notice in disciplinary proceedings should not ordinarily be quashed by the court. (Vide State of U.P. v. Brahm Datt Sharma [(1987) 2 SCC 179 : (1987) 3 ATC 319 : AIR 1987 SC 943] , Bihar State Housing Board v. Ramesh Kumar Singh [(1996) 1 SCC 327] , Ulagappa v. Commr. [(2001) 10 SCC 639 : AIR 2000 SC 3603 (2)] , Special Director v. Mohd. Ghulam Ghouse [(2004) 3 SCC 440 : 2004 SCC (Cri) 826 : AIR 2004 SC 1467] and Union of India v. Kunisetty Satyanarayana [(2006) 12 SCC 28 : (2007) 2 SCC (L&S) 304] .)

25. Thus, the law on the issue can be summarised to the effect that the charge-sheet cannot generally be a subject-matter of challenge as it does not adversely affect the rights of the delinquent unless it is established that the same has been issued by an authority not competent to initiate the disciplinary proceedings. Neither the disciplinary proceedings nor the charge-sheet can be quashed at an initial stage as it would be a premature stage to deal with the issues. Proceedings are not liable to be quashed on the grounds that proceedings had been initiated at a belated stage or could not be concluded in a reasonable period unless the delay creates prejudice to the delinquent employee. Gravity of alleged misconduct is a relevant factor to be taken into consideration while quashing the proceedings.

26. Learned Counsel for the petitioner has also extensively taken this Court to various documents to indicate that the charges itself are false and in fact the erstwhile Superintendent of Jail against whom the petitioner had made a complaint, was responsible for misconduct and even the allegations have been proved to be correct in the said enquiry, while none of the charges against the petitioner can be sustained. In this regard, this Court is of the view that it is the domain of the enquiry officer to conduct the enquiry, and this Court would not go into the merits of the charges in writ petition under Article 226 of the Constitution of India. The law in this regard it is settled in the case of In ***State of***

Punjab v. Ajit Singh, (1997) 11 SCC 368, where the Hon'ble Supreme Court set aside the order of quashing the charge-sheet and held as under:

"We are, however, of the view that the High Court was in error in setting aside the charge-sheet that was served on the respondent in the disciplinary proceedings. In doing so the High Court has gone into the merits of the allegations on which the charge-sheet was based and even though the charges had yet to be proved by evidence to be adduced in the disciplinary proceedings. The High Court, accepting the explanation offered by the respondent, has proceeded on the basis that there was no merit in the charges levelled against the respondent. We are unable to uphold this approach of the High Court."

27. Lastly, it is submitted that the petitioner ought to be protected in light of the fact that he is exposed to the illlegality in the organisation and consequently he should be given the protection as is given to a whistleblower. It is submitted that the proceedings initiated cannot be initiated against the petitioner as it is on his complaints that the entire enquiry was undertaken and in turn he has been chargesheeted.

28. In order to consider as to whether the petitioner is entitled to be given protection as a whistleblower, it has to be seen as to whether he has made the complainant's and disclosures in public interest, and whether such disclosure was bonafide and not actuated by malice or with the intention to satisfy the personal grudge against a colleague or senior.

29. The Hon'ble Supreme Court has considered the aforesaid aspect in the case of **Manoj H.Mishra vs Union Of India & Ors (2013) 6 SCC 313** decided on 9 April, 2013 as under:-

*"33. .....One of the basic requirements of a person being accepted as a "**whistle blower**" is that his primary motive for the activity should be in furtherance of public good. In other words, the activity has to be undertaken in public interest, exposing illegal activities of a public organization or authority. The conduct of the appellant, in our opinion, does not fall within the high moral and ethical standard that would be required of a bona fide "**whistle blower**.*

34. In our opinion, the appellant without any justification assumed the role of vigilante. We do not find that the submissions made on behalf of the respondents to the effect that the appellant was merely seeking publicity are without any substance. The newspaper reports as well as the other publicity undoubtedly created a great deal of panic among the local population as well as throughout the State of Gujarat. Every informer can not automatically be said to be a bonafide "whistle blower". A "whistle blower" would be a person who possesses the qualities of a crusader. His honesty, integrity and motivation should leave little or no room for doubt. It is not enough that such person is from the same organization and privy to some information, not available to the general public. The primary motivation for the action of a person to be called a "whistle blower" should be to cleanse an organization. It should not be incidental or byproduct for an action taken for some ulterior or selfish motive.

35. We are of the considered opinion that the action of the appellant herein was not merely to highlight the shortcomings in the organization. The appellant had indulged in making scandalous remarks by alleging that there was widespread corruption within the organization. Such allegations would clearly have a deleterious effect throughout the organization apart from casting shadows of doubts on the integrity of the entire project. It is for this reason that employees working within the highly sensitive atomic organization are sworn to secrecy and have to enter into a confidentiality agreement. In our opinion, the appellant had failed to maintain the standard of confidentiality and discretion which was required to be maintained. In the facts of this case, it is apparent that the appellant can take no advantage of the observations made by this Court in the case of Indirect Tax Practitioners' Association (supra). This now brings us to the reliance placed by the appellant on the judgment in the case of Gujarat Steel Tubes Case (supra). In our opinion, the ratio in the aforesaid judgment would have no relevance in the case of the appellant. We are not satisfied that this is a case of "glaring injustice".

30. A perusal of the complaints made by the petitioner will make it abundantly clear that they have not been made in public interest but have singled out and target the Jail Superintendent posted along with the petitioner. A perusal of the complaint dated 27/04/2020 clearly indicates that he has highlighted irregularities committed by one Umesh Singh who was posted as Jail superintendent, and the complaints dated 30/04/2020 and 16.6.2020 also contains similar allegations. Considering the facts of the present case in light of the pronouncement of the Apex Court in the case of ***Manoj H. Mishra (supra)***, this Court is of the considered view that the petiitoner cannot be given the statuts or consequent protection of whistle blower.

31. The enquiry report also considers and contains sufficient material on the basis of which the petitioner had been chargesheeted, and it cannot be said at this stage that the allegations are false or not made out. The petitioner having made allegations against a particular individual cannot claim the status of a whistleblower in as much as according to the judgement of the Hon'ble Apex Court the same has not been made in bonafide manner, inasmuch as he has himself been found to be implicated in the irregularities which he himself has brought to fore. It is only when the matter is inquired into by a regular enquiry, then only the entire facts can be brought forth and this Court would not interfere to prevent the conduct of such an enquiry.

32. In light of the above discussions, the writ petition is bereft of merits and is accordingly **dismissed**. However, it is provided that the respondents shall proceed to conclude the enquiry expeditiously in accordance with law.

33. Useful assistance provided in the matter by Mr. Himanshu Mishra, Law Clerk Trainee is appreciated.

(2022)01ILR A1098
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 24.12.2021

BEFORE

THE HON'BLE RAJNISH KUMAR, J.

Service Single No. 15591 of 2019

Anil Kumar Puri ...Petitioner
Versus
Distt. Coop. Bank Ltd. Sitapur & Anr. ...Respondents

Counsel for the Petitioner:
Manoj Kumar, Sridhar Awasthi

Counsel for the Respondents:
A.R. Khan

A. Service Law-Constitution of India, 1950-Article 226-challenge to-withhold of retiral benefits-petitioner received all retiral benefits except the amount of gratuity after retirement-on account of misconduct amount of gratuity had been adjusted towards NPA loan accounts of eight borrowers-However, nothing has been proved against the petitioner-Even the enquiry have not been done properly as to whether the loans were wrongly and illegally disbursed by the petitioner-no effort has been made by the respondents to recover the amount after retirement of petitioner-therefore, amount of gratuity of the petitioner has wrongly and illegally been forfeited-executive instructions are not having statutory character, and therefore cannot be termed as law within the meaning of Article 300A. (Para 1 to 22)

B. It is settled that the Gratuity and pension are not bounties and an employee gets these benefits by his long continuous fulfilled unblemished service as such it is hard earned benefit of an employee and is in the nature of property. the right of property cannot be taken away without due process of law as per provisions of Article 300-A of the Constitution of India. Without any proof of misconduct or loss by the petitioner, the same could not have been adjusted towards NPA loan account merely on the basis of a resolution passed against the petitioner. (Para 15, 16)

The writ petition is allowed. (E-6)

List of Cases cited:

1. Whirlpool Corp. Vs Registrar of Trade Marks (1998) 8 SCC 1

2. Radha Krishna Industries Vs St. of H.P. & ors. (2021) 6 SCC 771

3. St. of Jharkhand & ors. Vs Jitendra Kumar Srivastava & anr.. Civil Appeal No. 6770 of 2013

4. Amod Prasad Rai Vs St. of U.P. & anr. (2009) SCC OnLine All. 2624

5. Baroda Uttar Pradesh Gramin Bank Vs U.O.I. & ors. (2019) SCC OnLine All. 4945

6. Remington Rand of India Ltd. Vs The Workmen (1970) AIR SC 1421 The Mgmt of Tournamulla Estate Vs Workmen (1973) AIR SC 2344

7. Secretary, O.N.G.C. Ltd. & anr. Vs V.U. Warrier (2005) 5 SCC 245

8. M/S SAIL Ltd. Vs Raghbendra Singh & ors., SC, SLP No. 11025 of 2020

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

1. Heard, Shri Sudeep Seth, learned Senior Advocate assisted by Shri Sridhar Awasthi, learned counsel for the petitioner and Shri A.R.Khan, learned counsel for the respondents.

2. The writ petition under Article 226 of the Constitution of India has been filed challenging the resolution No.43 passed by opposite party no.2/Committee of Management, District Cooperative Bank Limited, Sitapur in its meeting dated 07.10.2013. The further prayer has been made for commanding the opposite parties to release and pay the retiral benefits of Gratuity amounting to Rs.6,17,905/- alongwith accrued interest thereon w.e.f. 01.07.2013 till the date of payment at the rate of 18% per annum to the petitioner.

3. The brief facts, for adjudication of the case, are that the petitioner retired on 30.06.2013 on attaining the age of superannuation from the services of respondent no.1/District Cooperative Bank Limited, Sitapur. The petitioner was informed about his retirement on 30.06.2013 by means of an order dated 22.06.2013 and his relieving on the said date as the charge was to be handed over to one Shri Ashish Shukla, who had to assume the charge. The petitioner received all the retiral benefits except the amount of Gratuity after his retirement on 30.06.2013. The petitioner made a representation dated 29.10.2013 and reminder dated 12.06.2014 to the opposite party no.1 for payment of his Gratuity. Thereafter he made a representation on 19.12.2014 to the opposite party no.2 for payment of Gratuity. On the representation dated 19.12.2014 of the petitioner the Chairman of the Bank made an endorsement to the Secretary/Chief Executive Officer of the Bank to make payment of Gratuity forthwith. However the Gratuity was not paid to the petitioner.

4. The petitioner approached to the Regional Labour Commissioner, who on an objection raised by the opposite party no.1 regarding jurisdiction of the Regional Labour Commissioner (Central), Lucknow, closed the case by means of the order dated 30.09.2015 and granted liberty to the petitioner to raise his grievance before the appropriate forum at State of U.P. Thereafter the petitioner approached the Assistant Labour Commissioner, Lucknow under the Payment of Gratuity Act 1972 vide P.G. Case No.124 of 2015. He disposed of the case by means of order dated 16.08.2016 on the ground that he has no jurisdiction. The petitioner thereafter approached to the Registrar, Cooperative Societies, U.P., Lucknow by means of the application dated 23.12.2016, who by means of the order dated 04.01.2017 directed to the Secretary/Chief Executive Officer to take necessary action for immediate payment of the amount of Gratuity of the petitioner. The response thereof was sent to the opposite party no.1 on 10.02.2017 informing that the post retiral benefits i.e. Provident Fund, Group Insurance and Leave Encashment have been paid to the petitioner on various dates. It had further been informed that the amount of Gratuity of Rs.6,17,905/- has been received from the Insurance Company but since the loan amount disbursed by the petitioner had not been recovered from the borrowers and the petitioner had not made any effort to recover the loan amount and the said accounts have become non performing assets (NPA) as such under the provisions of Payment of Gratuity Act 1972 the amount of Gratuity had been adjusted towards the NPA loan accounts of 8 borrowers. It was also informed that in case borrowers deposit the loan amount, the said amount would be paid/released to the petitioner. A certificate dated 24.04.2015 had been issued by the Mahmoodabad Branch of the Bank with respect to the three loan accounts in which the amount had been deposited from time to time.

5. The petitioner again approached to the Additional Commissioner and Additional Registrar (Banking), Cooperative Societies, U.P., Lucknow for payment of amount of Gratuity by means of representation dated 04.08.2018. In response thereof it was informed to the petitioner by means of letter dated 13.02.2019 that the amount of Gratuity had been adjusted against the NPA loan accounts of the defaulter borrowers and there being a provision to settle the dispute

under Section 70 of the U.P. Cooperative Societies Act 1965 and Chapter 18 of Rules 1968, therefore he may institute an Arbitration Case. Therefore the petitioner had approached this court by means of writ petition Service Single No.14287 of 2019, but he was not having the resolution dated 07.10.2013, therefore he got the writ petition dismissed as withdrawn with liberty to file a fresh. Thereafter filed the present writ petition challenging the resolution dated 07.10.2013 passed by the opposite party no.2.

6. I have considered the submissions of learned counsel for the parties and perused the records.

7. An objection was raised by learned counsel for the respondents that the petitioner has an alternative and statutory remedy of Arbitration under Section 70 of the U.P. Cooperative Societies Act 1965 and Chapter 18 of Rules 1968, therefore, the writ petition is not maintainable and liable to be dismissed on this ground. Learned counsel for the petitioner had submitted that the amount of gratuity of petitioner has been adjusted towards NPA loan accounts without jurisdiction or authority of law. The remedy provided under Section 70 is also not efficacious remedy and the petitioner will be required to deposit 1% of the fee amount for raising his grievance in Arbitration and the petitioner is already on the verge of starvation and famine as pension is not admissible to him, therefore the petitioner has approached to this court by means of the present writ petition and he may not be relegated to alternative remedy and writ petition may be decided on merit.

8. It appears that this plea was not raised when the writ petition had come up for hearing for the first time on 29.05.2019 and the time for counter affidavit was sought and granted by this court. This court had also directed to list the case in the category of senior citizen as the petitioner is a senior citizen. The petitioner had retired after attaining the age of superannuation on 30.06.2013. The various correspondences and proceedings were undertaken by the petitioner since his retirement as disclosed above. But it appears that the respondents had not taken this plea. The counter and rejoinder affidavits have been exchanged. This court also finds that purely question of law is involved in the present writ petition as to whether the amount of Gratuity can be adjusted towards NPA loan accounts after retirement or not without any authority of law. That too without inquiry and proved misconduct of an employee. Normally the writ petition should not be entertained if there is an alternative remedy but there is no bare also. Therefore in the facts and circumstances of the case, this court feels it appropriate to decide the case on merit instead of relegating it to the alternative remedy.

9. The Hon'ble Supreme Court in the case of **Whirlpool Corporation Versus Registrar of Trade Marks; (1998) 8 SCC 1**, has held that in an appropriate case inspite of availability of alternative remedy, High Court may still exercise its jurisdiction in at least three contingencies i.e. where the writ petition seeks enforcement of any of the fundamental rights or where there has been a violation of principles of natural justice or where the orders or proceedings are wholly without jurisdiction or vires of an Act is challenged. The same view has been taken by the Hon'ble Supreme Court in the case of

Radha Krishna Industries Versus State of Himachal Pradesh and others; (2021) 6 SCC 771, and it has been held that the rule of exhaustion of statutory remedies is a rule of policy, convenience and discretion.

10. The sole issue which falls for considering in this writ petition is as to whether after retirement of an employee of the respondent-bank, his amount of Gratuity can be adjusted towards NPA loan accounts or not. The petitioner had retired after attaining the age of superannuation on 30.06.2013 from the service of the respondent no.1. Thereafter all the retiral dues except the Gratuity were paid to the petitioner. It appears that the Gratuity has not been paid to the petitioner on the basis of a resolution dated 07.10.2013 of the respondent no.2 which reads as under:-

"निर्णय

सचिव बैंक द्वारा अवगत कराया गया कि शाखा प्रबन्धक शाखा अटरिया के द्वारा प्रस्तुत रिपोर्ट के अनुसार श्री अनिल पुरी सेवा निवृत्त कर्मचारी वर्ग–2 के द्वारा उनके शाखा अटरिया कार्यकाल में श्रीमती सुमन यादव को स्वीकृत के0सी0सी0 ऋण की राशि मु0 31213.00 एव श्री लक्ष्मण को स्वीकृत के0सी0सी ऋण की राशि मु0 38117.00 रू0 दिनांक 30.09.2013 तक की वसूली होना शेष है। इसी प्रकार शाखा महमूदाबाद कार्यकाल में श्री पुरी द्वारा स्वीकृत दीनदयाल योजना के 8 सदस्यों की राशि मु0 652168.00 रू0 ट्रेडिंग लोन 3 सदस्यों को स्वीकृत मु0 241105.00 रू0 एवं उपभोक्ता ऋण सदस्य को मु0 69000.00 रू0 बकाये में पड़ चुका है। ट्रेंडिग लोन एवं उपभोक्ता ऋण के ब्याज की गणना 30.06.2013 तक एवं दीनदयाल योजना के ब्याज की गणना 31.01.2013 तक की गई।

सर्वसम्मति से उपरोक्त वितरित ऋणों की जांच उप महाप्रबन्धक सं0नि0/विकास से कराने का निर्णय लिया जाता है। जांच कराने के उपरान्त वसूली की कार्यवाही सम्पादित की जाये। अग्रेतर यह भी निर्णय लिया जाता है कि भविष्य में किसी कर्मचारी के सेवा निवृत्त होने से कम से कम दो वर्ष पूर्व उसके कार्यकालों में बांटे गये ऋणों के सापेक्ष बकाया पडे ऋणों की स्थिति की मुख्यालय स्तर पर समीक्षा कर ली जाये। सचिव बैंक अनुवर्ती कार्यवाही संपादित करे।"

11. The aforesaid resolution indicates that the decision was taken, after retirement of the petitioner, for conducting an inquiry in regard to the disbursement of the loans by the petitioner during his posting. It as also decided that after inquiry the proceedings of recovery should be made. The further decision was taken that in future at least prior to two years of retirement of any employee, the assessment of the status of the loans disbursed during his period may be made. Therefore the decision was taken for conducting an inquiry in regard to the loans disbursed by the petitioner. Thereafter the proceedings of recovery were to be undertaken. However, in pursuance thereof the amount of Gratuity of the petitioner has been adjusted towards NPA loan accounts on account of alleged none repayment of the loans without any enquiry and proof of misconduct of petitioner.

12. The services of the petitioner are governed by the U.P. Cooperative Societies Employees' Service Regulations, 1975 (hereinafter referred as Regulations 1975). Section 95 provides for the Gratuity. Regulation 95 is extracted below:-

"95-Gratuity-(i) A co-operative society may by a resolution of its committee of management allow to its employees gratuity equivalent to not more than 15 days, salary for every complete year of service (part of the year if less than six months, to be ignored), if he has attained the age of superannuation or has been declared invalid for service by the Civil Surgeon or has been retrenched or dies while in service:

Provided he has put in ten years of continuous service immediately preceding retirement, invalidation, or retrenchment or five years' continuous service in case of

death, as the case may be. In case of death, gratuity shall be payable to the nominee of the employee and in the absence of nomination, to his legal heir;

(ii) For purposes of meeting its obligations under clause(1), a co-operative society ma create Employees' Gratuity Fund."

13. In view of Regulation 95, an employee would be entitled to Gratuity equivalent to not more than 15 days salary for every complete year of service, if he has attained the age of superannuation provided he has put in ten years of continuous service immediately preceding retirement. Admittedly the aforesaid Regulations are applicable and the Payment of Gratuity Act 1972 is not applicable on the petitioner. The petitioner had rendered the requisite service mentioned in the aforesaid Regulation. He retired on attaining the age of superannuation on 60 years of age. Therefore, the petitioner is entitled for Gratuity in accordance with the aforesaid Regulations. However the same has not been paid on the ground that certain loan accounts disbursed by the petitioner have become NPA. The petitioner has annexed a certificate dated 24.04.2015 of the concerned Branch of the Bank to indicate that the repayment was being made time to time in three loan accounts. However, as stated, after adjustment of the amount of Gratuity of the petitioner towards the said loan accounts no repayment is being made.

14. It has been stated by the respondent-bank in his letter dated 10.02.2017 to the Additional Commissioner and Additional Registrar (Banking), Cooperative Societies, U.P. Lucknow that in case the loan amount is deposited, the amount of Gratuity would be paid to the petitioner. This court fails to understand as to when the amount has already been adjusted against the loan accounts as to how and why the same would be repaid by the defaulters. Nothing has been brought before this court to show that any inquiry was made in pursuance of the resolution dated 07.10.2013 in regard to the loan accounts and anything was found against the petitioner. However it appears that no effort has also been made in accordance with law for recovery of the loan amounts in regard to the loans in question.

15. It is settled that the Gratuity and pension are not bounties and an employee gets these benefits by his long continuous fulfilled unblemished service as such it is hard earned benefit of an employee and is in the nature of property. The right of property cannot be taken away without due process of law as per provisions of Article 300-A of the Constitution of India. Nothing has been brought before this court to show any provision of law for withholding, forfeiting or adjustment of amount of gratuity towards NPA loan accounts. That too without any proof of misconduct or loss by the petitioner during his period of service. Therefore the same could not have been adjusted towards NPA loan accounts or withheld/forfeited merely on the basis of a resolution of the respondent no.2 passed against the petitioner or any executive instructions.

16. The Hon'ble Supreme Court considered the issue in the case of **State of Jharkhand and others Versus Jitendra Kumar Srivastava and another; Civil Appeal No.6770 of 2013** and held as under in paragraphs 14 and 15 by means of

judgment and order dated 14th August, 2013;-

"**14**. Article 300 A of the Constitution of India reads as under:

"**300A Persons not to be deprived of property save by authority of law**. No person shall be deprived of his property save by authority of law."

Once we proceed on that premise, the answer to the question posed by us in the beginning of this judgment becomes too obvious. A person cannot be deprived of this pension without the authority of law, which is the Constitutional mandate enshrined in Article 300 A of the Constitution. It follows that attempt of the appellant to take away a part of pension or gratuity or even leave encashment without any statutory provisions and under the umbrage of administrative instruction cannot be countenanced.

15. It hardly needs to be emphasized that the executive instructions are not having statutory character and, therefore, cannot be termed as "law" within the meaning of aforesaid Article 300A. On the basis of such a circular, which is not having force of law, the appellant cannot withhold; even a part of pension or gratuity. As we noticed above, so far as statutory rules are concerned, there is no provision for withholding pension or gratuity in the given situation. Had there been any such provision in these rules, the position would have been different."

17. A Coordinate Bench of this court in the case of **Amod Prasad Rai Versus State of U.P. and another; 2009 SCC OnLine All.2624**, in regard to a case covered under the payment of Gratuity Act, 1972 held that withholding the Gratuity is not permissible under any circumstance other than those enumerated in section 4(6) of the Act and right to gratuity is a statutory right. Section 4(6) of the said Act provides that the gratuity of an employee, can be forfeited only on account of termination for any act, willful omission or negligence causing any damage or loss or destruction of property belonging to the employer, termination for his riotous or desorderly conduct or any other act of violence on his part or offence involving moral turpitude, provided that such offence is committed by him in the course of his employment. The respondents have failed to show even any such ground for withholding or forfeiting the Gratuity of the petitioner against the petitioner.

18. In the case of **Baroda Uttar Pradesh Gramin Bank Versus Union of India and others; 2019 SCC OnLine All.4945** considering the issue as to whether the employers are entitled to recover a sum of Rs.5 lakhs, ordered to be realized from the terminal benefits of the employee in enforcement of the punishment order made in disciplinary proceedings, by deducting it from gratuity payable to the employee? The Coordinate Bench held that the gratuity cannot be forfeited without any power and also held that what is not attachable in enforcement of a decree of any court, civil, revenue or criminal, cannot be made available to the employer to recover his dues, howsoever, lawfully adjudged. Thus gave answer to the aforesaid question in negative.

19. Learned counsel for the respondents has relied on **Remington Rand of India Ltd. Versus The Workmen; AIR 1970 Supreme Court 1421, The Management of Tournamulla Estate Versus Workmen; AIR 1973 Supreme Court 2344, Secretary, O.N.G.C. Ltd. and another Versus**

V.U.Warrier; (2005) 5 SCC 245 and M/S. Steel Authority of India Ltd. Versus Raghbendra Singh and others decided on 15th December 2020, by the Supreme Court in Special Leave to Appeal (C) No.(s) 11025 of 2020.

20. These all cases relied by learned counsel for the respondents are not applicable on the facts and circumstances of the present case because in the said cases the forfeiture of gratuity has been upheld on account of misconduct resulting in damage of the property of the employer, whereas in the present case nothing has been proved against the petitioner, even the enquiry as proposed in the impugned resolution appears to have not been done to find out as to whether the loans were wrongly and illegally disbursed by the petitioner to the ineligible persons. It appears that no effort has also been made by the respondents to recover the amount after retirement of the petitioner.

21. In view of above, this court is of the considered view that the amount of gratuity of the petitioner has wrongly and illegally been forfeited and adjusted towards the NPA Loan Accounts without authority of law. Therefore the writ petition is liable to be allowed.

22. The writ petition is **allowed**. The impugned resolution dated 07.10.2013 is hereby quashed so far as it relates to the petitioner. The respondents are directed to release and pay the amount of Gratuity of Rs.6,17,905/- to the petitioner alongwith interest @ 8% per annum w.e.f. the date of retirement of petitioner till the date of payment within a period of six weeks from the date of production of a certified copy of this order. No order as to costs.

(2022)01ILR A1105
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 24.12.2021

BEFORE

THE HON'BLE VIVEK CHAUDHARY, J.

Service Single No. 33425 of 2019

Anurag Mehrotra ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Anurag Mehrotra (In Person)

Counsel for the Respondents:
C.S.C., Deepak Seth

A. Civil Law - Constitution of India, 1950-Article 226-challenge to-denial of incentive bonus-representation rejected deliberately as no reason is given for denying the said benefit to the petitioner-It is settled that the State Government cannot issue executive instructions with regard to the field already occupied by the G.P.F. Rules of 1985 issued under Article 309 of the Constitution of India, it also cannot modify the said rules by an executive order-no power left in the State Government to withdraw or repeal the said bonus in exercise of its executive power-In exercise of power under Rule 11(1) of G.P.F. Rules of 1985 the State Government cannot withdraw the incentive bonus required to be given under Rule 12 of the G.P.F. Rules of 1985-Therefore the said executive order is declared to be ultra-vires and is set aside. (Para 1 to 16)

The writ petition is allowed. (E-6)

List of Cases cited:

1. A.K Bhatnagar & ors. Vs U.O.I. & ors. (1991) 1 SCC 544

2. K. Kuppusamy & anr. Vs St. of T.N. & ors. (1998) 8 SCC 469

3. B.N. Nagarajan & ors. etc. Vs St. of Karnataka & ors. etc (1979) AIR SC 1676: (1979) 4 SCC 507

4. U.O.I. Vs S.S. Soma Sundaram Vishwanath (1988) AIR SC 2255

5. Paluru Ram Krishnaiah Vs U.O.I. (1990) AIR SC 166

6. St. of U.P. & ors. Vs Smt. Shakuntla Shukla (1999) ACJ 1295

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

1. Petitioner has filed present writ petition challenging the order dated 13.11.2019 by which the representation of petitioner is rejected by respondent no.2 and further prayer for grant of bonus under the Incentive Bonus Scheme as per Rule 12(1) of General Provident Fund (U.P.), Rules, 1985 (hereinafter referred to as 'G.P.F. Rules of 1985'). Petitioner is also claiming interest on delayed payment of dearness allowances which have been deposited by the respondents deliberately with delay in his provident fund account with a further a prayer that respondents 2, 4 and 5 be directed to calculate the interest on the payment made by respondent no. 2 in his provident fund account for the month of November, 1994, December, 1994, October, 1997, March, 2001 and March, 2009 on his deposit amount. The main grievance of the petitioner is that he is denied payment of incentive bonus under Rule 12(1) of G.P.F. Rules of 1985.

2. I have heard petitioner in person and learned Standing Counsel for the State at length.

3. Submission of petitioner is that the G.P.F. Rules of 1985 were framed and brought into operation in exercise of power under Article 309 of Constitution of India. The same was notified on 29.10.1985. Petitioner submits that the impugned order dated 13.11.2019 does not give any reason for denying benefits of Rule 12(1) of G.P.F. Rules of 1985 to the petitioner under which he is entitled for bonus. He further submits that even in the counter affidavit no reason is given for denying the said benefit to the him.

4. During course of argument learned Standing Counsel placed before this Court a Government Order dated 05.07.1986 which provides payment of interest at the rate of 12% per annum on the amount deposited in the general fund for the year 1986-87. Clause 2 of the said government order further provides that w.e.f. 01.04.1988 no incentive bonus shall be separately payable. Further reliance is placed upon Rule 11(1) of the G.P.F. Rules of 1985.

5. For convenience it would be appropriate to quote Rule 11(1) and 12(1) of the G.P.F. Rules of 1985 and Government Order dated 05.07.1986 which reads:-

General Provident Fund (U.P.) Rules, 1985

11. Interest.- (1) Subject to the provisions of sub-rule (5) Government shall pay to the credit of the account of a subscriber interest at such rate as may be determined for each year by the Government of India.

12. Incentive Bonus Scheme.- (1) A subscriber who does not withdraw any money from the amount standing to his credit in the Fund by way of advance under Rule 13 or withdrawn under Rule 16 during

the preceding three years, shall be entitled to a bonus at the rate of 1 per cent on the entire balance at his credit on the last day of the year.

उत्तर प्रदेश सरकार
वित्त (सामान्य) अनुभाग--4
संख्या-4 जी0 आई0-28/दस-86-59-81
लखनऊ, दिनांक 5 जुलाई 1986

जनरल प्रोविडेंट फण्ड (उ० प्र०) रूल्स 1985 नियम 11(1) तथा कन्ट्रीब्यूटी प्रोविडेन्ड फण्ड (उ० प्र०) रूल्स, के नियम (11) (1) मे नियम 9 के प्राविधानों के अनुसार राज्यपाल महोदय घोषित करते हैं कि जनरल प्रोविडेंट फण्ड (उ0प्र0), कन्ट्रीब्यूटी प्रोविडेन्ड फण्ड (उ० प्र०) तथा उत्तर प्रदेश कन्ट्रीब्यूटी प्रोविडेन्ड फण्ड पेंशन इंश्योरेंस फण्ड ने अभिदाताओं (सब्सक्राइबर्स) द्वारा वित्तीय वर्ष 1986-87 में जमा की गई तथा उनके नाम अवशेष पर ब्याज की दर सभी खातों में जमा कुल राशि पर 12 प्रतिशत (बारह प्रतिशत) प्रति वर्ष होगी। यह हर पहली अप्रैल, १९८६ से प्रारम्भ होने वाले वित्तीय वर्ष के दौरान लागू होगी।

2. 1 अप्रैल, 1988 से आरम्भ होने वाले वित्तीय वर्ष में तथा बाद के वर्षों में कोई प्रोत्साहन बोनस अलग से देय नहीं होगा। जिन मामलों में वर्ष के दौरान अन्तिम निष्कासन (फाइनल या नान रिफ़ंडेबुल) लिया जायेगा, उसमे ली गई धनराशि के एक प्रतिशत के बराबर निकटतन रूपए तक पूर्णांकित राशि, अविदाता के खाते में जमा की जाने वाली ब्याज को राशि में से घटा दी जायेगी।

3. ब्याज की गणना हेतु एक सदयोगणक (रेडीरेकनर) संलग्न है
भवदीय
सचिव
जे0पी0सिंह

7. Petitioner submits that G.P.F. Rules of 1985 are framed in exercise of power under Article 309 of the Constitution of India and any change in the same can be made only by exercising power under Article 309 of the Constitution of India. Rules framed under Article 309 of the Constitution of India cannot be modified or changed in exercise of executive powers by the State Government. In support of his case, petitioner relies upon the following judgments:-

(i) A.K. Bhatnagar and Others Vs. Union of India and Others; '(1991) 1 SCC 544';

(ii) K. Kuppusamy and Another Vs. State of T.N. and Others; '(1998) 8 SCC 469';

(iii) B.N. Nagarajan and others etc. Vs. State of Karnataka and Others etc.; 'AIR 1979 SC 1676: (1979) 4 SCC 507' .

8. Article 162 and Article 309 of the Constitution of India read as under:-

"162. Extent of executive power of State*-Subject to the provisions of this Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws.*

Provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by the Constitution or by any law made by Parliament upon the Union or authorities thereof.

309. Recruitment and conditions of service of persons serving the Union or a State*- Subject to the provisions of this*

Constitution, Acts of the appropriate Legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State:

Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor [***] of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this article, and any rules so made shall have effect subject to the provisions of any such Act."

9. A perusal of Article 309 of the Constitution of India shows that under the same, the Governor of a State or such person as he may direct in case of services and posts in connection with the affairs of the State can frame rules regulating the recruitment and the conditions of service of persons appointed and the same shall be effective until provision in that behalf is made by or under an Act of a appropriate legislature. Therefore, any rule framed under Article 309 can only be replaced by an Act of an appropriate legislature. It cannot be replaced by an executive order under Article 162 of the Constitution of India. The law in this regard is well settled by the Supreme Court as well as by this Court in number of cases. Suffice would be refer to judgment passed in case of **'Union of India Vs. S.S. Soma Sundaram Vishwanath'** reported in [**AIR 1988 SC 2255**] in which the Supreme Court held:-

"It is well settled that the norms regarding recruitment and promotion of the officer belong to the Civil Service can be laid down either by a law made by the appropriate Legislature or by the rules made under the proviso to Article 309 of the Constitution of India or by means of executive instructions issued in Article 73 of the Constitution of India in the case of Civil Services in the Government of India and under Article 162 of the Constitution of India in the case of Civil Services in the State Governments, ***if there is a conflict between the executive Instructions and the rules made under the proviso to Article 309 of the Constitution of India the rule made under the proviso to Article 309 of the Constitution of India prevail and if there is a conflict between the rules made under the proviso to Article 309 of the Constitution of India and the law made by the appropriate Legislature, the latter prevails." (emphasis added)***

10. Similarly in case of ***'Paluru Ram Krishnaiah Vs. Union of India'*** reported in ***[AIR 1990 SC 166],*** comparing rules framed under Article 309 and executive instructions, the Court held:-

"It is thus apparent that an executive instruction could make a provision only with regard to matter which was not covered by the Rules and that such executive instruction could not override any provision of the Rule."

11. Both the aforesaid judgments are also considered by Division Bench of this Court in case of **'State of U.P. and Others Vs. Smt. Shakuntla Shukla' reported in [1999 ACJ 1295].** Reaffirming the same, the Division Bench held:-

".....Executive instructions operating in a field cease to be operative as soon as the

field is covered by any statutory rules or rules made under the proviso to Article 309 of the Constitution....."

12. Further in paragraph-3 of the judgment passed in case of ***'K. Kuppusamy and Another Vs. State of T.N. and Others? reported in [(1998) 8 SCC 469***], the Court held:-

"3. The short point on which these appeals must succeed is that the Tribunal fell into an error in taking the view that since the Government had indicated its intention to amend the relevant rules, its action in proceeding on the assumption of such amendment could not be said to be irrational or arbitrary and, therefore, the consequential orders passed have to be upheld. We are afraid this line of approach cannot be countenanced. The relevant rules, it is admitted, were framed under the proviso to Article 309 of the Constitution. They are statutory rules. Statutory rules cannot be overridden by executive orders or executive practice. Merely because the Government had taken a decision to amend the rules does not mean that the rule stood obliterated. Till the rule is amended, the rule applies. Even today the amendment has not been effected. As and when it is effected ordinarily it would be prospective in nature unless expressly or by necessary implication found to be retrospective. The Tribunal was, therefore, wrong in ignoring the rule."

13. In paragraph-25 of the judgment passed in case of ***'B.N. Nagarajan and others etc. Vs. State of Karnataka and Others etc' reported in [AIR 1979 SC 1676: (1979) 4 SCC 507],*** the Court held:-

"25……..In other words, the regularisation order, in colouring the appointments of promotees as Assistant Engineers with permanence would run counter to the rules framed under Article 309 of the Constitution of India. What could not be done under the three sets of Rules as they stood, would thus be achieved by an executive fiat. And such a course is not permissible because an act done in the exercise of the executive power of the Government, as already stated, cannot override rules framed under Article 309 of the Constitution.? ***(emphasis added)***

14. From the above it is settled that the State Government cannot issue executive instructions with regard to the field already occupied by the G.P.F. Rules of 1985 issued under Article 309 of the Constitution of India. It also cannot modify the said rules by an executive order. The G.P.F. Rules of 1985 provides for 1% bonus. There is no power left in the State Government to withdraw or repeal the said bonus in exercise of its executive power. The same can only be withdrawn or modified in exercise of power under Article 309 of the Constitution of India. The Government Order dated 05.07.1986 is not issued in exercise of power under Article 309 but is issued in exercise of its executive power. Rule 11(1) of the G.P.F. Rules of 1985 only empowers the State Government the subscribed interest at such rate as may be determined for each year by Government of India. In exercise of power under Rule 11(1) of G.P.F. Rules of 1985 the State Government cannot withdraw the incentive bonus required to be given under Rule 12 of the G.P.F. Rules of 1985. Therefore, the Government Order dated 05.07.1986 to the extent it withdraws the benefit of bonus required to be paid under

Rule 12 of the G.P.F. Rules, 1985 is declared to be ultra-vires and is set aside.

15. In view thereof, the impugned order dated 13.11.2019 cannot stand and is set aside.

16. Respondents are directed to calculate and pay bonus to the petitioner as per Rule 12(1) of G.P.F. Rules of 1985 along with permissible interest thereon within a period of two months from today. Respondents are also directed to decide the claim of petitioner with regard to delayed payment of interest on his dearness allowances and provident fund account within the aforesaid period of two months.

17. With the aforesaid, present writ petition is ***allowed.***

(2022)01ILR A1110
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.01.2022

BEFORE

THE HON'BLE ROHIT RANJAN AGARWAL, J.

Writ-A No. 7780 of 2019
With Writ-A Nos. 9058 of 2019, 6340 of 2020 & 17224 of 2019

Mohd. Saleem ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Shiv Ram Misra, Sri Shashi Nandan, Sr. Advocate

Counsel for the Respondents:
C.S.C., Sri Greesh Kumar Malviya, Sri Shesh Kumar, Sri G.K. Singh, Sr. Advocate

A. Civil Law - Constitution of India, 1950-Article 226-challenge to-STAT order-the State Transport Authority had deliberately granted permits to the five petitioners, though they were lower in merit and having vehicles of lower model-grant of permit was totally against the dictum of Apex Court as the relevant date was the date of consideration of the applications and not the date on which it was made before the authority-Moreover, the transport authority was required to consider all the applications strictly on the basis of comparative merit which has been ignored and applications of the contesting respondents had been overlooked and the appeals and revisions filed by the contesting respondents were dismissed solely on the ground of limitation-the act or the rules does not bar any remedy to the applicants whose applications are refused or they can be non-suited on the technical ground-the Act or the Rule nowhere puts embargo upon the entertainment of any appeal or revision filed with any delay-Hence, no interference required as the order passed by the STA was in defiance to the directions of the Court.(Para 1 to 49)

The writ petition is dismissed. (E-6)

List of Cases cited:

1. A.S. Jalaluddin Vs Balasubramania Bus Services (P) Ltd.

2. MSRTC Vs Mangrulpir Jt. Motor Service(P) Ltd. (1971) 2 SCC 222

3. Esskey Roadways (Firm) Vs Annadhakrishnan Bus Service (1994) 6 SCC 71

4. Collector, Land Acqusition, Anantnag & anr. Vs Mst. Katiji & ors. (1987) 2 SCC 107

5. Zila Bus Operators. Assn. & ors.. Vs St. of U.P & ors., Writ-A No 9993 of 2018

6. Automotive Prarivahan Sahkari Samiti Ltd. & anr. Vs State Transport Appellate Tribunal & anr. (Misc. Single No . 6760 of 2019)

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

1. Heard Sri Shashi Nandan, Senior Advocate, assisted by Sri Shiv Ram Misra, learned counsel for the petitioner, learned Standing Counsel for respondents No.1 to 3, Sri G.K.Singh, Senior Advocate, assisted by Sri Greesh Kumar Malviya for private respondent Nos.4 and 5 and Sri Shek Kumar Srivastava, learned counsel for respondent No.6.

2. These are four connected writ petitions which are in regard to the dispute among the private bus operators for inter state route known as Datia-Chatarpur-via-Jhansi Naugaon. Writ petition nos. 7780 of 2019 and 9058 of 2019 have been filed assailing the order dated 09.05.2019 passed in Appeal No. 28 of 2015 by the State Transport Appellate Tribunal, U.P. at Lucknow (hereinafter referred as STAT), while writ petition no. 6340 of 2020 assails the order dated 27.02.2020 passed by the STAT passed in Appeal No. 33 of 2015. While in writ petition no. 17224 of 2019 a civil misc. recall application has been filed by one Tanveer Ahamad for recalling the order dated 01.11.2019 passed by this Court.

3. As the controversy raised in all four connected writ petitions are similar, thus, these petitions are heard together and decided by a common order with the consent of counsel for the parties.

4. Facts in brief for better appreciation of the controversy are herein stated as under;

5. That within the jurisdiction of State Transport Authority there is a route known as Datia-Chatarpur-via-Jhansi Naugaon route. Total length of the route is 158 kilometres out of which 87 kilometres lie within the jurisdiction of State of U.P., while 71 kilometres stretch in the jurisdiction of State of M.P.

6. For providing transport facilities to the public of inter state route a reciprocal agreement was arrived between the State of U.P. and State of M.P. on 21.11.2006 which was published in the gazette. According to the agreement, route at serial no. 86 provided for ten permits with twenty trips to be allotted to the private bus operators of State of U.P. Pursuant to which several applications were filed for grant of permits for the route by the petitioners as well as the contesting respondents.

7. For the first time, on 17.03.2011 the applications came up for consideration before the STA, and the authority rejected all the applications on the ground that some of the information in column of form no. S.R. 20 was not filled by the applicants. Against the decision of STA, appeals were filed before the STAT and vide order dated 21.02.2013 all the appeals filed by the different applicants were allowed and matter was remitted to the STA for reconsideration.

8. The order of STAT was subject matter of challenge before this Court through various writ petitions, being writ petition nos. 13684 of 2013, 13686 of 2013, 13689 of 2013, 13687 of 2013 and 12157 of 2013, on the ground that power of the STAT was co-extensive with that of STA and it should have decided the matter itself without remitting the matter to the STA. On 5/12-3/2013 all the writ petitions were allowed by this Court and matter was remitted to the STAT who was required to decide the same on merits. STAT on 10.05.2013 dismissed all the appeals.

Against the said decision several writ petitions being writ petition nos. 29556 of 2013, 30406 of 2013, 30404 of 2013, 30396 of 2013 and 30401 of 2013, were filed challenging the order of STAT.

9. This Court on 19.12.2014 allowed all the writ petitions and remitted the matter to the STA for reconsideration with specific directions to consider the applications of the applicants after considering the comparative merit. The entire exercise was to be concluded within six weeks from the date of the judgment.

10. STA on 16.04.2015 granted five permits to petitioners of writ petition no. 6340 of 2020. The said decision was questioned by one Rauf Khan by filing writ petition no. 28044 of 2015. This Court on 15.05.2015 dismissed the said writ petition on the ground of alternative remedy and required him to file an appeal against the decision of STA.

11. Rauf Khan filed Appeal No. 28 of 2015 before the STAT. One Gulsher Ahamad also filed an appeal and revision on 01.06.2015 against the order of STA dated 16.04.2015 before the STAT. The appeal and revision of Gulsher Ahamad was dismissed by the STAT on 10.04.2019 and 13.02.2019 on the ground of limitation, as it was filed beyond the period of limitation i.e. 30 days as the STA had taken decision on 16.04.2016.

12. Appeal and revision filed by one Garima Agarwal against the order of STA was also dismissed by the STAT on 26.09.2018 on the ground of limitation. However, appeal filed by Rauf Khan was heard by the STAT, and was partly allowed on 09.05.2019 granting permit to Rauf Khan, Gulsher Ahamad and Garima Agarwal. Further, the permit granted earlier to Mohd. Saleem, Mohd. Ayub and Tanveer Ahamad was cancelled on the ground that Rauf Khan, Gulsher Ahamad and Garima Agarwal were higher in merit and their vehicles were of later models. The order of STAT was challenged in writ petition nos. 7780 of 2019 and 9058 of 2019 by Mohd. Saleem and Mohd. Ayub, as far as the permits granted to Gulsher Ahamad and Garima Agarwal are concerned, on the ground that the order dated 09.05.2019 failed to take note of the fact that appeals and revisions filed by Gulsher Ahamad and Garima Agarwal stood dismissed by the earlier order of the STAT on the ground of limitation and their case cannot be considered.

13. Gulsher Ahamad filed writ petition nos. 17224 of 2019 and 17222 of 2019 challenging the order passed by the STAT dismissing his appeal and revision on the ground of limitation dated 13.02.2019 and 10.04.2019. On 01.11.2019 and 13.11.2019 this Court while allowing the writ petition directed the STAT to decide the appeal and revision on merit. In the said writ petition counsel of Mohd. Saleem, petitioner no. 1 in writ petition no. 6340 of 2020, had appeared, however, a recall application has been filed in writ petition no. 17224 of 2019 by one Tanveer Ahamad.

14. Acting on the remand order passed by this Court, the appellate authority on 27.02.2020 partly allowed the appeal of Gulsher Ahamad and remitted the matter to the STA for reconsideration on merits, setting aside the earlier decision of STA dated 16.04.2015. While the revision of Gulsher Ahamad, after remand order was passed by this Court, has been dismissed. It is against the order dated 27.02.2020 passed on the appeal of Gulsher Ahamad

that writ petition no. 6340 of 2020 has been filed by the petitioners in that writ petitions. Hence, the following writ petitions have been preferred.

15. Sri Shashi Nandan, learned Senior Counsel, appearing for the petitioners in writ petition nos. 7780 of 2019, 6340 of 2020 and 9058 of 2019, submitted that once the appeal and revision of Gulsher Ahamad and Garima Agarwal stood dismissed by the STAT in the year 2018 and 2019, no question arose for allowing and granting them permit by the STAT in the appeal filed by Rauf Khan vide order dated 09.05.2019. He next contended that the provisions of Limitation Act does not apply in the proceedings under the Motor Vehicle Act 1988 (hereinafter called as the "Act of 1988'), the power to condone the delay does not vest in the authorities.

16. It was next urged that Section 89 of the Act of 1988 only provides for filing of an appeal by an aggrieved person whose application is refused by the State or the Regional Transport Authority for grant of permit. While Section 90 empowers the STAT to entertain the revision where no appeal lies. According to him, there is no power vested with the Tribunal to condone the delay in challenging the order passed by the State or Regional Transport Authority.

17. Once the Tribunal had found that there was delay in filing the appeal and revision by the two applicants namely Gulsher Ahmad and Garima Agarwal, the Tribunal was not justified in granting permit to both these applicants granting benefit in the appeal filed by Rauf Khan. He, however, categorically submitted that the petitioners are not claiming any relief against Rauf Khan and their grievance is only against Gulsher Ahamad and Garima Agarwal.

18. On the question of recall application filed in writ petition no. 17224 of 2019, learned Senior Counsel submitted that it was filed without issuing notice to all the applicants and the present recall application was at the behest of one Tanveer Ahamad, who was not heard before the delay was condoned and the matter was remitted to the Tribunal to hear the matter afresh. Apart from the plea of limitation no other point was canvassed by the learned Senior Counsel challenging as to the merits of the case.

19. Sri G.K. Singh, learned Senior Counsel, appearing for the contesting respondent Gulsher Ahamad, in all connected matters, submitted that the U.P. Motor Vehicle Rules, 1998 (hereinafter referred as the "Rules of 1998'), Rule 60 provides that every decision of the Regional Transport Authority and the State Transport Authority shall be published on the notice board by the Secretary of the concerned authority. He then contended that Rule 91 provides for the period for filing the appeal which is 30 days and has to be counted from the date of receipt of the order. As in the present case the information which was received by Gulsher Ahamad was on 06.05.2015 about the order dated 16.04.2015, thus, the appeal was within the prescribed time limit.

20. He next submitted that second proviso to Section 90 of the Act of 1988 provides that the revision may be entertained after the prescribed period of 30 days upon an application subject to satisfaction of Tribunal, thus, it is wrong to say that no provision for condonation of

delay has been provided under the Act. He next urged that the controversy relating to the condonation of delay and appeals being filed beyond the period of limitation has been dealt in case of Mansoor Beg Vs. State of U.P. (Misc. Single No. 13158 of 2019) decided on 09.05.2019, Mohd. Javed Vs. State Transport Appellate Tribunal and 2 others (Writ-A No. 13418 of 2019) decided on 26.08.2019, Smt. Roshan Ara Vs. State Transport Appellate Tribunal and 2 others (Writ-A No. 15933 of 2019) decided on 14.10.2019 and Ganesh Prasad Sahu Vs. State Transport Appellate Tribunal, Lucknow and others (Misc. Single No. 25976 of 2018) alongwith connected matters decided on 10.12.2019.

21. He then submitted that after the remand by this Court on 19.12.2014 the STA was duty bound to consider all the applications on the basis of comparative merit, but the authority proceeded to grant the permit ignoring the fact that on the date of consideration the vehicles which were of later models of Gulsher Ahamad and Garima Agarwal and Rauf Khan were not considered and placed at a lower merit than those of the petitioners whose vehicles were of older model, and were placed at a higher merit. According to the learned Senior Counsel appearing for the respondent the controversy regarding the limitation as raised by the petitioners' counsel has been set to rest by the decisions as quoted above and the Tribunal has wrongly interpreted provisions of Section 89 and 90 of the Act of 1988 and has not considered the Rule 91 of the Rules of 1998.

22. Having heard the rival submissions and upon careful consideration of the material on record, before proceeding to decide the matter on merits, relevant extract of the provisions of Act of 1988 and Rules of 1998 are necessary for better appreciation of the case. Section 89 and 90 of the Act of 1988 are extracted hereasunder;

"89. Appeals.--(1) Any person-

(a) aggrieved by the refusal of the State or a Regional Transport Authority to grant a permit, or by any condition attached to a permit granted to him, or

(b) aggrieved by the revocation or suspension of the permit or by any variation of the conditions thereof, or

(c) aggrieved by the refusal to transfer the permit under section 82, or

(d) aggrieved by the refusal of the State or a Regional Transport Authority to countersign a permit, or by any condition attached to such countersignature, or

(e) aggrieved by the refusal of renewal of a permit, or

(f) aggrieved by the refusal to grant permission under section 83, or

(g) aggrieved by any other order which may be prescribed,

may, within the prescribed time and in the prescribed manner, appeal to the State Transport Appellate Tribunal constituted under sub-section (2), who shall, after giving such person and the original authority an opportunity of being heard, give a decision thereon which shall be final.

1[(2) The State Government shall constitute such number of Transport Appellate Tribunals as it thinks fit and each such Tribunal shall consist of a judicial officer who is not below the rank of a District Judge or who is qualified to be a Judge of the High Court and it shall exercise jurisdiction within such area as may be notified by that Government.]

(3) Notwithstanding anything contained in sub-section (1) or sub- section

(2), every appeal pending at the commencement of this Act, shall continue to be proceeded with and disposed of as if this Act had not been passed.

Explanation.-For the removal of doubts, it is hereby declared that when any order is made by the State Transport Authority or the Regional Transport Authority in pursuance of a direction issued by the Inter-State Transport Commission under clause (c) of sub-section (2) of section 63A of the Motor Vehicles Act, 1939 (4 of 1939), as it stood immediately before the commencement of this Act, and any person feels aggrieved by such order on the ground that it is not in consonance with such direction, he may appeal under sub-section (1) to the State Transport Appellate Tribunal against such order but not against the direction so issued.

90. Revision.--The State Transport Appellate Tribunal may, on an application made to it, call for the record of any case in which an order has been made by a State Transport Authority or Regional Transport Authority against which no appeal lies, and if it appears to the State Transport Appellate Tribunal that the order made by the State Transport Authority or Regional Transport Authority is improper or illegal, the State Transport Appellate Tribunal may pass such order in relation to the case as it deems fit and every such order shall be final:

Provided that the State Transport Appellate Tribunal shall not entertain any application from a person aggrieved by an order of a State Transport Authority or Regional Transport Authority, unless the application is made within thirty days from the date of the order:

Provided further that the State Transport Appellate Tribunal may entertain the application after the expiry of the said period of thirty days, if it is satisfied that the applicant was prevented by good and sufficient cause from making the application in time:

Provided also that the State Transport Appellate Tribunal shall not pass an order under this section prejudicial to any person without giving him a reasonable opportunity of being heard."

23. Likewise Rule 60 and Rule 91 of the Rules of 1998 are extracted hereasunder;

"60. Publication of the decisions of the Transport Authority--Every decision of each Regional Transport Authority and the State Transport Authority shall be published on the notice board by the Secretary of the concerned Regional Transport Authority or the State Transport Authority, as the case may be for information to the persons concerned.

91. Appeal against the order of State or Regional Transport Authority.--(1) The authority to decide an appeal against the order of the State Transport Authority or a Regional Transport Authority in respect of matters dealt with in clauses (a), (b), (c), (d), (e), (f) and (g) of sub-section (1) of Section 89 shall be the State Transport Appellate Tribunal, constituted under sub-section (2) of Section 89.

(2) Any person aggrieved by an order referred to in sub-rule (1) may prefer an appeal within thirty days of the receipt of the order to the Chairman of the said Tribunal in the form of memorandum along with the requisite number of envelopes and necessary postage stamps for making service of notices through registered post on the respondents other than the State and Regional Transport Authorities. The

memorandum shall set-forth concisely and under distinct heads the grounds of objection to the order appealed from. The memorandum shall be accompanied by as many copies thereof as there are respondents and shall also be accompanied by a certified copy of the order appealed against.

(3) (i) The appeal may be filed and argued by the appellant himself or by an agent or an Advocate, duly authorised in this behalf. On behalf of the respondent, other than the transport authority, the appeal may be argued by the respondent himself, by an agent or an Advocate duly authorised in this behalf.

(ii) On behalf of the transport authority, the Deputy Transport Commissioner (Tribunal) or an officer of the Transport Department, an agent or an Advocate duly authorised in this behalf by the Transport Commissioner may argue the appeal and may generally appeal", act and plead before the Appellate Tribunal.

(4) Upon receipt of an appeal in accordance with sub-rules (1), (2) and (3), the Tribunal may fix a date within the office hours, for hearing of the appeal giving the transport authority concerned, other respondents, if any and the appellant, not less than thirty days' notice and shall in that case, order the appellant to deposit the fee as specified under Rule 125.

(5) The notice of the date of the hearing shall be given by registered post to the appellant and the respondent, other than the transport authority on the address given in the memorandum of appeal or at any other address that may be filed by them for the purpose. The notice to the transport authority shall be given through the Deputy Transport Commissioner (Tribunal) or through such other person who may be appointed to argue the appeal before the Appellate Tribunal.

(6) The Appellate Tribunal may for sufficient reason, restore an appeal dismissed in default or for want of prosecution on an application moved by an appellant within fifteen days from the date of the knowledge of the order of dismissal of the appeal.

(7) The appellant shall, within fourteen days of the receipt of the intimation of the date of hearing, submit to the Tribunal copies of the documents upon which the appellant proposes to rely. The respondent shall have a right to file papers, on which he relies, within a week of the filing of the documents by the appellant.

(8) The Secretary, State Transport Authority, or Regional Transport Authority may give copies of any document connected with an appeal preferred under sub-rule (2) on payment of fee as specified under Rule 125.

(9) The Secretary, State Transport Authority, or Regional Transport Authority may allow any person interested in an appeal to inspect the file connected with such appeal on payment of fee as specified under Rule 125."

24. From careful reading of Section 89 of the Act of 1988 it is clear that any person aggrieved by the refusal of the State or a Regional Transport Authority to grant a permit, or by any condition attached to a permit granted to him, or by any condition attached to a permit granted to him or aggrieved by revocation or suspension of permit, or by any portion of condition, refusal to transfer the permit, refusal of State or Regional Transport Authority to countersign of permit or any condition attached to such counter signature or refusal of renewal of a permit or refusal to grant permission under Section 83 may file an appeal with the STAT.

25. Likewise Section 90 of the Rules of 1998 deals with making an application to STAT against an order of State Transport Authority or Regional Transport Authority against which no appeal lies. The first proviso to Section 90 provides that no revision application shall be entertained unless it is made within 30 days from the date of order.

26. Second proviso to Section 90 provides leverage to the STAT for entertaining application after expiry of 30 days, if it is satisfied that the applicant was prevented by good and sufficient cause from making an application in time.

27. The Rules of 1998 having been framed under the provisions of the Act of 1988 read with Section 21 of General Clauses Act, 1987. Rule 60 provides for publication of every decision of the Regional Transport Authority and State Transport Authority on the notice board by the concerned Secretary for information to the persons concerned. Rule 91 (2) provides for procedure for filing an appeal by any aggrieved person before the STAT against the order of the STA or Regional Transport Authority within 30 days of the receipt of the order, meaning thereby that the period of limitation shall start running from the date of receipt of the order and not from the date of passing of the order.

28. This case has chequered history and initially applications filed by the bus operators for plying on Datia-Chatarpur-via-Jhansi-Naugaon route for the first time came for consideration in the year 2011. As the application stood rejected on technical ground the decision was challeged before the Tribunal, which allowed and remanded the matter to the STA. However, on the writ petitions filed by the different applicants on the ground of power of Tribunal being co-extensive with that of STA, the matter was remanded to the Tribunal to decide the same. However, the appeals were dismissed by the Tribunal, which led to the filing of number of petitions by the bus operators before this Court, and on 19.12.2014 the matter was remitted to the STA for reconsideration, allowing the writ petition with specific direction for considering the comparative merit of each applicant and the entire exercise was to be completed within six weeks.

29. It was from here on that the real dispute arose as the STA on 16.04.2015 considered all the applications and granted permit to five petitioners of writ petition no. 6340 of 2020 on the ground that Mohd. Saleem, Mohd. Ayub and Tanveer Ahamad on the date of earlier meeting held on 17.03.2011 had the latest model of the vehicle, which as on date is old and, thus, 45 days time was given to them to procure vehicle of new model while Hajjan Shamsunnisha Begam and Amir Raza, who had purchased the vehicle in the year 2015 were entitled for the grant of permit. It would be apposite to place the record relied by the STA in its meeting held on 16.04.2015 for the grant of permit considering the applications of various applicants, their vehicles, model and the date of registration. Relevant portion of the said meeting is extracted hereasunder;

"आज के बैठक में परिशिष्ट-ख के क्रमांक-1 से 10 पर एवं परिशिष्ट-ग के क्रमांक-01 से 16 तक उल्लिखित आवेदकों द्वारा प्रस्तावित वाहनों का विवरण निम्नवत् है-

परिशिष्ट-ख के आवेदकों का विवरण				
क्रमांक	आवेदक का नाम	प्रस्तावित वाहन	माडल	पंजीयन तिथि
1	श्री मोहम्मद सलीम	यूपी-93/एटी-5657	फरवरी, 2013	22.4.2013
2	हज्जन समशून निशा बेगम	यूपी-93/एटी-6645	दिसंबर, 2014	27.1.2015
3	गुलशेर अहमद	यूपी-93/एटी-6647	जनवरी, 2015	27.1.2015
4	श्री मुहम्मद अय्युब	यूपी-93/एटी-2569	फरवरी, 2013	30.4.2013
5	श्री आमिर रजा	यूपी-93/एटी-6646	दिसंबर, 2014	27.1.2015
6	श्री संतोष कुमार कोरी हरिजन एवं श्री मो० यूनुस खां	यूपी-95/बी-3286	2011	10.5.2011 सह आवेदक श्री मो० यूनुस खां के नाम पंजीकृत है।
7	श्री रऊफ खां	यूपी-93/एटी-6649	जनवरी, 2015	27.1.2015
8	श्रीमती सफीना बानो	यूपी-93/एटी-6648	नवंबर, 2014	27.1.2015
9	श्री तनवीर अहमद	यूपी-93/टी-6780 यूपी-93/एटी-3193	2011 2011	10.3.2011 10.3.32011
10	श्रीमती गरिमा अग्रवाल	यूपी-93/एटी-6888	दिसंबर, 2014	2.3.2015

परिशिष्ट-ग के आवेदकों का विवरण।

1	श्री जावेद अख्तर	MP-16/P-0358	2014	वाहन क्रय करने का सौदा होने की बात कही गयी है किंतु वह वाहन आवेदक के नाम पंजीकृत नहीं है।
2	श्रीमती शशी अरोरा	UP75/M3515	2012	22.3.2012
3	श्रीमती	MP07/P6	2014	13.10.2014

	आस्था अरोरा	777		
4	श्रीमती सीमा अरोरा	MP07/P5777	2014	9.10.2015
5	श्री राजकुमार अरोरा	UP75/M7652	अगस्त,2014	1.11.2014
6	श्री पवन अरोरा	MP07/P9777	2014	13.10.2014
7	श्री तनवीर अहमद	UP93/AT3193	2011	10.3.2011
8	श्री मो० सलीम	UP93/AT5657	2013	22.4.2013
9	श्री मो० आयूब	UP93/AT2569	2013	30.4.2013
10	श्री मजीद खान			मेसर्स अशोका लीलेंड से वाहन बुक कराने की बात कही गयी।
11	श्री अनूप शिवहरे	MP07/P2255	2009	1.12.2009
12	श्रीमती गरिमा अग्रवाल	UP93/T9556	2011	20.4.2012
13	श्रीमती सिया जानकी	---	---	परमिट स्वीकृत होने पर नई वाहन क्रय कर परमिट प्राप्त करने की बात कही गयी।
14	श्री शहरयार अहमद	UP-93/AT-1732	---	आवेदन पत्र के प्रस्तावित वाहन आवेदक के नाम पंजीकृत होने का प्रमाण प्रस्तुत नहीं किया गया। परमिट स्वीकृत होने पर नई वाहन क्रय कर परमिट प्राप्त करने की बात कही गयी।
15	क्षेत्रीय प्रबंधक, उत्तर प्रदेश राज्य सड़क परिवहन निगम, झांसी।	UP93/T0611	2008	27.3.2008

16	क्षेत्रीय प्रबंधक, उत्तर प्रदेश राज्य सड़क परिवहन निगम, झांसी।	UP93/T2482	2009	4.6.2009

आज की बैठक दिनांक 16.4.2015 में आवेदकों द्वारा प्रस्तावित वाहनों के माडल एवं पंजीयन के आधार पर परिशिष्ट-ख के क्रमांक-10 पर उल्लिखित आवेदिका श्री गरिमा अग्रवाल, क्रमांक-7 पर उल्लिखित आवेदक श्री रऊफ खां, क्रमांक-3 पर उल्लिखित श्री गुलशेर अहमद, क्रमांक-5 पर उल्लिखित श्री आमिर रजा एवं क्रमांक-2 पर उल्लिखित हज्जन समसुननिशा बेगम मेरिट में क्रमशः 1, 2, 3, 4 व 5 पर आते हैं। "

30. From the decision of STA it is clear that Rauf Khan, Gulsher Ahamad and Garima Agarwal, who were having the vehicles of 2014-15 model, were not considered eligible while the petitioners having the older model were granted permit ignoring the directions of this Court dated 19.12.2014, solely on the ground that on the initial date of application i.e. 17.03.2011 they were having the vehicles of the higher model. The challenge made by Gulsher Ahamad to the order of STA was to be seen from the date of receipt of the order as provided under Rule 91 (2), and not from the date of order. The appellate authority recorded a categorical finding that Gulsher Ahamad came to know about the order on 06.05.2015, thus, his appeal was within time and rightly set-aside the order of STA and remanded the matter for reconsideration.

31. Similarly, in the appeal filed by Rauf Khan the Tribunal recorded a categorical finding that the STA had not complied the direction of this Court dated 19.12.2014 and had considered the applications which were lower in merit vis.a.vis. granted permit to those vehicles which were of older models, and vehicles of later models were denied from the zone of consideration. The Tribunal rightly cancelled the permit granted to Mohd. Saleem, Mohd. Ayub and Tanveer Ahamad whose vehicles were of older models while those of Gulsher Ahamad, Rauf Khan and Garima Agarwal were of later models.

32. The law relating to whether the State Transport Authority should consider respective claim on the date of consideration or on the date of application stood decided by the Apex Court as early as in 1965 in case of **A.S. Jalaluddin Vs. Balasubramania Bus Services (P)** Ltd. decided on 31.10.1967 followed by another decision of Apex Court in case of **Maharashtra State Road Transport Corporation Vs. Mangrulpir Jt. Motor Service (P) Ltd. 1971 (2) SCC 222** which was followed and reaffirmed by Apex Court in case of **Esskey Roadways (Firm) Vs. Anandhakrishnan Bus Service 1994 (6) SCC 71**, wherein Apex Court held that the date of consideration of application was relevant and not the date of application. Relevant paragraph nos. 2 and 3 are extracted hereasunder;

"2. The only question that arises for consideration in this appeal is whether the RTA should consider the respective claims as on the date of the consideration or as on the date of the application. The RTA held that the date of application was the relevant date. But the Appellate Authority and the High Court found that the date of the

consideration was the relevant date. Admittedly, the respondent-partnership firm was reconstituted on 1-4-1976 taking one Easwaran as a managing partner and it was registered on 21-5-1976 under Section 69 of the Partnership Act. Admittedly, the managing partner had the technical qualification as on the date of consideration. The managing partner being the technically qualified man, the respondents are entitled to the award of two more marks on the ground of qualifications. The Appellate Tribunal taking that fact into consideration awarded 10 marks and on comparative evaluation, since the respondent by then had three permits, granted the permit to the respondent. The question whether the date of consideration is the relevant date is no longer res integra. This Court in Maharashtra State Road Transport Corpn. v. Mangrulpir Jt. Motor Service (P) Ltd. held that: (SCC p. 230, para 22)

"The High Court was in error on the second question in holding that the Regional Transport Authority would have to consider the respective qualifications of the applicants as on the date of their applications and not as on the date of the actual consideration by the Regional Transport Authority of the applications for the grant of permit."

This Court considered diverse circumstances in support of that conclusion. This Court said that as on the date of the application if insolvency petition is pending against one of the applicants, but on the date of consideration if he is declared to be an insolvent, he becomes disentitled to the grant of permit by operation of law. As on the date of the application if there is no conviction, but as on the date of consideration, if an applicant is convicted, he also becomes ineligible for consideration.

3. Another circumstance arose in Dhani Devi v. Sant Bihari case was that when one of the applicants before the consideration died and his LRs were brought on record. When it was questioned, this Court held that the LRs are entitled to be considered as inheriting the estate of the deceased applicant for grant of permit. In A.S. Jalaluddin v. Balasubramania Bus Service (P) Ltd.3 the question arose that whether the applicant who secured the residential qualification by establishing a branch office at one of the terminus of the route would be considered eligible as on the date of the consideration. This Court held that he is entitled. In view of these considerations, it must be held that the date of consideration is the relevant date for the purpose of considering the eligibility to grant the required marks under Section 46 of Act 4 of 1939. This law being in operation from 1970, we do not think that it requires any reconsideration by this Court by a larger Bench. Accordingly, we hold that the date of consideration is the relevant date on which the respective claims of the candidates have to be considered for award of the marks for grant of permit. It is made clear that this declaration of law is confined to and peculiar of the statutory operation under Section 46 Act 5 of 1958."

33. Argument of learned Senior Counsel Sri Shashi Nandan that no provision for condonation of delay exist under Section 89 and 90 of the Act of 1988 cannot be accepted, as the second proviso to Section 90 categorically provides for the same giving the power to the Tribunal to condone the delay in case the cause shown

is sufficient. Similarly, Rule 60 read with Rule 91 (2) of the Rules of 1998 clearly provides for the publication of the decision of the transport authority as well as Sub-Rule 2 of Rule 91 provides for period of limitation of 30 days from the date of receipt of order. As there is no denial to the fact that the order of the State Transport Authority was conveyed on 06.05.2015, the appeal was within time.

34. Moreover, after the remand of the matter by this Court on 19.12.2014 the STA was duty bound to comply with the directions while disposing of the applications for grant of route permit only on the basis of comparative merit of the parties, including considering the latest model of vehicle. The decision of the STA holding that on the date of earlier application of petitioner Mohd. Saleem, Mohd. Ayub and Tanveer Ahamad were having the vehicles of latest model and thus a window of 45 days was granted in the year 2015 so as to enable them to get the vehicle of latest model was totally against the mandate of this Court, as the applicants on the date of consideration i.e. 16.04.2015 were not having vehicles of the latest model and were lower in merit, but the STA arbitrarily and illegally granted permit which was totally in defiance of this Court's order.

35. A coordinate Bench of this Court in case of **Mansoor Beg (Supra)** had in extenso considered the power of condoning delay relying upon the decision of Apex Court in case of **Collector, Land Acquisition, Anantnag and another Vs. Mst. Katiji and others, 1987 (2) SCC 107**. Relevant paragraph is extracted hereasunder;

"Hon'ble Supreme Court not once but on several occasions has emphasized on adopting justice-oriented approach by the courts/judicial authorities or Tribunals. In the case of **Collector, Land Acquisition, Anantnag and another Vs. Mst. Katiji and others, reported in [(1987) 2SCC 107**], it has been held that ***the power to condone the delay is conferred in order to enable the courts to do substantial justice to the parties by disposing of the matters on merits and further that the expression "sufficient cause" is elastic enough to enable the courts to apply the law in a meaningful manner to subserve the ends of justice.*** Hon'ble Supreme Court goes on to the extent of observing that to subserve the ends of justice is the life-purpose of existence of the institution of Courts. In the said case, Hon'ble Supreme Court calls for adopting a liberal approach in the matters relating to condonation of delay in instituting the proceedings before the Courts/Tribunal and has thus formulated the following principles:

"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 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 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 fides. 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 not 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."

Thus, on a bear reading of the aforesaid legal principles enunciated by Hon'ble Supreme Court, broadly speaking the approach while considering a prayer or application seeking condonation of delay in instituting any proceedings which should be adopted by a court or a judicial forum or tribunal is that it should not proceed on the premise or assumption that delay in approaching the court is always deliberate and that the primary function of the court or an adjudicatory authority is to adjudicate the dispute, rather than to shut its door to a litigant or a party.

It would be of some relevance to state that what needs to be borne in mind is that the expression "sufficient cause" is adequately elastic so as to apply the law relating to condonation of delay in a meaningful manner to subserve the ends of justice. The approach of the court or tribunal in such a matter should be liberal, non-pedantic and justice-oriented. While there cannot be any presumption of deliberately causing delay, in case the party institutes the proceedings with delay and is found to have acted cursorily or negligently, the said aspect is also to be taken into account by the courts. However, in absence of lack of bona fide or gross negligence or in absence of any attempt by a party to adopt dilatory tactics, the approach of the courts/tribunal should always be to provide opportunity of seeking adjudication of the issue by condoning the delay.

If the impugned order passed by the STAT is analyzed on the aforesaid reasoning given herein above, the same cannot be permitted to be sustained in the eyes of law.

In some what similar matters, this Court has considered similar approach adopted by the STAT while deciding the application seeking condonation of delay in the case of **Zila Bus Operators Association and others Vs. State of U.P. and others, Writ-A No. 9993 of 2018.** The Court in the said case has held that delay of about 15 days ought to have been condoned when an explanation was offered by the revision-applicant. Similar view has been taken by this Court yet in another case decided on 08.03.2019 in **Automotive Parivahan Sahkari Samiti Ltd. And another Vs. State Transport Appellate Tribunal and another (Misc. Single No. 6760 of 2019)."**

36. In **Ganesh Prasad Sahu (Supra),** this Court had an occasion to consider the decisions of the STAT in appeals and revisions which were dismissed on the ground of limitation, the Court relying upon various decisions of the Apex Court as well as this Court held as under;

"Thus, from the above, it would be clear that the manner in which the Tribunal has dealt with the orders is flawed and is not supported by the proper reason. The Tribunal has not considered the effect of the language used in the Rule 91 of U.P. Motor Vehicles Rules, 1998. Even

assuming if the appeals were not found to be within thirty days from the date of receipt of the order then the explanation given by the petitioners ought to have been considered for condonation of delay. On the contrary, the reasons given by the Chairman, U.P. State Transport Appellate Tribunal is with an intention of defeating the ends of justice and has quoted portions from various decisions without considering what the judgments rendered by the Apex Court have held regarding the phrase "sufficient cause" which came to be interpreted by the Apex Court in various decisions which are being noticed hereinafter."

37. In **Mohd. Javed (Supra),** this Court found that where there was no publication as mandated under Rule 60 of the Rules of 1998 the appeal could not be dismissed on the ground of limitation and matter was to be adjudicated on merit. Similar view was taken in case of **Smt. Roshan Ara (Supra).**

38. As it is eventually clear that the STA had entertained the applications of the petitioners of writ petition no. 6340 of 2020 on the ground that they were at higher merit, with latest model of vehicle on the date of application i.e. in the year 2011, thus, entitled for grant of permit was totally against the dictum of Apex Court as the relevant date was the date of consideration of the applications and not the date on which it was made before the authority. Moreover, on 19.12.2014 the transport authority was required to consider all the applications strictly on the basis of comparative merit which has been ignored and applications of the contesting respondents had been overlooked and the appeals and revisions filed by the contesting respondents were dismissed solely on the ground of limitation.

39. The technical argument raised by the petitioners' counsel cannot be accepted as the authorities were duty bound to consider all the applications before it, on the date of consideration strictly on the basis of comparative merit and directions of this Court. The Act or the Rules does not bar any remedy to the applicants whose applications are refused or they can be non-suited on the technical ground. The very purpose and basis for providing of an appellate and revisional forum is to rectify the mistake of authority and to check its arbitrary action and decision.

40. In the present case, the STA had deliberately granted permits to the five petitioners, though they were lower in merit and having vehicles of lower model. The Act or the Rule nowhere puts embargo upon the entertainment of any appeal or revision filed with any delay. The second proviso to Section 90 clearly gives handle to the revisional authority to entertain revision upon cause showing "sufficient'. Likewise Rule 60 read with Rule 91 mandates for the period of 30 days to be reckoned from the date of order as well as the order being published by the authority on the notice board. It has no where been a case of the authority or the petitioners that despite the order being served upon the contesting respondents, the appeal was filed beyond the statutory period provided under the Act or the Rules.

41. The Tribunal had rightly considered the fact of non-compliance of the directions of this Court dated 19.12.2014 in the appeal filed by Rauf

Khan and had categorically recorded finding that STA had wrongly granted permit in favour of Mohd. Saleem, Mohd. Ayub and Tanveer Ahamad, who were placed lower in merit and were having vehicles of older model.

42. This Court cannot shut its eye while doing justice on mere technicalities and the action of the authorities has to be judged and gauged on each and every frontier, and whether the directions are complied with or not. This Court finds that the STA had committed gross illegality and in an arbitrary manner had circumvented the order of this Court dated 19.12.2014 and conveniently granted window of 45 days to Mohd. Saleem, Mohd. Ayub and Tanveer Ahamad to upgrade their vehicles which was never the intention of this Court and the direction was straight and clear to decide the applications considering the comparative merit within six weeks.

43. Lastly an attempt has been made by petitioners' counsel to demonstrate the fact that no notice was issued by the Tribunal after the matter was remanded by this Court in deciding the appeal.

44. From perusal of the order-sheet, which has been appended as annexure no. 18 to the writ petition, it is more than apparent that notices were issued to all the parties and they had appeared. Thus, the argument as regards notice fails and has no merit for consideration, as the parties had been litigating before the authorities and this Court and are aware of the matter at each and every stage, and the argument that notices were not issued and served cannot be accepted as the matter has been hotly contested by them at each and every stage right from the Tribunal to this Court.

45. A recall application has been moved by one Tanveer Ahamad in writ petition no. 17224 of 2019 which was disposed of vide order dated 01.11.2019 with a direction to the appellate tribunal to decide the appeal on merit after affording opportunity of hearing to all the concerned parties. The sole ground taken is that Tanveer Ahamad, who was one of the applicant for grant of permit, was not heard before the matter was relegated to the authority. From the order passed by this Court it appears that Mohd. Saleem, the main contesting party, was heard through his counsel and the order was passed with the consent of counsel for the parties directing the Tribunal to decide the matter on merit.

46. As this Court had not decided the writ petition on merit and had only remanded the matter to the appellate authority to consider and decide the appeal on merit, after hearing the parties, the recall application at the behest of one of the candidate is not maintainable and is dismissed as misconceived, as this Court had not adjudicated the matter on merit.

47. On due consideration of merits of the case, this Court finds that no interference is required to the order dated 09.05.2019 passed by the STAT in appeal no. 28 of 2015 filed by Rauf Khan, which is matter of challenge in writ petition nos. 7780 of 2019 and 9058 of 2019, challenging the order of STA dated 16.04.2015, as the order passed by the STA was in defiance to the directions of this Court dated 19.12.2014, and applicants lower in merit were considered by the authority while granting permit.

48. Similarly, no interference is required in writ petition no. 6340 of 2020

which challenges the order passed by the STAT dated 27.02.2020 whereby the appeal of Gulsher Ahamad has been partly allowed and matter has been remitted to the STA.

49. All the writ petitions along with recall application fails and are hereby dismissed.

(2022)01ILR A1126
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.12.2021

BEFORE

THE HON'BLE PRITINKER DIWAKER, J.
THE HON'BLE ASHUTOSH SRIVASTAVA, J.

Writ-A No. 27120 of 2018

Shashank Singh & Ors. ...Petitioners
Versus
Hon'ble High Court of Judicature at Allahabad & Anr. ...Respondents

Counsel for the Petitioners:
Sri Ashutosh MIshra

Counsel for the Respondents:
C.S.C., Sri Manish Goel

A. Civil/Service matter-Constitution of India,1950-Article 226-challenge to-process of direct recruitment to the U.P.H.J.S. 2018-the petitioners were once practicing advocate and later on got selected as Judicial Officers-under Article 233 of the Constitution of India, a Judicial officer regardless of his or her previous experience, as an Advocate with 7 years practice, cannot apply and compete for appointment to any vacancy in the post of District Judge, his ir her chance to occupy the post would be through promotion in accordance with the Rules framed under Article 233 and Proviso to Article 309 of the Constitution of India-One of the essential requirements articulated by the expression in Article 233(2) is that such person must with requisite period be continuing as an advocate on the date of application and not seven years any time in the past.(Para 1 to 14)

The writ petition is dismissed. (E-6)

List of Cases cited:

1. Dheeraj Mor Vs Hon'ble High Court of Delhi Civil Appeal No 1698 of 2020 arising out of SLP(C) No. 14156 of 2015 & ors., reptd. 2020 SCC Online SC 213

2. Deepak Aggarwal Vs Keshav Kaushik & ors. (2013) 5 SCC 277

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

1. Heard Sri Ashutosh Mishra, learned counsel for the petitioners and Sri Ashish Mishra, learned counsel, who represents the High Court, Respondent No.1. The learned Standing Counsel has accepted notice of the writ petition on behalf of the Respondent No.2.

2. Sri Ashish Mishra, learned counsel for the respondent High Court has filed counter affidavit. Learned counsel for the petitioners does not want to file rejoinder affidavit. We, therefore, proceed to decide the writ petition on merits.

3. The subject matter of the writ petition relates to the process of Direct Recruitment to the U.P. Higher Judicial Services-2018 (Part II). The Allahabad High Court issued a Notification dated 12.11.2018 inviting applications for direct recruitment to the Uttar Pradesh High Judicial Service-2018 (Part-II) against 59 vacancies (SC-08, ST-01, OBC-16 and Unreserved-34) in the pay scale of Rs.51550-1230-58930-1380-63070 from Advocates having not less than 7 years standing as on the last date fixed for the

submission of application forms, who must have attained the age of 35 years and must not have attained the age of 45 years as on 01.01.2019. The age limit was relaxed by 3 years in case of SC/ST/OBC category candidates, but such candidates must not have attained the age of 48 years as on 01.01.2019. 20% horizontal reservation for women candidates belonging to the State of U.P. only was provided. The applications were required to be filed online. A preliminary examination (objective type) was to be held at Prayagraj (Allahabad) on 03.02.2019. Both Advocates practicing within the State of U.P. and outside the State of U.P. were eligible to apply, but after obtaining requisite forwarding from the District and Sessions Judge/Registrar General/Registrar of the High Court/Secretary General of the Supreme Court as applicable.

4. All the petitioners, who are five in number, although enrolled with the Bar Council of U.P. are members of the M.P. Judicial Services and working as Judicial Officers in the State of M.P. under the supervision of the M.P. High Court at Jabalpur. The petitioners are aggrieved by Rule 5 of the U.P. Higher Judicial Service Rules, 1975 insofar as it bars the Judicial Officers from participating in the recruitment process for filing up the vacancies by direct recruitment.

5. It is contended on behalf of the petitioners that the Rule 5 of the 1975 Rules is violative of the fundamental rights of the petitioners and the source of direct recruitment cannot be restricted to practicing Advocates only. The petitioners were once practicing Advocates and later on got selected as Judicial Officers and otherwise satisfy the eligibility criteria laid down in the notification dated 12.11.2018 issued for filing up the vacancies. The 1975 Rules are liable to be declared unconstitutional to the extent it excludes the persons possessing requisite experience in the field of law of more than 7 years cumulatively as an Advocate and as a Judicial Officer for being considered eligible to appear in the U.P.H.J.S. Exams.

6. For appreciating the arguments raised on behalf of the writ petitioners, it would be appropriate to refer to Rule 5 of the U.P. Higher Judicial Service Rules 1975, which is reproduced as under:-

"5. Sources of recruitment.- The recruitment to the Service shall be made-

a) by promotion from amongst the Civil Judges (Senior Division) on the basis of Principle of merit-cum-seniority and passing a suitability test.

b) by promotion strictly on the basis of merit through limited competitive examination of Civil Judges (Senior Division) having not less than five years qualifying service;

c) by direct recruitment from amongst the Advocates of not less than seven years standing as on the last date fixed for the submission of application forms.

7. A perusal of the Rule 5 of the 1975 Rules reveals that the source of recruitment to the U.P.H.J.S. is by promotion as also by direct recruitment. The source of recruitment by promotion is confined to Judicial Officers [Civil Judge (Senior Division)] while the source of direct recruitment is confined to Advocates with not less than 7 years standing.

8. The U.P. Higher Judicial Service Rules, 1975 have been framed in exercise

of the power conferred by the Proviso to Article 309 read with Article 233 of the Constitution of India.

9. Article 309 of the Constitution of India deals with the recruitment and conditions of service of persons serving the Union or a State. The Article 309 provides the competence for the Governor of a State or such person as he may direct to make the rules regulating the recruitment and the conditions of service of persons appointed to services and posts in connection with the affairs of the State. Article 233 of the Constitution of India deals with the appointment of District Judges. The Article 233 of the Constitution of India is reproduced here-under:-

"Article 233 of Constitution of India "Appointment of District Judges"

(1) Appointments of persons to be, and the posting and promotion of, district judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State.

(2) A person not already in the service of the Union or of the State shall only be eligible to be appointed a district judge if he has been for not less than seven years an advocate or a pleader and is recommended by the High Court for appointment."

10. The Article 233 of the Constitution of India has been recently interpreted by the Hon'ble Apex Court in the **Civil Appeal No.1698 of 2020 (Dheeraj Mor Vs. Hon'ble High Court of Delhi) arising out of SLP (C) No.14156 of 2015** and other connected matters vide decision dated February 19th, 2020 reported in 2020 SCC online SC 213. The Hon'ble Apex Court after considering all aspects of the matter observed as under:-

"59. In view of the aforesaid interpretation of Article 233, we find that rules debarring judicial officers from staking their claim as against the posts reserved for direct recruitment from bar are not ultra vires as rules are subservient to the provisions of the Constitution.

60. We answer the reference as under:-

(i) The members in the judicial service of the State can be appointed as District Judges by way of promotion or limited competitive examination.

(ii) The Governor of a State is the authority for the purpose of appointment, promotion, posting and transfer, the eligibility is governed by the Rules framed under Articles 234 and 235.

(iii) Under Article 232(2), an Advocate or a pleader with 7 years of practice can be appointed as District Judge by way of direct recruitment in case he is not already in the judicial service of the Union or a State.

(iv) For the purpose of Article 233(2), an Advocate has to be continuing in practice for not less than 7 years as on the cut-off date and at the time of appointment as District Judge. Members of judicial service having 7 years' experience of practice before they have joined the service or having combined experience of 7 years as lawyer and member of judiciary, are not eligible to apply for direct recruitment as a District Judge.

(v) The rules framed by the High Court prohibiting judicial service officers from staking claim to the post of District Judge against the posts reserved for

Advocates by way of direct recruitment, cannot be said to be ultra vires and are in conformity with Articles 14, 16 and 233 of the Constitution of India.

(vi) The decision in Vijay Kumar Mishra (supra) providing eligibility, of judicial officer to compete as against the post of District Judge by way of direct recruitment, cannot be said to be laying down the law correctly. The same is hereby overruled.

61. In the case of Dheeraj Mor and others cases, time to time interim orders have been passed by this Court, and incumbents in judicial service were permitted to appear in the examination. Though later on, this Court vacated the said interim orders, by that time certain appointments had been made in some of the States and in some of the States results have been withheld by the High Court owing to complication which has arisen due to participation of the ineligible in-service candidates as against the post reserved for the practising advocates. In the cases where such in-service incumbents have been appointed by way of direct recruitment from bar as we find no merit in the petitions and due to dismissal of the writ petitions filed by the judicial officers, as sequel no fruits can be ripened on the basis of selection without eligibility, they cannot continue as District Judges.

They have to be reverted to their original post. In case their right in channel for promotion had already been ripened, and their juniors have been promoted, the High Court has to consider their promotion in accordance with prevailing rules. However, they cannot claim any right on the basis of such an appointment obtained under interim order, which was subject to the outcome of the writ petition and they have to be reverted."

11. It would be apt to also quote the additional reasoning given by Justice S. Ravindra Bhat, in respect of the issue decided by the Hon'ble Apex Court.

"90. A close reading of Article 233, other provisions of the Constitution, and the judgments discussed would show discloses the following:

(a) That the Governor of a State has the authority to make "appointments of persons to be, and the posting and promotion of, district judges in any State (Article 233 [1]);

(b) While so appointing the Governor is bound to consult the High Court (Article 233 [1]:Chandra Mohan (supra) and Chandramouleshwar Prasad v Patna High Court 1970 (2) SCR 6662);

(c) Article 233 (1) cannot be construed as a source of appointment; it merely delineates as to who is the appointing authority;

(d) In matters relating to initial posting, initial appointment, and promotion of District Judges, the Governor has the authority to issue the order; thereafter it is up to the High Court, by virtue of Article 235, to exercise control and superintendence over the conditions of service of such District Judges. (See State of Assam v Ranga Mahammad 1967 (1) SCR 4543);

(e) Article 233 (2) is concerned only with eligibility of those who can be considered for appointment as District Judge. The Constitution clearly states that one who has been for not less than seven years, "an advocate or pleader" and one who is "not already in the service of the Union or of the State" (in the sense that such person is not a holder of a civil or executive post, under the Union or of a State) can be considered for appointment,

as a District judge. Significantly, the eligibility- for both categories, is couched in negative terms. Clearly, all that the Constitution envisioned was that an advocate with not less than seven years' practise could be appointed as a District Judge, under Article 233 (2).

(f) Significantly, Article 233 (2) ex facie does not exclude judicial officers from consideration for appointment to the post of District Judge. It, however, equally does not spell out any criteria for such category of candidates. This does not mean however, that if they or any of them, had seven years' practise in the past, can be considered eligible, because no one amongst them can be said to answer the description of a candidate who "has been for not less than seven years" "an advocate or a pleader" (per Deepak Agarwal, i.e. that the applicant/candidate should be an advocate fulfilling the condition of practise on the date of the eligibility condition, or applying for the post). The sequitur clearly is that a judicial officer is not one who has been for not less than seven years, an advocate or pleader.

91. The net result of the decision in Chandra Mohan (supra), and subsequent decisions which followed it, is that Article 233 (2) renders ineligible all those who hold civil posts under a State or the Union, just as it renders all advocates with less than seven years' practice ineligible, on the date fixed for reckoning eligibility. Equally, those in judicial service [i.e. holders of posts other than District Judge, per Article 236 (2)] are not entitled to consideration because the provision (Article 233 [2]) does not this part of the case it is sufficient to say that there was consultation." prescribe any eligibility condition. Does this mean that any judicial officer, with any length of service as a member of the judicial service, is entitled to consideration under Article 233 (2)? The answer is clearly in the negative. This is because the negative phraseology through which eligibility of holders of civil posts, or those in civil service (of the State or the Union) and advocates with seven years' service is couched. However, the eligibility conditions are not spelt out in respect of those who are in the judicial service.

92. The omission, - in regard to spelling out the eligibility conditions vis-à-vis judicial officers, to the post of District Judge, in the opinion of this court, is clearly by design. This subject matter is covered by three provisions: Article 233 (1)- which refers to promotions to the post of District Judge; Article 234, which, like Article 233 (1) constitutes the Governor as the appointing authority in respect of judicial posts or services, (other than District Judges), and like Article 233 (1), subject to recommendation of the High Court concerned. This position is most definitely brought home by the fact that Article 235 vests in the High Courts the power of supervision and control of the judicial service, "including the posting and promotion of, and the grant of leave to, persons belonging to the judicial service of a State and holding any post inferior to the post of district judge." The corollary to this is that the Governor is appointing authority for the post of District Judge, and other judicial posts; both are to be filled after prior consultation with the High Court, and crucially, the promotion of judicial officers, to the post of District Judge, is regulated by conditions (read rules) framed by the High Court."

96. In the opinion of this court, there is an inherent flaw in the argument of the petitioners. The classification or distinction made- between advocates and judicial officers, per se is a constitutionally sanctioned one. This is clear from a plain

reading of Article 233 itself. Firstly, Article 233 (1) talks of both appointments and promotions. Secondly, the classification is evident from the description of the two categories in Article 233 (2): one "not already in the service of the Union or of the State" and the other "if he has been for not less than seven years as an advocate or a pleader". Both categories are to be "recommended by the High Court for appointment." The intent here was that in both cases, there were clear exclusions, i.e. advocates with less than seven years' practice (which meant, conversely that those with more than seven years' practice were eligible) and those holding civil posts under the State or the Union. The omission of judicial officers only meant that such of them, who were recommended for promotion, could be so appointed by the Governor. The conditions for their promotion were left exclusively to be framed by the High Courts.

101. The Constitution makers, in the opinion of this court, consciously wished that members of the Bar, should be considered for appointment at all three levels, i.e. as District judges, High Courts and this court. This was because counsel practising in the law courts have a direct link with the people who need their services; their views about the functioning of the courts, is a constant dynamic. Similarly, their views, based on the experience gained at the Bar, injects the judicial branch with fresh perspectives; uniquely positioned as a professional, an advocate has a tripartite relationship: one with the public, the second with the court, and the third, with her or his client. A counsel, learned in the law, has an obligation, as an officer of the court, to advance the cause of his client, in a fair manner, and assist the court. Being members of the legal profession, advocates are also considered thought leaders. Therefore, the Constitution makers envisaged that at every rung of the judicial system, a component of direct appointment from members of the Bar should be resorted to. For all these reasons, it is held that members of the judicial service of any State cannot claim to be appointed for vacancies in the cadre of District Judge, in the quota earmarked for appointment from amongst eligible Advocates, under Article 233.

12. Apart from the above observations, the Hon'ble Supreme Court while interpreting Article 236(2) of the Constitution of India, in the Case of ***Deepak Aggarwal Vs. Keshav Kaushik and others, reported in 2013 (5) SCC 277***, was pleased to observed as under:-

*"**88**. As regards construction of the expression, if he has been for not less than seven years an advocate in Article 233(2) of the Constitution, we think Mr. Prashant Bhushan was right in his submission that this expression means seven years as an advocate immediately preceding the application and not seven years any time in the past. This is clear by use of has been. The present perfect continuous tense is used for a position which began at some time in the past and is still continuing. Therefore, one of the essential requirements articulated by the above expression in Article 233(2) is that such person must with requisite period be continuing as as advocate on the date of application. "*

13. In the light of the above, it is clear that under Article 233 of the Constitution of India, a Judicial Officer regardless of his

or her previous experience, as an Advocate with 7 years practice, cannot apply and compete for appointment to any vacancy in the post of District Judge; his or her chance to occupy the post would be through promotion in accordance with the Rules framed under Article 233 and Proviso to Article 309 of the Constitution of India.

14. No relief can be given to the petitioners. The writ petition fails and is, accordingly, **dismissed**.

15. The interim order dated 20.12.2018 stands discharged.

(2022)01ILR A1132
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.10.2021

BEFORE

THE HON'BLE SUNEET KUMAR, J.

Writ-A No. 988 of 2021
Alongwith
Writ-A Nos. 4462 of 2020, 4515 of 2020, 4786 of 2020, 5199 of 2020, 5388 of 2020, 5807 of 2020, 5865 of 2020, 6145 of 2020, 8501 of 2020, 10636 of 2020, 14110 of 2020, 14279 of 2020, 2654 of 2021, 7656 of 2021, 8412 of 2021, 10222 of 2021

Rohit Kumar & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Man Bahadur Singh, H.N. Singh Sr. Advocate

Counsel for the Respondents:
C.S.C., Arun Kumar, Ashok Kumar, Raghvendra Pratap Singh, Ram Prakash Shukla, Sanjay Chaturvedi, Sanjay Kumar Srivastava, Satish Chandra Yadav, Vikram Bahadur Singh, Yatindra

A. Service Law - Constitution of India, 1950-Article 226-Challenge to-Government Order of Assistant Teacher 2019-petitioners appeared in ATRE-2019 to improve their percentage marks to get their preferred choice of district-Under the Rules, govering Assistant Teachers, there is a provision for securing inter-district transfer-petitioners had been deprived NOC to participate in the counselling for appointment and placement-GO discriminates against the candidates employed in other departments –GO to that extent has exceeded the power, authority and jurisdiction conferred upon the Government under Act, 1972 and the Rules, 1981. Para 5(1) of the Government Order, is an arbitrary exercise of power having no nexus with the object or clarification it seeks to remedy.(Para 1 to 22)

The writ petition is allowed. (E-6)

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

1. The batch of petitions involve similar controversy, therefore, on request of the learned counsels for the parties, the writ petitions are being decided by a common judgment and order.

2. Heard Sri H.N. Singh, learned Senior Advocate, assisted by Sri Man Bahadur Singh and Sri Agnihotri Kumar Tripathi, learned counsels appearing for the petitioners. In all other matters, learned counsels for the petitioners have adopted the arguments advanced by learned Senior Advocate. Smt. Archana Singh, learned Addl. Chief Standing Counsel has advanced arguments on behalf of State; Sri Yatindra, Sri Vikram Bahadur Singh, Sri Arun Kumar and Sri Sanjy Kumar, Advocates, have put in appearance on behalf of Uttar Pradesh Board of Basic Education and have advanced their submissions.

3. Facts of writ petition No.-988/2021 is being referred to for the sake of

convenience. The facts, interse, parties is not in dispute.

4. Petitioners, herein, are working in Junior Basic Schools in various districts of Uttar Pradesh, run and managed by the Uttar Pradesh Board of Basic Education1. Petitioners came to be selected and appointed pursuant to Assistant Teacher Recruitment Examination-2018.

5. By the instant petitions, petitioners have raised challenge to the legality and validity of the Government Order dated 4 December 2020, insofar Para 5(1), therein, denies issuance of No-Objection Certificate2 to the working teachers. A further direction has been sought directing the respondents to issue NOC to the petitioners and to appoint them in the district of their choice.

6. The facts, giving rise to the instant petition, briefly stated, is that pursuant to the Government Order dated 01 December 2019, applications were invited by the Board for Assistant Teacher Recruitment Examination-20193. Petitioners, being eligible and there being no prohibition/bar in the Government Order, applied to enable them to improve their merit and procure placement in a district of their choice. It is pointed out that the post of Assistant Teacher is a district cadre. As per Government Order dated 07 January 2019, the candidates belonging to General or open category were to obtain 65% marks, whereas, the candidates under reserved categories (scheduled caste, scheduled tribes and other backward classes) had to secure 60% marks. ATRE-2019 result was declared on 12 May 2020. As against 69000 vacancies 1,46,060 candidates were successful in securing minimum pass percentage marks.

7. The relevant extract of Government Order 7 January 2019 and Notification 16 May 2020 indicating the number of vacancies, the pass percentage marks and the number of qualified candidates is extracted:

सेवा में,
1निदेशक
2 सचिव

राज्य शैक्षिक अनंसंधान एवं प्रशिक्षण परिषद, परीक्षा नियामक प्राधिकारी,
उत्तर प्रदेश, लखनऊ।
उ0प्र0 प्रयागराज।
बेसिक शिक्षा अनुभाग – 4 लखनऊ
दिनांकः 07 जनवरी, 2019

विषयः– उत्तर प्रदेश बेसिक शिक्षा परिषद द्वारा संचालित परिषदीय प्राथमिक विद्यालयों हेतु ''सहायक अध्यापक भर्ती परीक्षा 2019'' में न्यूनतम उत्तीर्णांक निर्धारित किये जाने के सम्बन्ध में।

महोदय,
उपर्युक्त विषयक सचिव, बेसिक शिक्षा परिषद के पत्र संख्या– बे0शि0प0–16426–27/2018–19 दिनांक 05 जनवरी, 2019 का संदर्भ ग्रहण करें, जिसेक द्वारा ''सहायक अध्यापक भर्ती परीक्षा 2019'' में न्यूनतम ''उत्तीर्णक'' निर्धारित किये जाने का अनुरोध किया गया है।

2–इस सम्बन्ध में मुझे यह कहने का निर्देश हुआ है किश्श्शासन द्वारा सम्यक् विचारोपरान्त ''सहायक अध्यापक भर्ती परीक्षा 2019'' के आयोजन हेतु निर्गत शासनादेश संख्या– 2056/68–4–2018 दिनांक 01.12.2018 के क्रम में परीक्षा परिणाम हेतु निम्नवत् न्यूनतम उत्तीर्णांक निर्धारित किया जाता है। यह न्यूनतम उत्तीर्णांक मात्र ''सहायक अध्यापक भर्ती परीक्षा 2019'' के लिये ही होगाः–

(क) सामान्य वर्ग के अभ्यर्थियों को पूर्णांक 150 में से 97 अंक अर्थात् 65 प्रतिशत एवं अधिक अंक प्राप्त करने वाले अभ्यर्थियों को ''सहायक अध्यापक भर्ती परीक्षा, 2019'' हेतु उत्तीर्ण माना जायेगा।

(ख) अन्य समस्त आरक्षित वर्ग के अभ्यर्थियों को पूर्णांक 150 में से 90 अंक अर्थात् 60 प्रतिशत एवं

अधिक अंक प्राप्त करने वाले अभ्यर्थियों को ''सहायक अध्यापक भर्ती परीक्षा, 2019'' हेतु उत्तीर्ण माना जायेगा।

(ग) उपरोक्त 'क' एवं 'ख' के आधार पर उत्तीर्ण अभ्यर्थी 69,000 रिक्तियों के विरूद्ध विज्ञापित पदों पर आवेदन करने के अधिकारी होंगे एवं उपरोक्त न्यूनतम उत्तीर्णांक के आधार पर सफल होने मात्र पर ही किसी अभ्यर्थी को नियुक्ति हेतु अधिकार नहीं होगा क्योंकि यह परीक्षा नियुक्ति के लिये केवल पात्रता मानदण्डो में से एक है।

(घ) निर्धारित विज्ञापित पदों की संख्या (69000) से अधिक अभ्यर्थी उत्तीर्ण होने की स्थिति में सफल होने वाले कुल अभ्यर्थियों में से अन्तिम मेरिट के आधार पर विज्ञापित पदों के सापेक्ष उत्तर प्रदेश बेसिक शिक्षा (अध्यापक) सेवा नियमावली, 1981 के बीसवें संशोधन के परिशिष्ट –1 एवं निर्धारित आरक्षण के अनुसार अर्ह अभ्यर्थियों का चयन किया जायेगा।

शेष अभ्यर्थी चयन प्रकिया से स्वतः बाहर हो जायेंगे तथा इस ''सहायक अध्यापक भर्ती परीक्षा, 2019'' के आधार पर चयन हेतु कोई अधिकार नहीं होगा।

भवदीय

x x x x

कार्यालय सचिव

उत्तर प्रदेश बेसिक शिक्षा परिषद, प्रयागराज

पत्रांक बे0शि0प0/778/2020–21

दिनांकः 16.05.2020

विज्ञप्ति

शासनादेश संख्या–344/68–5–2020 दिनांक 13.05.2020 के अनुक्रम में उ0प्र0 बेसिक शिक्षा परिषद द्वारा संचालित परिषदीय प्राथमिक विद्यालयों में 69,000 सहायक अध्यापकों की भर्ती के लिए आयोजित सहायक अध्यापक भर्ती परीक्षा–2019 में **उत्तीर्ण 1,46,060 अभ्यर्थियों** में से जनपदवार निर्धारित पदों की संख्या (जो घट बढ़ सकती है) पर चयन/नियुक्ति हूतु उ0प्र0 बेसिक शिक्षा अध्यापक सेवा नियमावली–1981 (अद्यतन संशोधित) में उल्लिखित प्राविधानों तथा वांछितश्शैक्षिक/प्रशिक्षण अर्हताधारी अभ्यर्थियों से **जनपद आवंटन हेतु ऑनलाइन आवेदन पत्र आमंत्रित किये जाते हैं।**

8. Consequent, thereof, shortlisted candidates were called upon by the Board to make on-line applications for counselling and appointment pursuant to the Government Order dated 13 May 2020. The counselling was to be held by the Selection Committee in respective districts. The successful candidates already working in Government department, semi-Government department, Board were required to submit NOC of their employer. Accordingly, some of the petitioners obtained NOC from their respective District Basic Education Officers, which subsequently came to be cancelled. The NOC was declined to the other successful Assistant Teachers pursuant to the Government Order dated 4 December 2020. The impugned para 5(1) is extracted:

प्रेषक,

सर्वोच्च प्राथमिकता

रेणुका कुमार,

संख्या– 1656/68–5–2020

अपर मुख्य सचिव,

उत्तर प्रदेश शासन।

सेवा में,

1. समस्त जिलाधिकारी,

2. महानिदेशक,

उत्तर प्रदेश।

स्कूलशिक्षा, उ0प्र0 लखनऊ।

3. निदेशक,

4. समस्त बेसिक शिक्षा अधिकारी,

बेसिक शिक्षा,उ0प्र0 लखनऊ।

उत्तर प्रदेश।

बेसिक शिक्षा अनुभाग–5

लखनऊः दिनांकः 04 दिसम्बर, 2020

विषय– परिषदीय प्राथमिक विद्यालयों में 69,000 रिक्त पदों के सापेक्ष अभ्यर्थियों के चयन/नियुक्ति प्रक्रिया में अभिलेंखों में विसंगति के सम्बन्ध में स्पष्टीकरण (Clarification)

महोदय,

उपर्युक्त विषयक महानिदेशक, स्कूल शिक्षा, उ0प्र0 के पत्र संख्या–महानि0स्कू0शि0/6030/2020–21, दिनांक 11.11.2020 का कृपया सन्दर्भ ग्रहण करने का कष्ट करें, जिसके द्वारा परिषदीय प्राथमिक विद्यालयों में 69,000 रिक्त पदों को भरे जाने हेतु बेसिक शिक्षा अधिकारियों द्वारा प्राप्त करायी गयी विसंगतियों के सम्बन्ध में अग्रेतर कार्यवाही हेतु निर्देश उपलब्ध कराने की अपेक्षा की गयी है। उक्त के सम्बन्ध में शासन स्तर

पर दिनांक 18.11.2020 को विभागीय अधिकारियों के साथ सम्पन्न बैठक के क्रम मे परिलक्षित विसंगतियों के सम्बन्ध में निम्नानुसार कार्यवाही किये जाने का निर्णय लिया गया है:–

अभ्यर्थी के आवेदन एवं प्रस्तुत अंकपत्र एवं प्रमाण पत्र में माता–पिता का नाम अलग है, तो स्वीकार नहीं किया जायेगा, परन्तु माता के स्थान पर पिता का नाम और पिता के स्थान पर माता का नाम अंकित है तो अन्य वैधानिक अभिलेखों से परीक्षणोपरान्त यह पुष्ट होता है कि अभ्यर्थी के माता एवं पिता का वास्तविक नाम वही है तो इस लिपिकीय त्रुटि के लिए उसका चयन निरस्त नहीं किया जायेगा।

बिन्दु संख्या–5: अनापत्ति प्रमाण पत्र (एन0ओ0सी0) के कारण –

उपर्युक्त प्रकार के विसंगतियों के सम्बन्ध में निम्नानुसार कार्यवाही किये जाने का निर्णय लिया गया है:–

(1) अभ्यर्थी जो शिक्षा विभाग में पूर्व से सहायक अध्यापक पद पर कार्यरत हैं उसी विभाग में समकक्ष पद के लिए कार्यमुक्त नहीं किया जायेगा क्योंकि शिक्षकों को अन्तर्जनपदीय स्थानान्तरण की सुविधा अनुमन्य है।

(2) ऐसे अभ्यर्थी जो अन्य विभाग में कार्यरत हैं उन्हें नियुक्ति–पत्र प्रदान कर दिया जाये तथा अपने मूल विभाग से कार्यमुक्त होकर कार्य भार ग्रहण करने हेतु तीन माह का समय दिया जायेगा।

कृपया उपरोक्त दिशा–निर्देशों के अनुसार अग्रेत्तर कार्यवाही सुनिश्चित कराने का कष्ट करें।

9. The grievance of the petitioners is that they were working as Assistant Teacher in different districts of Uttar Pradesh and had appeared in ATRE-2019 to improve their percentage marks so as to enable them to get their preferred choice of district. It is urged that by the impugned Government Order, petitioners, have been deprived NOC to participate in the counselling for appointment and placement, for the reason that under the Rules governing the Assistant Teachers, there is a provision for securing inter-district transfer. In other words, it is sought to be submitted that para-5(1) of the Government Order discriminates against the petitioners, vis-a-vis, other candidates employed/working in other departments of the Government. It is urged that the Government order to that extent is violative of Article 14 and 16 of the Constitution of India.

10. Respondents have taken a stand that since petitioners are already an Assistant Teacher working in various Junior Basic Schools, they have a right to apply and seek transfer inter district under the Rules. It is urged that they have been rightly not been issued NOC to participate in the counselling or join at the district upon selection. It is further submitted that in the event of NOC being issued to the petitioners, who are working Assistant Teachers, that many post would remain vacant and would not sub-serve the purpose of the Board recruiting teachers. It is further argued that there is no provision of waiting-list, therefore, vacancies falling vacant as a consequence of petitioners being appointed and allotted district, other than the district of their choice, would be against the object of recruiting Assistant Teachers. The Government Order is fair, just and non discriminatory.

11. Rival submissions fall for consideration.

12. The Board, duly constituted, is governed under the provisions of U.P. Basic Education Act, 19724. Section 13 of the Act, 1972, provides for control of the State Government and envisages that the Board shall carry out such directions, as may be issued from time to time by the State Government, for the efficient administration of the Act. The appointment

and selection of Assistant Teacher is governed by U.P. Basic Education (Teachers) Service Rules, 19815. This fact is reflected from the Guidelines dated 1 December 2018, issued by the Government for ARTE 2019. The relevant portion of the Government Order and guidelines is extracted:

सेवा में,
निदेशक,
सचिव,
राज्य शैक्षिक अनुसंधान एवं प्रशिक्षण परिषद, परीक्षा नियामक प्राधिकारी,
उ0प्र0,लखनऊ।
उ0प्र0,इलाहाबाद।
बेसिक शिक्षा अनुभाग – 4 लखनऊः दिनांकः 01 दिसम्बर, 2018

विषयः– ''सहायक अध्यापक भर्ती परीक्षा 2019'' के आयोजन हेतु गाइड लाइन्स/ दिशा निर्देश।
महोदय,

उपर्युक्त विषयक सचिव, परीक्षा नियामक प्राधिकारी के पत्र संख्या–गोप0/ स0अ0भ0प0–19/ 21556–59/2018–19 दिनांक 01 दिसम्बर, 2018 का संदर्भ ग्रहण करें, जिसके द्वारा ''सहायक अध्यापक भर्ती परीक्षा 2019'' के संबंध में मार्गदर्शी सिद्धान्त, गाइड लाइन्स, प्रक्रिया और समय सारिणी के संबंध में शासनादेश निर्गत किये जाने का अनुरोध किया गया है।

2– इस सम्बन्ध में मुझे यह कहने का निर्देश हुआ है कि शासन द्वारा सम्यक् विचारोपरान्त उ0प्र0 बेसिक शिक्षा परिषद द्वारा संचालित परिषदीय प्राथमिक विद्यालयों में ''सहायक अध्यापक भर्ती परीक्षा 2019'' आयोजित किये जाने हेतु मार्गदर्शी सिद्धन्त, गाइड लाइन्स, प्रक्रिया और समय सारिणी संलग्न कर निर्गत किया जाता है।

3– ''सहायक अध्यापक भर्ती परीक्षा 2019'' उ0प्र0 बेसिक शिक्षा परिषद द्वारा संचालित परिषदीय प्राथमिक विद्यालयों में सहायक अध्यापक के कुल 69,000 रिक्त पदों पर भर्ती के लिये आयोजित की जायेगी। यह परीक्षा मात्र इसी भर्ती के लिये ही मान्य होगी।

संलग्नक– यथोपरि। भवदीय,

Guidelines:

बेसिक शिक्षा परिषद द्वारा संचालित परिषदीय प्राथमिक विद्यालयों में ''सहायक अध्यापक भर्ती परीक्षा 2019 का आयोजन करने के लिए मार्गदर्शी सिद्धान्त, गाइड लाइन्स, प्रक्रिया और समय सारिणी

(ख) सहायक अध्यापक भर्ती परीक्षा उ0प्र0 बेसिक शिक्षा परिषद द्वारा संचालित परिषदीय प्राथमिक विद्यालयों में सहायक अध्यापक के पदों पर भर्ती हेतु 69,000 पदों के सापेक्ष आयोजित की जायेगी। विशेष परिस्थितियों में पदों की संख्या घट/बढ़ सकती है। यह परीक्षा मात्र इसी भर्ती हेतु मान्य होगी।

2– परीक्षा संस्था

शासनादेश सं0– 4029/15–11–2017 दिनांक 24.11.2017 द्वारा सहायक अध्यापक भर्ती परीक्षा के आयोजन हेतु परीक्षा संस्था के रूप में राज्य शैक्षिक अनुसंधान एवं प्रशिक्षण परिषद, उ0प्र0 लखनऊ की इकाई ''सचिव, परीक्षा नियामक प्राधिकारी, एलनगंज, उ0प्र0 प्रयागराज'' को नामित किया गया है।

3.....

4– आवेदन के लिए न्यूनतम अर्हता, आयु एवं निवास –

1. उत्तर प्रदेश बेसिक शिक्षा (अध्यापक) सेवा (बाइसवॉ संशोधन) नियमावली 2018 के नियम– 08 में उल्लिखित शैक्षिक, प्रशिक्षण उत्तीर्ण भारत सरकार अथवा राज्य सरकार द्वारा आयोजित प्राथमिक स्तर आवेदन शुल्क से प्राप्त धनराशि का व्यय परीक्षा सम्बन्धी कार्यों के लिए वित्त विभाग द्वारा जारी मितव्ययता के सिद्धान्तों के अनुसार सचिव, परीक्षा नियामक प्राधिकारी, उ0प्र0 प्रयागराज द्वारा किया जायेगा।

13. In view to uniformly raise the standard of teachers and teaching, Parliament enacted the Right of Children to Free and Compulsory Education Act, 20096. Central Government, in exercise of powers conferred under Section 23 of RTE Act, 2009, notified the National Council for Teachers Education7 as the Academic Authority. The qualification prescribed by NCTE for the appointment of teachers was uniformly made applicable throughout the country so as maintain a uniform standard of teaching in different categories of schools defined under the RTE Act, 2009. The State Government, accordingly, amended the qualifications in the respective Rules governing the appointment of teachers pursuant to the qualifications

notified by NCTE, which was not only binding but had an overriding effect. The NCTE on 23 August 2020, notified the qualifications for teachers in schools providing elementary education from Class 1 to 8. The notification subsequently came to be modified. Pursuant thereof, the State Government incorporated by way of amendment the qualifications under the Rules, 1981. The 23rd amendment in Rules, 1981, notified on 24 January 2019, was made applicable from a retrospective date i.e. 1 January 2018. The amended Rules, 1981, is relevant for the purpose of the instant controversy.

14. Rule 14 of Rules, 1981, provides the procedure of selection/determination of vacancies. The Assistant Teachers Recruitment Examination is to be conducted for the determined vacancies and the result is to be communicated to the Secretary of the Board, who thereafter, shall invite applications from successful candidates and recommend the names for counselling as per the option exercised by the candidates to the respective District Basic Education Officer for appointment. The District Basic Education Officer is the appointing authority of the Assistant Teacher of their respective district. Rules 16, 17 and 19 of Rules, 1981, provide the constitution of Selection Committee; verification of academic record and eligibility of the candidates. Upon verification and determining the quality point marks, the Selection Committee shall forward the names of the candidates to the appointing authority for issuance of appointment order. The relevant provisions of Rules, 1981, is extracted:

2- (b) "Appointing Authority" in relation to teachers referred to in Rule 3 means the District Basic Education Officer;

(h) "Junior Basic School" means a basic school where instructions from Class I to V are imparted;

(w) "Assistant Teacher Recruitment Examination" means a written examination conducted by the Government for recruitment of a person in junior basic schools run by Basic Shiksha Parishad.

(x) "Qualifying Marks of Assistant Teacher Recruitment Examination" means such minimum marks as may be determined from time to time by the Government.

(y) "Guidelines of Assistant Teacher Recruitment Examination" means such guidelines as may be determined from time to time by the Government.

14. **Procedure of Selection** - (1) Determination of vacancies - In respect of appointment, by direct recruitment to the post of Assistant Master of Junior Basic Schools under clause (a) of Rule 5, the appointing authority shall determine **the number of vacancies as also the number vacancies** to be reserved for candidates belonging to Scheduled Castes, Scheduled Tribes, Backward Classes and other categories under Rule 9 and **forward to the Secretary, Uttar Pradesh Basic Education Board, Prayagraj**. Information of compiled vacancies as per reservation **shall be provided by the Secretary, Uttar Pradesh Basic Education Board, Prayagraj to the Examination Body. For the notified vacancies an Assistant teacher Recruitment Examination shall be conducted by the Examination Body authorised** as such by the Government and result, according to reservation, shall be provided to Secretary, Uttar Pradesh Basic Education Board, Prayagraj.

Thereafter, **an advertisement for recruitment will be published in** at least two leading daily news papers having

adequate circulation in the State by the Secretary, Uttar Pradesh Basic Education Board, Prayagraj **inviting online applications from candidates** possessing prescribed educational and trainings qualification and passed teacher eligibility test, conducted by the Government or by the Government of India and **passed Assistant Teacher Recruitment Examination** conducted by the Government, **in which cadre wise district option will be filled by the candidates**.

(2).....

(3) The **name of candidates in the list prepared** under sub-rule (2) in accordance with clause (a) of sub-rule (1) of Rule 14 shall then be arranged in such manner that the candidate **shall be arranged in accordance with the quality points and weightage as specified in the Appendix I:**

Thereafter, cadre wise district will be allotted to the candidates as per their quality points and options by the Secretary, Uttar Pradesh Basic Education Board, Prayagraj and list will be sent to the appointing authority.

(4) No person shall be eligible for appointment unless his or her name is included in the list prepared under sub-rule (3).

(5) The list prepared under sub-rule (2) and received in accordance with sub-rule (3) of Rule 14 from the Secretary, Uttar Pradesh Basic Education Board, Prayagraj, shall be forwarded by the appointing authority to the Selection Committee."

"17. Procedure for direct recruitment - The Selection Committee shall verify the academic records and eligibility of candidates on the basis of the list referred to in clause (a) of sub-rule (3) of Rule 14 or sub-rule (2) of Rule 15. After verification and determining the eligibility of candidates the Selection Committee shall forward the name of the candidates to the appointing authority."

"19. Substantive Appointment - The **appointing authority shall make appointment to any post** referred to in Rule 5 by **taking the names of the candidates in the order in which they stand in the list prepared under Rule 17 or 18, as the case may be.** The character verification will be done by every appointed candidates compulsorily."

15. It is clear from the reading of Rule 14 and 17 that option has to be exercised by the candidate district wise, the names of the candidate has to be arranged in accordance with the quality point marks secured by the candidate. Thereafter, cadre wise district will be allotted to the candidates as per quality points and options. The appointment would, thereafter, be made by the appointing authority in the order in which the names of the candidate stands in the list prepared by the Selection Committee. In other words, the Rules, 1981, mandatorily provides allocation of district to the selected candidate on quality points based on option of the candidate.

16. It is urged that in view of Rules 14 to 19, the State Government has no role and as per the Rules, the process of selection has been conferred upon the Board and the Selection Committee. In the backdrop of the Rules, it is submitted that the State Government prohibiting the issuance of NOC to the petitioners and allowing NOC to be issued to candidates working in other departments is discriminatory. It is submitted that the cadre of Assistant Teacher is district wise and inter-district transfer is an exception and not an incidence of service governed by U.P. Basic Education (Teachers) (Posting) Rules, 2008. The Rules, 2008, prohibits a

teacher from seeking transfer unless he/she has put in five/three years of service respectively in the district. In other words, it is sought to be urged that a male teacher can seek transfer after putting in five years of service and a female teacher after putting in three years of service. The embargo of 5/3 years would, however, not apply in the case of those teachers who seek transfer in exceptional "exigencies'. The option for transfer can be exercised by a teacher only once. In short, it is urged that petitioners have a right to improve their percentage marks so as to enable them to seek placement in a district of their choice which is part of the selection process. It is urged that objection being raised by the respondents is without any basis and unreasonable.

17. It is further submitted that issuing NOC to the petitioners would have no bearing on the vacancies being sought to be filled by ATRE-2019. It is admitted by the respondents that as against 69000 vacancies, 1,46,000 candidates have qualified on having obtained minimum percentage marks. Board is bound to recommend 69,000 candidates, including the petitioners who have qualified. Placement of the petitioners in the district of their choice, on their percentage marks, would have no bearing on the vacancies to be filled up. That many number of candidates (1,46,000 - 69,000) i.e. 77,000 over and above the vacancies is available with the Board and would have to go without appointment. It is, therefore, urged that the plea of wait list and of vacancies being not filled up, on petitioners being adjusted/appointed in the districts of their choice would have no bearing on the vacancies. The stand of the respondents is without any foundation or basis.

18. It is not in dispute that the petitioners have been selected and cleared for appointment in various districts pursuant to ARTE 2019, and at that stage they have been prohibited issuance of NOC by the impugned Government Order. The plea of the Board that issuing NOC to the petitioners would disturb the student teacher ratio in the institutions, where they are working is misconceived. As noted herein above, 77,000 candidates exceed 69,000 vacancies, issuance of NOC to the petitioners would have no bearing on the student teacher ratio, as all the 69,000 teachers selected would be given placement in the various institutions of the district of their choice, including the petitioners. The placement of the petitioners in the district of their choice, based on their quality point marks, would have no bearing either on the number of vacancies or the number of teachers to be recommended against 69,000 vacancies. For instance, by way of illustration, 100 working Assistant Teachers are given posting say in 20 districts, upon selection. The 100 teachers are part of the selected 69,000 teachers against that many vacancy. Their placement would impact the number of vacancy district wise i.e. the district from where they are placed would witness a fall in the vacancy. Like wise there will be an increase in the vacancy of Assistant Teacher of that many number of teachers adjusted. But the adjustments would leave no impact on the overall vacancies. The selection and placement of the petitioners would neither increase the number of selected candidates nor reduce the number of vacancies to that extend. The plea of the State and Board that the teacher student ratio would be disturbed on the placement of petitioners, and/or the Board would have to recommend candidates over and above 69,000 vacancy (wait list) is

misconceived, imaginary and irrational. The argument taken on face value is absurd and does not subscribe to reason.

19. On specific query, learned counsels appearing for the State and the Board admit that there is no embargo in any of the Government Orders pertaining to ARTE 2019 prohibiting the Assistant Teachers already working in Basic schools from applying for the post of Assistant Teacher. It is further not being disputed by the respondents that improvement of percentage marks by the petitioners would enable them to make a choice of district. It is not being disputed that the cadre of Assistant Teachers is district cadre and transfer is not a general condition of service. It is further not being disputed that the allotment/placement to a district of a selected candidate is a part of the selection process of Assistant Teacher, solely dependent on the quality points secured by a candidate. The Rules, 2008, does not confer, as a matter of right, upon the Assistant Teacher to seek inter district transfer. The teacher can apply for transfer after putting in a requisite member of years of service as provided in the rules. The Board would consider the application based on a number of factors, viz, availability of teachers, teacher-student ratio, vacancy etc. In other words, the inter-district transfer cannot be claimed by a teacher as of right.

20. As against transfer, an Assistant Teacher can claim placement to a district of choice based on the percentage marks obtained in the selection process and the option exercised by the candidate. The Board or the Selection Committee have not been conferred any power under the Rules, 1981, for placement of a selected candidate to a district, but based on the option of the candidate and the quality point marks obtained by the selected candidate in the recruitment examination.

21. Government order dated 4 December 2020, is clarificatory in view of the anomalies noted, therein. The impugned para 5(1) of the said Government Order seeks to rectify an anomaly and in doing so the Government prohibits Assistant Teachers who are already appointed and working from issuance of NOC from their employer, as against, candidates working in other Government departments. On plain reading, the Government has not clarified, as to how, the selected candidates working as Assistant Teachers are to be adjusted in the district of their choice, but on the contrary the Government Order is in the nature of an injunction restraining the Board and the appointing authority i.e. the District Basic Education Officer from issuing NOC. In other words, the selection and placement, both part of the same recruitment, has been set at naught, insofar, the petitioners are concerned. In my opinion the Government Order to that extend has exceeded the power, authority and jurisdiction conferred upon the Government under Act, 1972 and the Rules, 1981. Para 5(1) of the Government Order 4 December 2020, is an arbitrary exercise of power having no nexus with the object or clarification it seeks to remedy. Executive action to escape wrath of Art. 14 has to be fair, reasonable, non-discriminatory, transparent, non-capricious, unbiased, without favouritism, in pursuit of appointment and equitable treatment.

22. Accordingly, the writ petition is **allowed** by passing the following orders:

(i.) Para 5(1) of the Government Order dated 4 December 2020 is declared arbitrary, unreasonable, discriminatory and

exceeding the authority conferred under Act, 1972 and Rules, 1981.

(ii.) Respondents are directed to issue NOC to all the petitioners recommended by the Selection Committee.

(iii.) All those Petitioners prohibited, in view of the Government Order dated 4 December 2020, from participating in the counselling, shall appear for counselling on the date to be notified by the Board.

(iv.) Petitioners shall be given appointment and placement of district strictly in accordance with Rules, 1981.

(v.) This order shall apply to all the candidates who have not approached this court but are affected by the impugned Government Order.

(vi.) The afore-noted orders shall be complied by the respondents within four weeks from the date of supply of copy of this order.

No Cost.

(2022)01ILR A1141
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 20.12.2021

BEFORE

THE HON'BLE J.J. MUNIR, J.

Service Single No. 8056 of 2020
Along with other 146 connected cases.

Rishabh Mishra & Ors. ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Lalta Prasad Misra, Amit kr. Singh Bhadauriya, Prabhakar Srivastava

Counsel for the Respondents:
C.S.C., Ajay

A. Service Law - Constitution of India,1950-Article 226-challenge to-publication of ATRE 2019 flawed answer key-the writ petitions placed in Group-A candidates who were vigilant before the Court upto the date of decision of Division bench in Abhishek Srivastava order granted one mark to each of the petitioners, if the award of one mark to any of the petitioners in Group-A, they find place in the merit list, the would get the appointment, whereas those in Group-B are dismissed who instituted their writ petitions after the judgment in Abhishek Srivastava, is dismissed.(Para 1 to 42)

The writ petition is partly allowed. (E-6)

List of Cases cited:

1. Abhishek Srivastava & 14 ors. Vs St. of U.P. & 2 ors., Spl. Appl.Def. No. 343 of 2021

2. Ran Vijay Singh & ors. Vs St. of U.P. & ors. (2018) 2 SCC 357

3. Malcom Lawrence Cecil D'Souza Vs U.O.I. & ors. (1976) 1 SCC 599

4. U.P.Jal Nigam & anr. Vs Jaswant Singh & anr. (2006) 11 SCC 464

5. Harwindra Kumar Vs Chief Eng., Karmik & ors. (2005) 13 SCC 300

6. Km Rashmi Mishra Vs M.PPSC & ors. (2006) 12 SCC 724

7. Ranjan Kumar & ors. Vs St. of Bih. & ors. (2014) 16 SCC 187

8. In Re Cognizance for Extension of Limitation, Misc. Appl. No. 665 of 2021 in SMW(C) No. 3 of 2020

(Delivered by Hon'ble J.J. Munir, J.)

1. These are a bunch of 147 writ petitions, where the petitioners, who are all candidates appearing in the Assistant

Teachers Recruitment Examination, 2019, have made it common cause to assail the result of the selection and consequent appointment of the luckier amongst them on ground that the answer key published on 08.05.2020 is patently flawed. There is much variety to the manner and the extent these petitioners want the Court to scrutinize the recruitment examination, but in substance, all of them say that they have been evaluated on the basis of a flawed answer key that has led to an actionable aberration in the result. All the writ petitions, despite the variety and the extent of relief claimed, raise common questions of fact and law and are, therefore, being decided by means of this common judgment and orders. The writ petition preferred by Rishabh Mishra and others, being Service Single No.8056 of 2020, has been heard as the leading case along with all the other connected writ petitions and is being decided as such.

2. Heard Dr. Lalta Prasad Mishra along with Mr. Amit Kumar Bhadauria, Mr. Sudeep Seth, learned Senior Advocate assisted by Mr. Avdhesh Shukla, Mr. Onkar Singh, Mr. Jitendra Bahadur, Mr. Anash Sherwani holding brief of Mr. Amrendra Nath Tripathi, Mr. Alok Kr. Misra, Mr. I.M. Pandey Ist, Mr. Rudra Kumar Tiwari, Mr. Avinash Pandey, Mr. Ram Singh, Mr. Arun Kumar Verma, Mr. Rajeiu Kumar Tripathi, Mr. Farooqahmad, Mr. Raj Priya Srivastava, Mr. Srideep Chatterjee, Mr. Prakhar Misra, Mr. Rajeev Narayan Pandey, Mr. Deepak Singh, Mr. Arvind Kumar Tiwari, Mr. Suyesh Pradhan, Mr. Nitin Kumar Mishra, Mr. Arun Kumar Mishra, Mr. Dileep Kumar Tiwari, Mr. Rakesh Kumar Singh, Mr. Anil Kumar Maurya, Mr. Rajesh Kumar Pathak, Mr. Shitla Prasad Tripathi, Mr. Saurabh Shukla, Mr. Om Chandra Sahu, Mr. Piyush Kumar Giri, learned Counsel for the petitioners in different writ petitions. Mr. Raghvendra Singh, the learned Advocate General assisted by Mr. Ran Vijay Singh, learned Additional Chief Standing Counsel has been heard on behalf of the State and Mr. Ajay Kumar, learned Counsel appearing for the U.P. Basic Education Board in the leading case, has also been heard.

3. The State of Uttar Pradesh on 9th of November, 2017 amended the Uttar Pradesh Basic Education (Teachers) Service Rules, 19811. The said amendment to the Rules was called the Uttar Pradesh Basic Education Board (Teachers) Service (Twentieth Amendment) Rules, 20172. By the Twentieth Amendment, changes were introduced to Rule 2(1) and Rule 8 of the Rules of 1981. The "Assistant Teacher Recruitment Examination' was introduced vide clause (w), the 'Qualifying Marks of Assistant Teacher Recruitment Examination' were provided for vide clause (x) and the 'Guidelines of Assistant Teacher Recruitment Examination' were envisaged under clause (y). These clauses (w), (x) and (y) were added to Rule 2(1) of the Rules of 1981. Pursuant to the Twentieth Amendment, the Assistant Teacher Recruitment Examination, 2018 was held, where 68,500 posts were advertised. The selection and recruitment process ran its full course and ended on 05.10.2018 with the appointment of 41,556 selected candidates. There is no issue about that selection here.

4. The next process of selection under the Rules of 1981, as amended by the Twentieth Amendment, was initiated on 01.12.2018. On occasion, the State Government issued fresh guidelines carried in the Government Order of 1st December,

2018. The recruitment process that commenced in terms of the Government Order dated 1st December, 2018 is called Assistant Teacher Recruitment Examination, 20193. Under the Recruitment Examination of 2019, 69,000 posts of Assistant Teaches were advertised. It is this recruitment, that is subject matter of the present batch of writ petitions. It must be remarked here that the Recruitment Examination of 2019 has not landed in Court for the first time. It has had a very troubled course in the past too, with varying issues being raised in challenge to its validity.

5. On 05.12.2018, guidelines for the Recruitment Examination of 2019 were issued by the Government, acting on the permission granted by the State Government on 01.12.2018. The Secretary, Examination Regulatory Authority, U.P., Allahabad issued an advertisement, notifying the Recruitment Examination of 2019. The petitioners, all of whom assert to be eligible to stake their candidature for the post of an Assistant Teacher in the Recruitment Examination of 2019, applied and participated in the written examination, that was held on 06.01.2019. The cutoff marks for selection were declared on 07.01.2019, which seems to have invited the first spate of litigation. The provisional answer key was published on 8th January, 2019 and objections thereto were invited. 11th January, 2019 was the last date for lodging objections to the provisional answer key. On May the 8th, 2020, the final answer key was issued followed by declaration of results on 11th May, 2020.

6. On 13th of May, 2020, a notification was issued, declaring the dates for registration and counselling of the selected candidates. The writ petition, giving rise to the leading case, was filed on 18th of May, 2020 to be joined in the enterprise of challenge with another 24 writ petitions at the instance of single and multiple writ petitioners. These other writ petitions were Service Single Nos.8224 of 2020, 8225 of 2020 etc., making for a total of 25 petitions. The record of the leading case shows that on 20th May, 2020 a day's time was granted to respondent nos.1, 3 and 4 to file a short counter affidavit, dispensing with notice to respondent nos.5, 6 and 7 at that stage. This petition was directed to come up on 22.05.2020. On 22.05.2020 and 28.05.2020, some further orders were passed, requiring the respondents to file a counter affidavit, clarifying the dispute about the key answer to the questions that were under challenge. The reference to those questions, that are impugned, would figure later in this judgment. It would also figure later how the controversy about the validity of at least four questions has now shrunk to a mere one.

7. Nevertheless, a short counter affidavit dated 28th May, 2020 was filed on behalf of the State Council of Educational Research and Training, U.P., Lucknow through its Director and the Examination Regulatory Authority, U.P. through its Secretary. The leading case, along with the other 24, was taken up before this Court on 03.06.2020, when, by a very detailed interim order, a learned Single Judge of this Court stayed the notification dated 08.05.2020, carrying the final answer key relating to the Recruitment Examination of 2019. All proceedings pursuant to the notification dated 08.05.2020 were also ordered to be stayed till the next date of listing. The objections to the various key

answers, that were put in by candidates pursuant to publication of the provisional answer key, were referred to a panel of experts. The respondents were directed to file the report received from the panel of experts before the Court on affidavit. It was ordered that the provisional answer key, along with objections thereto, be referred to a panel of experts to be appointed by the Secretary, University Grants Commission, New Delhi. There were detailed directions and a calendared schedule, according to which, the panel of experts were to be appointed by the U.G.C., for rendering their opinion and it being laid before this Court. Notice was also issued to respondent nos.5, 6 and 7 in the leading petition.

8. The interim order dated 03.06.2020 was challenged by the Examination Regulatory Authority and the other State respondents by means of Special Appeal nos.154 of 2020, 156 of 2020 and 157 of 2020. A Division Bench of this Court, vide order dated 12.06.2020, stayed the operation of the order dated 03.06.2020 passed in the leading case and the connected matters.

9. The petitioners in the leading case challenged the interim order passed by the Division Bench in Special Appeal no.154 of 2020 through Petition for Special Leave No.7884 of 2020 before the Supreme Court. Their Lordships, however, dismissed the Special Leave Petition with a request to the Division Bench to dispose of the pending appeals as early as possible and preferably, within a period of two months.

10. Special Appeal nos.154 of 2020, 156, 2020, 157 of 2020 and 160 of 2020 were taken up together by the Division Bench, with their Lordships of the Division Bench being of opinion that the Single Judge may be requested to decide the writ petitions on merits expeditiously. The Division Bench, therefore, directed that the Single Judge shall make an endeavour to consider and decide all the pending writ petitions on merits at an early date. It was also clarified that all pleas raised in the Special Appeals are left open, including the plea about impleadment of necessary parties. It was added as a word of clarification that this Court, while deciding the writ petitions, would not be influenced by the interim order dated 03.06.2020 as well as the interim order of the Division Bench dated 12.06.2020, passed in the Special Appeals. These orders, disposing of the Special Appeals, were passed by the Division Bench on 1st of February, 2021. It is in consequence of the orders of the Division Bench that these writ petitions have come up before this Court.

11. While all these developments took place before this Court at Lucknow, a batch of writ petitions was also filed at Allahabad mounting a challenge to the key answers under reference carried in the final answer key published on 08.05.2020. The batch of writ petitions, that were heard at Allahabad in **Rohit Shukla and 110 others**4, comprised other connected writ petitions. The petitions were dismissed by a learned Single Judge at Allahabad vide a judgment and order dated 07.05.2021. The judgment of the learned Single Judge dated 07.05.2021 in **Rohit Shukla and others (supra)** was challenged by the unsuccessful writ petitioners vide Special Appeal no.343 of 2021 along with a batch of 42 appeals. These appeals came to be disposed of by a common judgment and order dated 25.08.2021. Their Lordships of the Division Bench declined to interfere with the answer key vis-à-vis five of the six questions that were put in issue on appeal,

numerically reducing the challenge that was laid before the learned Single Judge, where it was a figure of nine in the key. At the hearing of the appeal, the key answers to Question Nos.47, 48, 54, 106 and 111 were tested with reference to authoritative texts and material and held not to be so palpably wrong that may call for interference by the Court. All these key answers refer to Question Booklet Series 'A' and have corresponding varying numbers in Question Booklet Series 'B', 'C' and 'D', but with the same content. The Division Bench, nevertheless, sustained the challenge with reference to Question No.60 in the Booklet Series 'A', which bears a different number in Booklet Series 'B', 'C' and 'D'. So far as the answer carried in answer key to Question No.60 in Booklet Series 'A' is concerned, the Division Bench held the key answer to be wrongly selected. The learned Single Judge's judgment to that extent was modified in terms of orders that can be best expressed in the words of their Lordships of the Division Bench in **Abhishek Srivastava and 14 others vs. State of U.P. and 2 others**5. These directions read:

"As an outcome of the discussion aforesaid, we find reason to cause interference in the judgement of the learned Single Judge limited to Question No. 60 and not for in any other questions for which objections have been raised by the appellants.

It is stated that selections have already been finalized followed by appointments but merely for that reason, the candidates having a case in their favour cannot be deprived to get benefit. Keeping in mind that selections have already been completed followed by appointments, direction in these appeals would apply only to those candidates who have raised the issue by maintaining a writ by now and not to any other candidate. The benefit to the candidates therein also would be if they are short of one mark because the value of each question is of one mark.

The matter is not referred to the expert for its examination finding that answer to Question No.60 was not correctly selected. The issue could not even be contested by the respondents thus to avoid further delay in the matter, we direct the respondents to take a decision appropriately to award one mark to the litigants till date.

To avoid any complication, the non-appellants can give value of one mark to the litigants for Question No.60 which otherwise can be with deletion to increase the value of all the questions proportionately but then it may open a Pandora and this Court do not intend to disturb the appointments already made thus direction is kept limited to the writ petitioners. If with award of one mark to any of the litigants till date before Allahabad High Court, they find place in the merit, then the respondents would give them appointment, subject to satisfaction of other conditions, if any.

The exercise aforesaid would not effect in any manner the selection or appointments already made. The benefit would be given to the appellants and the writ petitioners, if they are short of one mark and not otherwise. If any of the litigant till date are short by two marks in the merit, they would not be entitled to any benefit of this judgment.

With the aforesaid direction, all the appeals are disposed of after causing interference in the impugned judgment limited to Question No. 60."

12. It must be remarked here that before this Court, the learned Counsel appearing for the petitioners, in the multitude of writ petitions including the leading case, have assailed the answer key impugned, insofar as it relates to Question No.60 of Booklet Series "A'. The said Question bears numbers 87, 115 and 143 in Booklet Series "B', "C' and "D', respectively. Thus, challenge to the other answers in the answer key that was a figure of six before the Division Bench in **Abhishek Srivastava (supra),** is confined to Question No.60 alone.

13. It must also be recorded that in the writ petitions, challenge was raised to other questions as well, as would appear from a perusal of Paragraph No.19 of the writ, giving rise to the leading case. There, the key answers, with reference to Question nos.39, 70, 130 and 143 of Question Booklet Series "D', have been assailed in Paragraph Nos.20, 21, 22 and 23. But at the hearing, as already said, the writ petitioners confined their submissions to the answer key vis-à-vis Question No.60 of the Question Booklet Series "A' (corresponding to Question Nos.87, 115 and 143 in Question Booklet Series "B', "C' and "D', respectively). Now, Question No.60 in Question Booklet Series "A' reads:

"60."Educational administration provides appropriate education to appropriate student by appropriate teacher by which they can able to become the best by using available maximum resources." This definition is given by

(1) S.N. Mukherjee
(2) Cambell
(3) Welfare Grahya
(4) Dr. Atmanand Mishra"

14. The impugned answer key, relating to Question No.60, a copy of which finds place, amongst others, as Annexure no.2 in Service Single No.8071 of 2020, shows the correct option to be: "(3)". The third option in the Question Booklet Series "A' is "Welfare Grahya', the other options being: (1) S.N. Mukherjee; (2) Cambell; and (4) Dr. Atmanand Mishra. The contention of the learned Counsel for the petitioners, in all these cases, is that all the options in the impugned answer key to Question No.60 of Question Booklet Series "A' and the corresponding questions in the other Question Booklet Series, where the relative answer key carry the same option, are all patently wrong. It is argued that the suggested option "Welfare Grahya' is so manifestly wrong, that it cannot be a possible option.

15. There is a reference to a Treatise, called "Educational Administration and Management' by I.S. Sindhu, a xerox copy of which (relevant part) is annexed as Annexure no.10 to Service Single No.8071 of 2020, where the subject matter of Question No.60 in Question Booklet Series "A' finds place at Page No.105 of the paper book of this petition. The quote is credited to the original idea, authorship and words of "Graham Balfour". Likewise, in the leading case, in Question Booklet Series "D', the corresponding number of Question No.60 of Question Booklet Series "A' is Question No.143. The impugned answer key, relative to Question Booklet Series "D', is Annexure no.1 to this petition and the answer to Question No.143 of this series shown is Option No.3. The said option is the same as the one given out as the correct answer in the impugned answer key relating to Question Booklet Series "A', where it figures as Question No.60. This

answer is common to the other two Question Booklet Series "B' and "C'.

16. The issue, whether the impugned key answer to Question No.60 is without doubt and palpably a wrong answer, so as to be amenable to the Court's interference, fell directly for consideration of the Division Bench in **Abhishek Srivastava (supra).** Their Lordships of the Division Bench in Abhishek Srivastava held:

"Now comes Question No. 60 and is quoted hereunder:

"60. Educational administration provides appropriate education to appropriate student by appropriate teacher by which they can able to become the best by using available maximum resources" This definition is given by;

(1) S.N. Mukherjee

(2) Carnbell

(3) Welfare Grahya

(4) Dr. Atmanand Mishra"

The answer selected by the respondents is option no.3 whereas none of the answer is correct, according to the appellants. The material used by the expert and produced even by the respondents shows that name of the author is not correctly mentioned. The name of the author is "Graham Balfour" whereas it is mentioned as "Welfare Grahya". In view of the aforesaid, learned counsel for the appellants submit that option No.3 was wrongly selected by the respondents to be the correct answer. The material relied by the appellants is the Educational Administration and Health Education. Relevant part of the document is quoted hereunder:

"Educational administration is to enable the right pupils to receive the right education from the right teachers, at a cost within the means of the state under conditions which will enable the pupils best to profit by their training-Graham Belfour"

It is also Educational Administration handbook by Graham Balfour and the same s also quoted hereunder:

"Graham Balfour

Educational Administration

Two Lectures Delivered Before the University of Birmingham in February, 1921"

Learned counsel for the non-appellant could not contest the issue. It is submitted that the correct answer to Question No. 60 is "Graham Balfour' and answer No. 3 is close to the aforesaid, thus, taken it to be the correct answer. We find that correct name of the author has not been given in any of the option. In those circumstances, respondents could not have taken option No.3 to be the correct answer when the name of the author is "Graham Balfour" and not "Welfare Grahya".

In view of the aforesaid, we find substance in the argument of learned counsel for the appellants as otherwise it could not be contested by the non-appellant looking to the name given in option No.3, different than the name exist in the books even referred by the expert. During the course of argument also, the material relied by the respondents shows the correct name to be "Graham Balfour" whereas the option taken by the respondents is "Welfare Grahya". The selection of option No.3 suffers from the error on the fact of it thus, could not be contested by the non-appellant and, therefore, we cause interference in the judgment of the learned Single Judge in regard to answer to Question No.60. The appropriate direction would be given at the end of the judgment in reference to Question No.60."

17. It is submitted by the learned Advocate General that the answer key in relation to Question No.60 of Question Booklet Series "A' (and the corresponding numbers in other Question Booklet Series) has not been demonstrated to be palpably wrong. He says that if it is a case of doubt about the answer key being correct or incorrect, the doubt has to be held in favour of the Examination Authority. In support of this submission, much reliance has been placed by the learned Advocate General on the decision of the Supreme Court in **Ran Vijay Singh and others v. State of Uttar Pradesh and others**6. In Ran Vijay Singh, it has been held:

"30. The law on the subject is therefore, quite clear and we only propose to highlight a few significant conclusions. They are:

30.1. If a statute, Rule or Regulation governing an examination permits the re-evaluation of an answer sheet or scrutiny of an answer sheet as a matter of right, then the authority conducting the examination may permit it;

30.2. If a statute, Rule or Regulation governing an examination does not permit re-evaluation or scrutiny of an answer sheet (as distinct from prohibiting it) then the court may permit re-evaluation or scrutiny only if it is demonstrated very clearly, without any "inferential process of reasoning or by a process of rationalisation" and only in rare or exceptional cases that a material error has been committed;

30.3. The court should not at all re-evaluate or scrutinise the answer sheets of a candidate--it has no expertise in the matter and academic matters are best left to academics;

30.4. The court should presume the correctness of the key answers and proceed on that assumption; and

30.5. In the event of a doubt, the benefit should go to the examination authority rather than to the candidate."

18. It is submitted on the merits of the key answer to Question No.60 that it is not palpably wrong. Dilating on the reasoning why the impugned answer key is not palpably wrong vis-à-vis Question No.60 of Question Booklet Series "A' (including Question Booklet Series "B', "C' and "D'), it is urged that in English culture, the surname is often written first. The learned Advocate General says that "Welfare Grahya' is in fact the same as "Graham Balfour'. It is also argued that it is a test of the candidates' imagination, who were expected to reckon the correct option in the impugned answer key, that had resemblance to the correct answer.

19. This Court must remark that the submissions of the learned Advocate General asking this Court to accept "Welfare Grahya' as some kind of an understandable language mutant of "Graham Balfour', is incorrect to its face. For one, it is a proper noun and it is well-known that there are no synonyms of a proper noun, unless the case is that a particular proper noun in another language has a known and reputed equivalent. For instance, Maharaja Puru in times of Alexander was called by Greeks as Porus. If there were an answer where Puru and Porus were substituted as one for the other as the correct answer to a question about history or related subject, may be the logic that the learned Advocate General puts forth would apply. There is not the slightest evidence to suggest that "Welfare Grahya' is any kind of a name given to "Graham Balfour' in India. This is not even the case that the State urges. The learned Advocate General wants the candidates to draw

heavily on their imagination and conjecture, going by the phonetics of it that "Welfare Grahya' is the same thing as "Graham Balfour'. In our clear opinion, this is not a case where the Expert Committee or any expert for that matter, would have the last say. The impugned answer that figures in the answer key, in our considered opinion, is so palpably wrong that it is the law that would have the last say; not the expert.

20. The issue whether "Graham Balfour' and "Welfare Grahya' are one and the same thing, and "Welfare Grahya' could be the right answer, has already been gone into and decided by the Division Bench in **Abhishek Srivastava**, to which allusion has been made hereinbefore. Their Lordships of the Division Bench have relied on source material being a Treatise, called "Educational Administration and Management', a Handbook by "Graham Balfour' to conclude that the correct answer was "Graham Balfour' and not "Welfare Grahya'. The quote, that is subject matter of Question No.60, is credited to "Graham Balfour' and the Division Bench has held that the correct name of the author has not been given in any of the four options carried in the answer key relative to Question No.60 in Question Booklet Series 'A' (including the corresponding question numbers in the other Question Booklet Series). Thus, in the considered opinion of this Court, the answer to Question No.60 of Question Booklet Series "A' (corresponding to other question numbers in different Question Booklet Series) cannot be regarded as correct. The issue stands concluded by the decision of the Division Bench in **Abhishek Srivastava** (supra).

21. The learned Counsel for the petitioners, therefore, seek extension of the same benefit to the petitioners as that given to the writ petitioners, who were before the Court in **Abhishek Srivastava**. It is argued by those petitioners, who had instituted the writ petitions before the decision of the Division Bench in **Abhishek Srivastava**, that is to say, before 25.08.2021 that they are entitled to the benefit of the said decision. The other petitioners, who instituted their writ petitions after the decision in **Abhishek Srivastava**, also contend that they are entitled to the benefit of the said judgment.

22. The learned Advocate General has questioned the petitioners' claim on the foot of the submission that those petitioners, who did not file objections to the answer key within time allowed after publication of the provisional answer key, are not entitled to relief. It is submitted that those candidates-turned-petitioners, who did not bother to submit their objections against the provisional answer key after declaration of that key by the Authorities, do not have a right to challenge the validity of the impugned answer key. It is submitted that those petitioners, who have instituted writ petitions without submitting their objections to the provisional answer key, are no more than fence sitters, who are not vigilant about their rights. The learned Advocate General has drawn inspiration from the maxim "lex vigil lantibus non dor meintibus subvemit", which means that the law helps the vigilant and not those persons, who sleep over their rights. He has, in this connection, referred to the guidance of the Supreme Court in **Malcom Lawrence Cecil D'Souza v. Union of India and others**7.

23. It has also been urged by the learned Advocate General that the issue of being vigilant about one's rights lies at the core of a party's right to seek relief under the law in general and, in particular, in case of public employment. It is urged that the petitioners cannot capitalize on the benefit of a judgment rendered in the case of other candidates, who have toiled hard to enforce their rights over a long period of time. The learned Advocate General has further buttressed his submissions on the strength of the decision of their Lordships of the Supreme Court in **U.P. Jal Nigam and another v. Jaswant Singh and another**8. It is urged that acquiescence has not been approved on the part of a candidate who was not vigilant about his rights at an earlier stage, but claims relief after a judgment is passed in favour of some others, similarly circumstanced, who have run from pillar to post to secure their rights.

24. The question about being vigilant for one's right, particularly where administrative decisions are taken, adversely affecting rights of public servants, that remain unchallenged for long, engaged the attention of the Supreme Court in the context of a seniority dispute in **Malcom Lawrence Cecil D'Souza (supra)**, a decision on which the learned Advocate General has relied. It was a case, where the issue of inter se seniority between the officers of the Income Tax Department was agitated by one of them after a lapse of 14 or 15 years. It was in that context that it was observed in **Malcom Lawrence Cecil D'Souza:**

"8. The matter can also be looked at from another angle. The seniority of the petitioner qua Respondents 4 to 26 was determined as long ago as 1956 in accordance with 1952 Rules. The said seniority was reiterated in the seniority list issued in 1958. The present writ petition was filed in 1971. The petitioner, in our opinion, cannot be allowed to challenge the seniority list after lapse of so many years. The fact that a seniority list was issued in 1971. in pursuance of the decision of this Court in Karnik case would not clothe the petitioner with a fresh right to challenge the fixation of his seniority qua Respondents 4 to 26 as the seniority list of 1971 merely reflected the seniority of the petitioner qua those respondents as already determined in 1956. Satisfactory service conditions postulate that there should be no sense of uncertainty amongst public servants because of stale claims made after lapse of 14 or 15 years. It is essential that anyone who feels aggrieved with an administrative decision affecting one seniority should act with due diligence and promptitude and not sleep over the matter. No satisfactory explanation has been furnished by the petitioner before us for the inordinate delay in approaching the Court. It is no doubt true that he made a representation against the seniority list issued in 1956 and 1958 but that representation was rejected in 1961. No cogent ground has been shown as to why the petitioner became quiescent and took no diligent steps to obtain redress."

25. The other decision, on which the learned Advocate General has relied, is also relevant to the issue, and that is, **U.P. Jal Nigam and another v. Jaswant Singh (supra).** In **U.P. Jal Nigam and another v. Jaswant Singh**, the issue arose in the context of age of retirement of employees of the U.P. Jal Nigam. Some of the employees of the U.P. Jal Nigam had agitated their rights to continue in service up to the age of 60 years instead of superannuating at 58, claiming parity with State Government Employees, whose

Service Rules had been amended to provide 60 years as the age of superannuation. Many of the employees had continued on the strength of interim orders up to the age of 60.

26. In **Harwindra Kumar v. Chief Engineer, Karmik and others**9, it was finally held by the Supreme Court that employees of the U.P. Jal Nigam would be governed by the same regulations relating to superannuation as Government servants of the State and they too would retire at the age of 60 years. In consequence of the said decision, a spate of writ petitions were filed by employees, who had retired at the age of 58 years long back, asking for extension of the benefit of the judgment in **Harwindra Kumar**. The High Court disposed of the writ petitions granting benefit of the decision in **Harwindra Kumar** to the petitioners, who had already retired at the age of 58 years from the Jal Nigam Service. It was in that context that their Lordships of the Supreme Court allowed the Appeal preferred by the Jal Nigam by Special Leave and held in **U.P. Jal Nigam and another v. Jaswant Singh** thus:

"9. Similarly in Jagdish Lal v. State of Haryana [(1997) 6 SCC 538 : 1997 SCC (L&S) 1550] this Court reaffirmed the rule if a person chose to sit over the matter and then woke up after the decision of the court, then such person cannot stand to benefit. In that case it was observed as follows: (SCC p. 542)

"The delay disentitles a party to discretionary relief under Article 226 or Article 32 of the Constitution. The appellants kept sleeping over their rights for long and woke up when they had the impetus from Virpal Singh Chauhan case [Union of India v. Virpal Singh Chauhan, (1995) 6 SCC 684 : 1996 SCC (L&S) 1 : (1995) 31 ATC 813] . The appellants' desperate attempt to redo the seniority is not amenable to judicial review at this belated stage."

10. In the case of Union of India v. C.K. Dharagupta, (1997) 3 SCC 395 : 1997 SCC (L&S) 821, it was observed as follows:

"9. We, however, clarify that in view of our finding that the judgment of the Tribunal in R.P. Joshi v. Union of India, OA No. 497 of 1986 decided on 17-3-1987 gives relief only to Joshi, the benefit of the said judgment of the Tribunal cannot be extended to any other person. The respondent C.K. Dharagupta (since retired) is seeking benefit of Joshi case. In view of our finding that the benefit of the judgment of the Tribunal dated 17-3-1987 could only be given to Joshi and nobody else, even Dharagupta is not entitled to any relief.

11. In Govt. of W.B. v. Tarun K. Roy [(2004) 1 SCC 347 : 2004 SCC (L&S) 225] their Lordships considered delay as serious factor and have not granted relief. Therein it was observed as follows: (SCC pp. 359-60, para 34)

"34. The respondents furthermore are not even entitled to any relief on the ground of gross delay and laches on their part in filing the writ petition. The first two writ petitions were filed in the year 1976 wherein the respondents herein approached the High Court in 1992. In between 1976 and 1992 not only two writ petitions had been decided, but one way or the other, even the matter had been considered by this Court in Debdas Kumar [State of W.B. v. Debdas Kumar, 1991 Supp (1) SCC 138 : 1991 SCC (L&S) 841 : (1991) 17 ATC 261] . The plea of delay, which Mr Krishnamani states, should be a ground for denying the relief to the other persons

similarly situated would operate against the respondents. Furthermore, the other employees not being before this Court although they are ventilating their grievances before appropriate courts of law, no order should be passed which would prejudice their cause. In such a situation, we are not prepared to make any observation only for the purpose of grant of some relief to the respondents to which they are not legally entitled to so as to deprive others therefrom who may be found to be entitled thereto by a court of law."

12. The statement of law has also been summarised in Halsbury's Laws of England, para 911, p. 395 as follows:

"In determining whether there has been such delay as to amount to laches, the chief points to be considered are:

(i) acquiescence on the claimant's part; and

(ii) any change of position that has occurred on the defendant's part.

Acquiescence in this sense does not mean standing by while the violation of a right is in progress, but assent after the violation has been completed and the claimant has become aware of it. It is unjust to give the claimant a remedy where, by his conduct, he has done that which might fairly be regarded as equivalent to a waiver of it; or where by his conduct and neglect, though not waiving the remedy, he has put the other party in a position in which it would not be reasonable to place him if the remedy were afterwards to be asserted. In such cases lapse of time and delay are most material. Upon these considerations rests the doctrine of laches."

13. In view of the statement of law as summarised above, the respondents are guilty since the respondents have acquiesced in accepting the retirement and did not challenge the same in time. If they would have been vigilant enough, they could have filed writ petitions as others did in the matter. Therefore, whenever it appears that the claimants lost time or whiled it away and did not rise to the occasion in time for filing the writ petitions, then in such cases, the court should be very slow in granting the relief to the incumbent. Secondly, it has also to be taken into consideration the question of acquiescence or waiver on the part of the incumbent whether other parties are going to be prejudiced if the relief is granted. In the present case, if the respondents would have challenged their retirement being violative of the provisions of the Act, perhaps the Nigam could have taken appropriate steps to raise funds so as to meet the liability but by not asserting their rights the respondents have allowed time to pass and after a lapse of couple of years, they have filed writ petitions claiming the benefit for two years. That will definitely require the Nigam to raise funds which is going to have serious financial repercussions on the financial management of the Nigam. Why should the court come to the rescue of such persons when they themselves are guilty of waiver and acquiescence?

16. Therefore, in case at this belated stage if similar relief is to be given to the persons who have not approached the court that will unnecessarily overburden the Nigam and the Nigam will completely collapse with the liability of payment to these persons in terms of two years' salary and increased benefit of pension and other consequential benefits. Therefore, we are not inclined to grant any relief to the persons who have approached the court after their retirement. Only those persons who have filed the writ petitions when they were in service or who have obtained interim order for their retirement, those

persons should be allowed to stand to benefit and not others. We have been given a chart of those nine persons, who filed writ petitions and obtained stay and are continuing in service. They are as follows:

1. Shri Bhawani Sewak Shukla
2. Shri Vijay Bahadur Rai
3. Shri Girija Shanker
4. Shri Yogendra Prakash Kulshresht
5. Shri Vinod Kumar Bansal
6. Shri Pradumn Prashad Mishra
7. Shri Banke Bihari Pandey
8. Shri Yashwant Singh
9. Shri Chandra Shekhar

And the following persons filed writ petitions before retirement but no stay order was granted:

1. Shri Gopal Singh Dangwal(WP No. 35384 of 2005 vide
order dated 5-5-2005)
2. Shri R.R. Gautam (WP No. 45495 of 2005 vide
order dated 15-6-2005)

17. The benefits shall only be confined to abovementioned persons who have filed writ petitions before their retirement or they have obtained interim order before their retirement. The appeals filed against these persons by the Nigam shall fail and the same are dismissed. Rest of the appeals are allowed and orders passed by the High Court are set aside. There would be no order as to costs."

27. No doubt, both the decisions in **Malcom Lawrence Cecil D'Souza** and **U.P. Jal Nigam and another v. Jaswant Singh** are very relevant to the issue, but this Court is afraid that the principle there may not apply the same way to all the petitioners in this batch of writ petitions. There is a group of writ petitions filed by one or more petitioners, numbering 105 that were filed before 25.08.2021. These petitions are grouped together and marked as "Group-A'. These are:

GROUP-A

1. SERVICE SINGLE No. - 8056 of 2020
2. SERVICE SINGLE No. - 8057 of 2020
3. SERVICE SINGLE No. - 8062 of 2020
4. SERVICE SINGLE No. - 8063 of 2020
5. SERVICE SINGLE No. - 8071 of 2020
6. SERVICE SINGLE No. - 8085 of 2020
7. SERVICE SINGLE No. - 8095 of 2020
8. SERVICE SINGLE No. - 8096 of 2020
9. SERVICE SINGLE No. - 8099 of 2020
10. SERVICE SINGLE No. - 8101 of 2020
11. MISC. SINGLE No. - 8125 of 2020
12. SERVICE SINGLE No. - 8128 of 2020
13. SERVICE SINGLE No. - 8131 of 2020
14. SERVICE SINGLE No. - 8145 of 2020
15. SERVICE SINGLE No. - 8146 of 2020
16. SERVICE SINGLE No. - 8151 of 2020
17. SERVICE SINGLE No. - 8189 of 2020
18. SERVICE SINGLE No. - 8190 of 2020
19. SERVICE SINGLE No. - 8191 of 2020

20. SERVICE SINGLE No. - 8193 of 2020
21. SERVICE SINGLE No. - 8198 of 2020
22. SERVICE SINGLE No. - 8200 of 2020
23. SERVICE SINGLE No. - 8205 of 2020
24. SERVICE SINGLE No. - 8225 of 2020
25. SERVICE SINGLE No. - 8233 of 2020
26. SERVICE SINGLE No. - 8236 of 2020
27. SERVICE SINGLE No. - 8241 of 2020
28. SERVICE SINGLE No. - 8256 of 2020
29. SERVICE SINGLE No. - 8258 of 2020
30. SERVICE SINGLE No. - 8279 of 2020
31. SERVICE SINGLE No. - 8280 of 2020
32. SERVICE SINGLE No. - 8318 of 2020
33. SERVICE SINGLE No. - 8322 of 2020
34. SERVICE SINGLE No. - 8325 of 2020
35. SERVICE SINGLE No. - 8338 of 2020
36. SERVICE SINGLE No. - 8377 of 2020
37. SERVICE SINGLE No. - 8385 of 2020
38. SERVICE SINGLE No. - 8386 of 2020
39. SERVICE SINGLE No. - 8388 of 2020
40. SERVICE SINGLE No. - 8391 of 2020
41. SERVICE SINGLE No. - 8396 of 2020
42. SERVICE SINGLE No. - 8403 of 2020
43. SERVICE SINGLE No. - 8404 of 2020
44. SERVICE SINGLE No. - 8409 of 2020
45. SERVICE SINGLE No. - 8423 of 2020
46. SERVICE SINGLE No. - 8448 of 2020
47. SERVICE SINGLE No. - 8451 of 2020
48. SERVICE SINGLE No. - 8452 of 2020
49. SERVICE SINGLE No. - 8453 of 2020
50. SERVICE SINGLE No. - 8454 of 2020
51. SERVICE SINGLE No. - 8456 of 2020
52. SERVICE SINGLE No. - 8498 of 2020
53. SERVICE SINGLE No. - 8658 of 2020
54. SERVICE SINGLE No. - 8659 of 2020
55. SERVICE SINGLE No. - 8725 of 2020
56. SERVICE SINGLE No. - 8836 of 2020
57. SERVICE SINGLE No. - 8866 of 2020
58. SERVICE SINGLE No. - 8908 of 2020
59. SERVICE SINGLE No. - 8989 of 2020
60. SERVICE SINGLE No. - 9037 of 2020
61. SERVICE SINGLE No. - 9121 of 2020
62. SERVICE SINGLE No. - 9655 of 2020
63. SERVICE SINGLE No. - 10426 of 2020

64. SERVICE SINGLE No. - 10431 of 2020
65. SERVICE SINGLE No. - 10972 of 2020
66. SERVICE SINGLE No. - 11334 of 2020
67. SERVICE SINGLE No. - 11467 of 2020
68. SERVICE SINGLE No. - 14177 of 2020
69. SERVICE SINGLE No. - 14350 of 2020
70. SERVICE SINGLE No. - 19893 of 2020
71. SERVICE SINGLE No. - 21886 of 2020
72. SERVICE SINGLE No. - 22803 of 2020
73. SERVICE SINGLE No. - 23359 of 2020
74. SERVICE SINGLE No. - 24800 of 2020
75. SERVICE SINGLE No. - 24801 of 2020
76. SERVICE SINGLE No. - 24824 of 2020
77. SERVICE SINGLE No. - 24826 of 2020
78. SERVICE SINGLE No. - 24827 of 2020
79. SERVICE SINGLE No. - 24828 of 2020
80. SERVICE SINGLE No. - 24837 of 2020
81. SERVICE SINGLE No. - 671 of 2021
82. SERVICE SINGLE No. - 1847 of 2021
83. SERVICE SINGLE No. - 2675 of 2021
84. SERVICE SINGLE No. - 2856 of 2021
85. SERVICE SINGLE No. - 3188 of 2021
86. SERVICE SINGLE No. - 3216 of 2021
87. SERVICE SINGLE No. - 4016 of 2021
88. SERVICE SINGLE No. - 4223 of 2021
89. SERVICE SINGLE No. - 4290 of 2021
90. SERVICE SINGLE No. - 4371 of 2021
91. SERVICE SINGLE No. - 4443 of 2021
92. SERVICE SINGLE No. - 4446 of 2021
93. SERVICE SINGLE No. - 4528 of 2021
94. SERVICE SINGLE No. - 4625 of 2021
95. SERVICE SINGLE No. - 4665 of 2021
96. SERVICE SINGLE No. - 4795 of 2021
97. SERVICE SINGLE No. - 4931 of 2021
98. SERVICE SINGLE No. - 5223 of 2021
99. SERVICE SINGLE No. - 5553 of 2021
100. SERVICE SINGLE No. - 6769 of 2021
101. SERVICE SINGLE No. - 6843 of 2021
102. SERVICE SINGLE No. - 9552 of 2021
103. SERVICE SINGLE No. - 12777 of 2021
104. SERVICE SINGLE No. - 16713 of 2021

28. These petitions were clearly pending on the date the decision in Abhishek Srivastava was rendered. About these petitioners, it cannot be said that they are fence sitters or those who wish to reap

the benefits of a judgment passed by the Court about their rights that they never agitated earlier. It is just that these petitioners petitioned the Bench of this Court at Lucknow whereas another set of them, similarly circumstanced, petitioned this Court at Allahabad. Those who approached the High Court at Allahabad suffered a wholesome rejection of their claim by the learned Single Judge there, but on appeal, have been granted relief in terms of the decision in Abhishek Srivastava. The petitioners in Group-A were similarly agitating their rights before this Court at Lucknow and met with relative success before the learned Single Judge in terms of an interim order of 3rd June, 2020. It is another matter that the interim order was set aside in Appeal by the Division Bench. Many of the petitioners here went up against the interim order passed by the Division Bench in the Special Appeals to the Supreme Court, but failed there. This shows that most of the petitioners in Group-A were vigilant about their rights and went about the process of enforcing them. They cannot be called as fence sitters or the proverbial Rip Van Winkles.

29. The other is a group of writ petitions, where too, there are a number of petitioners. They have instituted writ petitions after 25.08.2021. They are grouped together and marked as "Group-B'. These are:

GROUP-B

1. SERVICE SINGLE No. - 20791 of 2021
2. SERVICE SINGLE No. - 21817 of 2021
3. SERVICE SINGLE No. - 22143 of 2021
4. SERVICE SINGLE No. - 22145 of 2021
5. SERVICE SINGLE No. - 22172 of 2021
6. SERVICE SINGLE No. - 22501 of 2021
7. SERVICE SINGLE No. - 22503 of 2021
8. SERVICE SINGLE No. - 22507 of 2021
9. SERVICE SINGLE No. - 22519 of 2021
10. SERVICE SINGLE No. - 22659 of 2021
11. SERVICE SINGLE No. - 22719 of 2021
12. SERVICE SINGLE No. - 22760 of 2021
13. SERVICE SINGLE No. - 22801 of 2021
14. SERVICE SINGLE No. - 22819 of 2021
15. SERVICE SINGLE No. - 22820 of 2021
16. SERVICE SINGLE No. - 22864 of 2021
17. SERVICE SINGLE No. - 22891 of 2021
18. SERVICE SINGLE No. - 22892 of 2021
19. SERVICE SINGLE No. - 22909 of 2021
20. SERVICE SINGLE No. - 22919 of 2021
21. SERVICE SINGLE No. - 23042 of 2021
22. SERVICE SINGLE No. - 23128 of 2021
23. SERVICE SINGLE No. - 23153 of 2021
24. SERVICE SINGLE No. - 23182 of 2021
25. SERVICE SINGLE No. - 23192 of 2021
26. SERVICE SINGLE No. - 23303 of 2021

27. SERVICE SINGLE No. - 23395 of 2021
28. SERVICE SINGLE No. - 23435 of 2021
29. SERVICE SINGLE No. - 23481 of 2021
30. SERVICE SINGLE No. - 23494 of 2021
31. SERVICE SINGLE No. - 23538 of 2021
32. SERVICE SINGLE No. - 23563 of 2021
33. SERVICE SINGLE No. - 23621 of 2021
34. SERVICE SINGLE No. - 23627 of 2021
35. SERVICE SINGLE No. - 23630 of 2021
36. SERVICE SINGLE No. - 23660 of 2021
37. SERVICE SINGLE No. - 23663 of 2021
38. SERVICE SINGLE No. - 23665 of 2021
39. SERVICE SINGLE No. - 23747 of 2021
40. SERVICE SINGLE No. - 23755 of 2021
41. SERVICE SINGLE No. - 23859 of 2021
42. SERVICE SINGLE No. - 23898 of 2021
43. SERVICE SINGLE No. - 24122 of 2021

About these petitioners, it may legitimately be said that they seek to reap the benefit of the decision in **Abhishek Srivastava**.

30. In our opinion, the principles in **Malcom Lawrence Cecil D'Souza and U.P. Jal Nigam and another v. Jaswant Singh** would apply to disentitle the petitioners in Group-B to relief. However, those principles would not apply to the petitioners in Group-A. Thus, the submission of the learned Advocate General, to the extent it relates to the petitioners in Group-A, cannot be accepted, but for those in Group-B, it is sustainable.

31. At this stage, Mr. Onkar Singh and other learned Counsel appearing for the petitioners, falling in Group-B of the writ petitions, submitted that they could not approach this Court earlier due to the Covid-19 pandemic. They instituted their writ petitions after the judgment in **Abhishek Srivastava**. It is urged that the facts, rights and entitlement to relief for the petitioners in the writ petitions marked as Group-B are identical to those in Group-A. It is emphasized that while entertaining the writ petitions, this Court granted time to the respondent-State to file a counter affidavit, but the State have not come up with a counter affidavit in the writ petitions that were instituted after 25.08.2021, that is to say, those placed in Group-B. The petitioners' assertions have not been controverted by the respondents.

32. Quite apart, the attention of this Court has been drawn on behalf of all the writ petitioners, whose cases fall in Group-B to the order of the Supreme Court in **Misc. Application No.665 of 2021 in SMW(C) No. 3 of 2020, in re Cognizance for Extension of Limitation**, where their Lordships vide order dated 23.03.2020, extended the period of limitation from 15.03.2020 until further orders. By a subsequent order, considering the normalcy restored with shrinking Covid-19 cases, it was directed by their Lordships of the Supreme Court that the period from 15.03.2020 till 14.03.2021 shall stand

excluded from the period of limitation. Thereafter, on 27.04.2021, the order dated 23.03.2020 was restored and extended until further orders. By a subsequent order dated 23.09.2021, the limitation period from 15.03.2020 to 02.10.2021 was directed to be ignored. Drawing inspiration from the aforesaid directions, it is submitted by the learned Counsel for the petitioners that the prevailing conditions were very extraordinary. They submit that the Division Bench in **Abhishek Srivastava** did not view the rights of the petitioners, who filed or would file after 25.08.2021 from this vantage at all. It is also urged that once one question has been judicially pronounced to be wrong, its benefit should go all candidates, who challenge the same, without fixing any cutoff date. It is also urged that this is particularly so because all the petitions are being heard simultaneously, irrespective of the date of institution.

33. Learned Counsel for the petitioners in this group of writ petitions say that if one mark is awarded to all the petitioners, some of them, who are short of one mark alone, would qualify the Recruitment Examination of 2019. It is also argued that the purity of recruitment examinations to public employment has to be strictly maintained. Thus, not awarding one mark to all the petitioners would result in selection of the less meritorious over much better candidates. It is also the petitioners' contention that they are not liable to suffer for the wrong committed in the examination process or the examination system. There is no way that the right may be denied to a petitioning candidate for one extra mark that he would be entitled to, but for the fact that the writ petition was instituted after the decision in **Abhishek Srivastava**. This contention has been vehemently opposed on behalf of the State by the learned Advocate General.

34. So far as the effect of delay in approaching the Court for relief in matters of public service and employment is concerned, the decisions in **Malcom Lawrence Cecil D'Souza (supra) and U.P. Jal Nigam and another v. Jaswant Singh (supra)** are eloquent about the principle that acquiescence is a factor that definitely destructs the right to relief, that may otherwise be a person's substantive entitlement. But the question is : Are the petitioners in the group of petitions marked 'B' indeed guilty of acquiescence? This Court has remarked earlier in the judgment that they are, and for that reason, put them in the disentitled group. There submission, however, deserves some further consideration.

35. The petitioners lastly urge that the unusual conditions created by the Covid-19 pandemic ought to be considered as a factor that places the normal rules of human conduct, particularly, time for enforcement of rights and obligations, in a mode of suspension. The extraordinary circumstances generated by the Covid-19 pandemic, no doubt, have led their Lordships of the Supreme Court to extend the statutory period of limitation for institution of legal proceedings, but would that work to make a difference for the petitioners in the writ petitions marked as Group-B? For one, there is no pleading to the effect that the petitioners in the group of petitions marked 'B' were prevented from approaching the Court prior to 25.08.2021, on account of some specific or particular events affecting them or their family members caused by the Covid-19 pandemic. It is just that, that after the judgment in **Abhishek Srivastava**, the

petitioners in the group of petitions marked 'B' moved this Court for relief, expecting to secure relief fortuitously.

36. So far as the impact of the Covid-19 pandemic is concerned, it was common to all the candidates who have petitioned this Court, including those who filed much before 25.08.2021 and find place in the writ petitions marked 'A'. The distinction between them appears to be that the petitioners in the writ petitions in Group-A petitioned the Court in the earnest endeavour to agitate and enforce their rights, whereas those in Group-B appear to be gain-seekers by windfall, post decision in **Abhishek Srivastava**. Moreover, the Division Bench in **Abhishek Srivastava** has confined relief to those petitioners who were before the Court by that date, in order to obviate a widespread impact on the recruitment process. There is no reason for this Court to disturb the recruitment process relating to the Recruitment Examination of 2019 any more than that is imperative in consequence of the judgment of the Division Bench in **Abhishek Srivastava**. Therefore, despite the points that have been canvassed on behalf of the writ petitioners, whose cases fall in the group of petitions marked 'B', their claim cannot be accepted.

37. The other submissions of the learned Advocate General that some of the petitioners have not objected to the provisional answer key, which disentitles them to relief before this Court, is also a proposition not worth acceptance. The Division Bench in **Abhishek Srivastava** did not go into that distinction about rights of the writ petitioners there, and there is no reason for us to carve out a disentitling sub-category for the few who have not objected before the Authorities against provisional answer key. The writ petitioners in Group-A have promptly agitated their rights and merely because some of them have not objected to the provisional answer key, would not work as an infallible estoppel to disentitle them to relief before this Court. This is particularly so as the Division Bench at Allahabad has found all candidates, who had instituted their writ petitions before 25.08.2021, entitled to limited relief, without disturbing the rights of the selected candidates. The petitioners in Group-A are, in no way, different from the writ petitioners before the Division Bench in **Abhishek Srivastava**. There is no reason for us, therefore, to accept the learned Advocate General's contention in this regard.

38. Quite apart from the limited relief that the petitioners in the writ petitions marked as Group-A would be entitled to, the learned Advocate General has been at pains to demonstrate that none of the writ petitions are maintainable on another score. He questions the maintainability of the writ petitions on account of non-impleadment of necessary and proper parties. He submits that all selected candidates are required to be impleaded as parties and put under notice. He has relied on the decisions of the Supreme Court in **Km. Rashmi Mishra v. M.P. Public Service Commission and others**10 and **Ranjan Kumar and others v. State of Bihar and others**11. In **Rashmi Mishra**, it was held:

"13. It is not in dispute that all the 17 selected candidates were not impleaded as parties. Respondents 3 and 4, although, purported to have been impleaded as parties, the same, as noticed hereinbefore, was done on a different premise.

Allegations of favouritism against them having been made, indisputably they were necessary parties. In the writ petition, although, the appellant contended that they were being impleaded in their representative capacity, admittedly no step had been taken in terms of Order 1 Rule 8 of the Code of Civil Procedure or the principles analogous thereto.

15. In the aforementioned situation, all the seventeen selected candidates were necessary parties in the writ petition. The number of selected candidates was not large. There was no difficulty for the appellant to implead them as parties in the said proceeding. The result of the writ petition could have affected the appointees. They were, thus, necessary and/or in any event proper parties.

16. In Prabodh Verma [(1984) 4 SCC 251 : 1984 SCC (L&S) 704] this Court held: (SCC pp. 273-74, para 28)

"The first defect was that of non-joinder of necessary parties. The only respondents to the Sangh's petition were the State of Uttar Pradesh and its officers concerned. Those who were vitally concerned, namely, the reserve pool teachers, were not made parties -- not even by joining some of them in a representative capacity, considering that their number was too large for all of them to be joined individually as respondents. The matter, therefore, came to be decided in their absence. A High Court ought not to decide a writ petition under Article 226 of the Constitution without the persons who would be vitally affected by its judgment being before it as respondents or at least by some of them being before it as respondents in a representative capacity if their number is too large, and, therefore, the Allahabad High Court ought not to have proceeded to hear and dispose of the Sangh's writ petition without insisting upon the reserve pool teachers being made respondents to that writ petition, or at least some of them being made respondents in a representative capacity, and had the petitioners refused to do so, ought to have dismissed that petition for non-joinder of necessary parties."

(See also All India SC & ST Employees' Assn. v. A. Arthur Jeen [(2001) 6 SCC 380] and Indu Shekhar Singh v. State of U.P. [(2006) 8 SCC 129 : 2006 SCC (L&S) 1916 : (2006) 5 Scale 107])

30. In the instant case, however, as all the selected candidates were not impleaded as parties in the writ petition, no relief can be granted to the appellant."

39. Again, in **Ranjan Kumar**, it was held:

"4. On a perusal of the orders impugned, we find that only 40 persons were made respondents before the High Court and hardly a few appointees filed applications for intervention. It is well settled in law that no adverse order can be passed against persons who were not made parties to the litigation. In this context, we may refer with profit to the authority in Prabodh Verma v. State of U.P. [Prabodh Verma v. State of U.P., (1984) 4 SCC 251 : 1984 SCC (L&S) 704] , wherein a three-Judge Bench was dealing with the constitutional validity of two Uttar Pradesh Ordinances which had been struck down by the Division Bench of the Allahabad High Court on the ground that the provisions therein were violative of Articles 14 and 16(1) of the Constitution of India. In that context, a question arose whether the termination of the services of the appellants and the petitioners therein as secondary school teachers and intermediate college lecturers following upon the High Court judgment was valid without making the

said appointees as parties. The learned Judges observed that the writ petition filed by the Sangh suffered from two serious, though not incurable, defects; the core defect was that of non-joinder of necessary parties, for respondents to the Sangh's petition were the State of Uttar Pradesh and its officers concerned and those who were vitally concerned, namely, the reserve pool teachers, were not made parties -- not even by joining some of them in a representative capacity, considering that their number was too large for all of them to be joined individually as respondents. Thereafter the Court ruled thus: (Prabodh Verma case [Prabodh Verma v. State of U.P., (1984) 4 SCC 251 : 1984 SCC (L&S) 704] , SCC pp. 273-74, para 28)

"28. ... The matter, therefore, came to be decided in their absence. A High Court ought not to decide a writ petition under Article 226 of the Constitution without the persons who would be vitally affected by its judgment being before it as respondents or at least by some of them being before it as respondents in a representative capacity if their number is too large, and, therefore, the Allahabad High Court ought not to have proceeded to hear and dispose of the Sangh's writ petition without insisting upon the reserve pool teachers being made respondents to that writ petition, or at least some of them being made respondents in a representative capacity, and had the petitioners refused to do so, ought to have dismissed that petition for non-joinder of necessary parties."

5. In the case at hand neither was any rule nor any regulation challenged. In fact, we have been apprised that at the time of selection and appointment there was no rule or regulation. A procedure used to be adopted by the administrative instructions. That apart, it was not a large body of appointees but only 182 appointees. Quite apart from that the persons who were impleaded, were not treated to be in the representative capacity. In this regard, it is profitable to refer to some authorities.

6. In Indu Shekhar Singh v. State of U.P. [Indu Shekhar Singh v. State of U.P., (2006) 8 SCC 129 : 2006 SCC (L&S) 1916] it has been held thus: (SCC p. 151, para 56)

"56. There is another aspect of the matter. The appellants herein were not joined as parties in the writ petition filed by the respondents. In their absence, the High Court could not have determined the question of inter se seniority."

7. In Rashmi Mishra v. M.P. Public Service Commission [Rashmi Mishra v. M.P. Public Service Commission, (2006) 12 SCC 724 : (2007) 2 SCC (L&S) 345] , after referring to Prabodh Verma [Prabodh Verma v. State of U.P., (1984) 4 SCC 251 : 1984 SCC (L&S) 704] and Indu Shekhar Singh [Indu Shekhar Singh v. State of U.P., (2006) 8 SCC 129 : 2006 SCC (L&S) 1916] , the Court took note of the fact that when no steps had been taken in terms of Order 1 Rule 8 of the Code of Civil Procedure or the principles analogous thereto all the seventeen selected candidates were necessary parties in the writ petition. It was further observed that the number of selected candidates was not many and there was no difficulty for the appellant to implead them as parties in the proceeding. Ultimately, the Court held that when all the selected candidates were not impleaded as parties to the writ petition, no relief could be granted to the appellant therein.

8. In Tridip Kumar Dingal v. State of W.B. [Tridip Kumar Dingal v. State of W.B., (2009) 1 SCC 768 : (2009) 2 SCC (L&S) 119] , this Court approved the view

expressed by the tribunal which had opined that for absence of selected and appointed candidates and without affording an opportunity of hearing to them, the selection could not be set aside.

9. In Public Service Commission v. Mamta Bisht [Public Service Commission v. Mamta Bisht, (2010) 12 SCC 204 : (2011) 1 SCC (L&S) 208] this Court, while dealing with the concept of necessary parties and the effect of non-implementation of such a party in the matter when the selection process is assailed, observed thus: (SCC pp. 207-08, para 9)

"9. ... in Udit Narain Singh Malpaharia v. Board of Revenue [Udit Narain Singh Malpaharia v. Board of Revenue, AIR 1963 SC 786] , wherein the Court has explained the distinction between necessary party, proper party and pro forma party and further held that if a person who is likely to suffer from the order of the court and has not been impleaded as a party has a right to ignore the said order as it has been passed in violation of the principles of natural justice. More so, proviso to Order 1 Rule 9 of the Code of Civil Procedure, 1908 (hereinafter called "Code of Civil Procedure') provides that non-joinder of necessary party be fatal. Undoubtedly, provisions of the Code of Civil Procedure are not applicable in writ jurisdiction by virtue of the provision of Section 141 of the Code of Civil Procedure but the principles enshrined therein are applicable. (Vide Gulabchand Chhotalal Parikh v. State of Gujarat [Gulabchand Chhotalal Parikh v. State of Gujarat, AIR 1965 SC 1153] , Babubhai Muljibhai Patel v. Nandlal Khodidas Barot [Babubhai Muljibhai Patel v. Nandlal Khodidas Barot, (1974) 2 SCC 706] and Sarguja Transport Service v. STAT [Sarguja Transport Service v. STAT, (1987) 1 SCC 5 : 1987 SCC (Cri) 19] .)"

10. In J.S. Yadav v. State of U.P. [J.S. Yadav v. State of U.P., (2011) 6 SCC 570 : (2011) 2 SCC (L&S) 140] , it has been held that: (SCC p. 583, para 31)

"31. No order can be passed behind the back of a person adversely affecting him and such an order, if passed, is liable to be ignored being not binding on such a party as the same has been passed in violation of the principles of natural justice."

It was further held that: (SCC p. 583, para 31)

"31. ... The litigant has to ensure that the necessary party is before the court, be it a plaintiff or a defendant, otherwise the proceedings will have to fail. In service jurisprudence if an unsuccessful candidate challenges the selection process, he is bound to implead at least some of the successful candidates in representative capacity."

11. In Vijay Kumar Kaul v. Union of India [Vijay Kumar Kaul v. Union of India, (2012) 7 SCC 610 : (2012) 2 SCC (L&S) 491] it has been ruled thus: (SCC p. 619, para 36)

"36. Another aspect needs to be highlighted. Neither before the Tribunal nor before the High Court, Parveen Kumar and others were arrayed as parties. There is no dispute over the factum that they are senior to the appellants and have been conferred the benefit of promotion to the higher posts. In their absence, if any direction is issued for fixation of seniority, that is likely to jeopardise their interest. When they have not been impleaded as parties such a relief is difficult to grant."

12. Recently in State of Rajasthan v. Ucchab Lal Chhanwal [State of Rajasthan v. Ucchab Lal Chhanwal, (2014) 1 SCC 144 : (2014) 1 SCC (L&S) 34] , it has been opined that: (SCC p. 149, para 14)

"14. ... Despite the indefatigable effort, we are not persuaded to accept the aforesaid proponent, for once the respondents are promoted, the juniors who have been promoted earlier would become juniors in the promotional cadre, and they being not arrayed as parties in the lis, an adverse order cannot be passed against them as that would go against the basic tenet of the principles of natural justice."

13. In view of the aforesaid enunciation of law, we are disposed to think that in such a case when all the appointees were not impleaded, the writ petition was defective and hence, no relief could have been granted to the writ petitioners."

40. The principles laid down in the aforesaid authorities are binding on this Court and the learned Advocate General would be right in his submissions, if the decision taken here were to the prejudice of any of the candidates, already selected, much less appointed. The directions of the Division Bench in **Abhishek Srivastava** would show that for the award of one extra mark vis-à-vis Question No.60 of Question Booklet Series "A' and the relative question numbers in the other Question Booklet Series, a candidate, in the limited contingency of being short of marks by one below the cutoff, is entitled to the benefit of selection, but appointments already made, would not be disturbed. Also, the benefit of the extra mark vis-à-vis Question No.60 (Question Booklet Series "A' and corresponding questions in other Question Booklet Series) would remain confined to the writ petitioners who were before the Court up to date of the decision of the Division Bench in Abhishek Srivastava, i.e. 25.08.2021. If this is the nature of the relief proposed to be granted, the non-impleadment of all selected or appointed candidates or issue of notice to them, would hardly be of any consequence.

41. No other point was pressed on behalf of either side.

42. In view of what has been said above and following the judgment of the Division Bench in **Abhishek Srivastava (supra**), all the writ petitions placed in Group-A are allowed in part, whereas those in Group-B are **dismissed**. For the writ petitions in Group-A, a mandamus is issued to the respondents directing them to grant one mark to each of the petitioners and that one mark would enure to the benefit of a petitioner, if he/ she is short of the cutoff by one mark. If with the award of one mark to any of the petitioners in Group-A, they find place in the merit-list, the respondents would give them appointment subject to satisfaction of the other conditions, if any. The aforesaid orders, however, would not disturb any selection or appointment, already made.

43. There shall be no order as to costs.

(2022)01ILR A1163
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.09.2021

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Habeas Corpus Writ Petition No. 577 of 2021

Tasim & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:

Sri Rajesh Shukla, Sri Satendra Narayan Singh

Counsel for the Respondents:
A.G.A.

Constitution of India , 1950 - Art.226 - Criminal Procedure Code, Sections 190 & 156 - Writ of habeas corpus - Maintainability - Alternate remedy - Petition filed by father to produce corpus before Court who is in illegal custody of respondents – Petitioner stated that corpus herself requested the petitioner to get her out from illegal custody of respondents - Petitioner lodged FIR against respondents u/s 363, 366 regarding abduction of his daughter – Petitioner is not satisfied with the progress of the investigation & grievance that respondents have not been arrested - Held - Petitioner has remedy u/S. 190 read with S. 156 of Cr.P.C. to approach before concerned Magistrate for redressal of his grievance - In view of availability of remedy, habeas corpus writ petition, not maintainable. (Para 6 8)

Disposed off (E-5)

(Delivered by Hon'ble Shamim Ahmed, J.)

1. Heard Sri Satendra Narayan Singh, Advocate holding brief of Sri Rajesh Shukla, learned counsel for the petitioners as well as learned A.G.A. for the State and perused the record.

2. This habeas corpus writ petition has been filed by the father of the corpus, Tasim, petitioner no. 1 with the following prayer :

"(i) Issue a writ, order or direction in the nature of habeas corpus petition directing the respondent nos. 2 and 3 to produce the corpus (Tabbassum) before this Hon'ble Court who is in the illegal custody of the respondent nos. 4 to 10. So that the legal custody of the corpus (Tabbassum) be handed over to her father i.e. petitioner no. 1.

(ii) Issue a writ, order or direction in the nature of habeas corpus petition, directing the respondent nos. 2 and 3 to provide protection to the petitioners from respondent nos. 4 to 10 whenever it is required by the petitioners.

(iii) Issue any other order or direction which this Hon'ble Court may deem fit and proper under the facts and circumstances of the instant case."

3. Learned counsel for the petitioners submits that the petitioner no. 2, Tabbassum (corpus) has herself informed the petitioner no. 1 that she is in illegal custody of respondent nos. 4 to 10 and she requested the petitioner no. 1 to get her out from the illegal custody of the respondent nos. 4 to 10. Thereafter, the father of the corpus i.e. petitioner no. 1 has himself met the respondent nos. 4 to 10 and requested them to let the petitioner no. 2 go along with him but they refused the same and said to him by threatening that he can do whatever he want. Thereafter, petitioner no. 1 has lodged first information report registered as Case Crime No. 0191 of 2021, under Sections 363 and 366 I.P.C. at Police Station-Thana Bhawan, District-Shamli with regard to abduction of his daughter by the respondent nos. 4 to 10. The petitioner no. 1 is a labour and he used to proceed for his work in the morning and comes back in the evening. The respondent no. 4, Amir son of respondent no. 10, Khurshid has abducted his daughter who is a minor girl with the help of other accused persons. Learned counsel for the petitioners submits that petitioner no. 1 has sent an application on Jan Sunwai portal on 24.06.2021 and 26.06.2021 and a direction was given to S.H.O. of Police Station Thana Bhawan, District Shamli by S.S.P. for taking

necessary action and in this regard a report was also submitted on 26.07.2021. On 01.07.2021, the petitioner no. 1 came to know that S.H.O. of Police Station Thana Bhawan, District Shamli has decided the matter and submitted report dated 30.06.2021. He further submits that petitioner no. 1 again sent an application online complaining that his daughter has been abducted and anyhow she could not be traced out. In this regard, a direction was given to SHO of Police Station Thana Bhawan, District Shamli for investigating the matter. He further argued that the daughter of the petitioner no. 1 could not be traced out whether she is alive or not. The respondent nos. 4 to 10 have not arrested despite several complaints made by the petitioner no. 1 against them and the minor girl of the petitioner no. 1 has yet not been traced out.

4. Learned counsel for the petitioner further argued that the petitioner no. 1 has moved Criminal Misc. Writ Petition No. 5831 of 2021 (Tasim Vs. State of U.P. & 9 Ors.;) with the prayer that this Court may graciously be pleased to direct the respondent no. 2 to supervise the investigation and direction may also be given to the respondent no. 3 to arrest the accused persons in pursuance of the first information report dated 25.06.2021. The Hon'ble Court *vide order dated* **02.08.2021 passed in Criminal Misc. Writ Petition No. 5831 of 2021 (Tasim Vs. State of U.P. & 9 Ors.;)** dismissed the same with the following observation :

"Heard learned counsel for the petitioner and 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 Mandamus directing the respondent no.2 to supervise the investigation and direction may be given to respondent no.3 to arrest the accused of the First Information Report dated 25.6.2021 as Case Crime No.0199 of 2021, under Section 363 and 366 I.P.C. Police Station-Thana bhawan, District-Shamli.

(b) Issue a writ, order or direction in the nature of Mandamus to direct the concerned authorities to conclude fair investigation in the aforesaid First Information Report within the time as prescribed by this Hon'ble Court."

Learned counsel for the petitioner submits that the investigating officer is not properly investigating the matter and collusively not taking action against the accused.

Be that as it may, the petitioner has a remedy under Section 156(3), Cr.P.C. to move an appropriate application before the concerned Magistrate. This legal position has also been clarified by this court vide judgment dated 27.01.2021 in Criminal Misc. Writ Petition No.15692 of 2020 (Ajay Kumar Pandey vs. State of U.P. and others).

In view of the aforesaid, we do not find any good reason to entertain this writ petition. Therefore, without expressing any opinion on merits of the case of the petitioner, this writ petition is dismissed leaving it open to the petitioner to move an appropriate application before the concerned Magistrate under Section 156(3), Cr.P.C. In the event such an application is filed by the petitioner, it is expected that the concerned Magistrate shall proceed in accordance with law."

5. Per contra, learned A.G.A. submits that the jurisdiction lies with the Magistrate in view of the provision of Section 190 read with Section 156 of Cr.P.C. and the Magistrate shall proceed in accordance with law. He further suggests that the petitioner no. 1 may approach before the concerned Magistrate regarding the latest progress of the case and he may also apprised the learned Magistrate that the matter may be expedited, the learned Magistrate may proceed in the matter in accordance with law, hence the present habeas corpus writ petition is not maintainable at this stage and referred the provision of Section 190 and 156 Cr.P.C. which is reproduced hereinbelow :

"190. Cognizance of offences by Magistrates.

(1)Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub- section (2), may take cognizance of any offence-

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a police report of such facts;

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub- section (1) of such offences as are within his competence to inquire into or try.

156. Police officer' s power to investigate cognizable case.

(1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.

(2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.

(3) Any Magistrate empowered under section 190 may order such an investigation as above- mentioned."

6. Considering the arguments as advanced by the learned counsel for the parties and after perusal of record, this Court finds that there is a force in the submission made by learned A.G.A. that the petitioner no. 1 has a remedy under Section 190 read with Section 156 of Cr.P.C. to approach before the concerned Magistrate for redressal of his grievance and this court also vide order dated 2.8.2021 in the case of ***Tasim (supra)*** directed the petitioner no. 1 to approach before the concerned Magistrate under Section 156(3) Cr.P.C. for redressal of his grievances.

7. From the persual of the record, it appears that the complaint of petitioner no. 1 with regard to abduction of his minor daughter, the same was forwarded to the concerned police station but nothing has done in the matter whereas a direction was issued to the S.H.O. of concerned police station to investigate the matter expeditiously and submit his report forthwith and if the petitioner no. 1 is not satisfied with the progress of the investigation, he may apprise the learned Magistrate with this fact and he may move appropriate application in the case for further direction to be issued in accordance with law by the learned Magistrate.

8. Thus, in view of the above, the remedy, if any, for the petitioner is to approach the concerned Magistrate in respect of his grievance, the present habeas corpus writ petition before this Court is not maintainable.

9. With the above observation and direction, the present habeas corpus writ petition is being finally **disposed of.**

(2022)01ILR A1167
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.12.2021

BEFORE

THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Habeas Corpus Writ Petition No. 632 of 2021

Sushil Kumar Tiwari & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Maqsood Ahmad Beg, Sri Naiyar Masroof Siddiqui

Counsel for the Respondents:
G.A.

Constitution of India, 1950 - Article 226 - Habeas Corpus writ petition – custody of minor child - father alleging that corpus is under illegal custody of his biological mother- Held - In a child custody matter, a writ of habeas corpus would be entertainable where it is established that the detention of the minor child by the parent or others is illegal and without authority of law - custody of the child with his mother is not unlawful - only in an exceptional situation that the custody of a minor may be directed to be taken away from the mother for being given to any other person-including father of the child, in exercise of writ jurisdiction - in the present case, father, can take resort to the substantive statutory remedy in respect of his claim regarding custody/visitation of the child. (Para 18, 19)

Dismissed. (E-5)

List of Cases cited:

1. Rachhit Pandey (Minor) & anr. Vs St. of U.P. & ors. 2021 (2) ADJ 320

2. Master Manan @ Arush Vs St. of U.P. & ors. 2021 (5) ADJ 317

3. Krishnakant Pandey (Corpus)& ors. Vs St. of U.P. & ors. 2021 2 AWC 1053 ALL

4. Master Tarun @ Akchhat Kumar & anr. Vs St. of U.P. & ors. 2021 (6) ADJ 23

5. Priyanshu (Minor) Vs St. of U.P.& ors. 2021 (7) ADJ 438

6. Vahin Saxena (Minor Corpus) & anr. Vs St. of U.P. & ors. 2021 SCC OnLine All 593

7. Reshu @ Nitya & ors. Vs St. of U.P. & ors. Habeas Corpus Writ Petition No. 9 of 2020, decided on 22.10.2021

8. Mohammad Ikram Hussain Vs St. of U.P. & ors. AIR 1964 SC 1625

9. Kanu Sanyal Vs District Magistrate Darjeeling (1973) 2 SCC 674

10. Sayed Saleemuddin Vs Dr. Rukhsana & ors. (2001) 5 SCC 247

11. Nithya Anand Raghvan Vs St. (NCT of Delhi) & anr. (2017) 8 SCC 454

12. Tejaswini Gaud & ors. Vs Shekhar Jagdish Prasad Tewari & ors. (2019) 7 SCC 42

(Delivered by Hon'ble Dr. Yogendra Kumar Srivastava, J.)

1. Heard Sri Maqsood Ahmad Beg, learned counsel for the petitioners and Sri Vinod Kant, learned Additional Advocate General assisted by Sri Arvind Kumar, learned Additional Government Advocate appearing for the State respondents.

2. The petitioner no. 1 asserting himself to be the father of the petitioner no. 2-corpus, has filed the present habeas corpus petition alleging that the corpus is under illegal custody of his mother-respondent no. 4.

3. Pleadings in the petition are to the effect that the marriage of petitioner no. 1 was solemnized with respondent no. 4 on 09.06.2010 and the petitioner no. 2 was born on 23.08.2015 and that the petitioner no. 1 and the respondent no. 4 are living separately for the past several years. It is averred that the petitioner no. 1 has filed a divorce petition and the respondent no. 4 has also instituted certain legal proceedings against the petitioner no. 1. An application stated to have been filed before the local police authorities some time in the year 2020, has been appended along with the petition wherein it is stated that the petitioner-corpus (stated to be of age about five years at that point of time) had been taken away by his mother-respondent no. 4, about three years earlier. Based on the aforestated facts, the present petition seeking a writ of habeas corpus has been filed.

4. Sri Vinod Kant, learned Additional Advocate General appearing along with Sri Arvind Kumar, learned Additional Government Advocate for the State respondents, submits that instructions have been received to the effect that criminal proceedings, pursuant to a complaint case instituted by the respondent no. 4, are pending, which fact has not clearly been placed on record. It is further submitted that as per the admitted facts, the petitioner no.2-corpus being in the custody of his biological mother since the time when he was an infant of about two years of age, the same cannot be held to amount to illegal detention, and accordingly the present petition seeking a writ of habeas corpus would not be entertainable. Reliance has been placed upon recent decisions of this Court in **Rachhit Pandey (Minor) And Another vs. State of U.P. and 3 others1, Master Manan @ Arush vs. State of U.P. and 8 others2, Krishnakant Pandey (Corpus) And 2 Others vs. State of U.P. And 3 Others3, Master Tarun @ Akchhat Kumar And Another vs. State of U.P. And 3 Others4, Priyanshu (Minor) vs. State of U.P. And 5 Others5, Vahin Saxena (Minor Corpus) and another Vs. State of U.P. and others6 and Reshu @ Nitya and others Vs. State of U.P. and others7**

5. In order to appreciate the rival contentions, the ambit and scope of exercise of powers for grant of a writ of habeas corpus in such matters would be required to be adverted to.

6. 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 vs. State of U.P. and others8 and Kanu Sanyal vs. District Magistrate Darjeeling9.**

7. The object and scope of a writ of habeas corpus in the context of a claim relating to custody of a minor child fell for consideration in **Sayed Saleemuddin vs.**

Dr. Rukhsana and others10, and it was held that in a habeas corpus petition seeking transfer of custody of a child from one parent to the other, the principal consideration for the court would be to ascertain whether the custody of the child can be said to be unlawful or illegal and whether the welfare of the child requires that the present custody should be changed. It was stated thus:-

"11. ...it is clear that in an application seeking a writ of Habeas Corpus for custody of minor children the principal consideration for the Court is to ascertain whether the custody of the children can be said to be unlawful or illegal and whether the welfare of the children requires that present custody should be changed and the children should be left in care and custody of somebody else. The principle is well settled that in a matter of custody of a child the welfare of the child is of paramount consideration of the Court..."

8. Taking a similar view in the case of **Nithya Anand Raghvan v State (NCT of Delhi) and another11**, it was held that the principal duty of the court in such matters is to ascertain whether the custody of the child is unlawful and illegal and whether the welfare of the child requires that his present custody should be changed and the child be handed over to the care and custody of any other person. The relevant observations made in the judgement are as follows:-

"44. The present appeal emanates from a petition seeking a writ of habeas corpus for the production and custody of a minor child. This Court in *Kanu Sanyal v. District Magistrate, Darjeeling, (1973) 2 SCC 674,* has held that habeas corpus was essentially a procedural writ dealing with machinery of justice. The object underlying the writ was to secure the release of a person who is illegally deprived of his liberty. The writ of habeas corpus is a command addressed to the person who is alleged to have another in unlawful custody, requiring him to produce the body of such person before the court. On production of the person before the court, the circumstances in which the custody of the person concerned has been detained can be inquired into by the court and upon due inquiry into the alleged unlawful restraint pass appropriate direction as may be deemed just and proper. The High Court in such proceedings conducts an inquiry for immediate determination of the right of the person's freedom and his release when the detention is found to be unlawful.

45. In a petition for issuance of a writ of habeas corpus in relation to the custody of a minor child, this Court in *Sayed Saleemuddin v. Rukhsana, (2001) 5 SCC 247,* has held that the principal duty of the court is to ascertain whether the custody of child is unlawful or illegal and whether the welfare of the child requires that his present custody should be changed and the child be handed over to the care and custody of any other person. While doing so, the paramount consideration must be about the welfare of the child. In *Elizabeth Dinshaw v. Arvand M. Dinshaw,* (1987) 1 SCC 42, it is held that in such cases the matter must be decided not by reference to the legal rights of the parties but on the sole and predominant criterion of what would best serve the interests and welfare of the minor. The role of the High Court in examining the cases of custody of a minor is on the touchstone of principle of parens patriae jurisdiction, as the minor is within the jurisdiction of the Court [see *Paul Mohinder Gahun Vs. State (NCT of Delhi),* 2004 SCC OnLine Del 699, relied upon by

the appellant]. It is not necessary to multiply the authorities on this proposition.

46. The High Court while dealing with the petition for issuance of a writ of habeas corpus concerning a minor child, in a given case, may direct return of the child or decline to change the custody of the child keeping in mind all the attending facts and circumstances including the settled legal position referred to above. Once again, we may hasten to add that the decision of the court, in each case, must depend on the totality of the facts and circumstances of the case brought before it whilst considering the welfare of the child which is of paramount consideration. The order of the foreign court must yield to the welfare of the child. Further, the remedy of writ of habeas corpus cannot be used for mere enforcement of the directions given by the foreign court against a person within its jurisdiction and convert that jurisdiction into that of an executing court. Indubitably, the writ petitioner can take recourse to such other remedy as may be permissible in law for enforcement of the order passed by the foreign court or to resort to any other proceedings as may be permissible in law before the Indian Court for the custody of the child, if so advised.

47. In a habeas corpus petition as aforesaid, the High Court must examine at the threshold whether the minor is in lawful or unlawful custody of another person (private respondent named in the writ petition). For considering that issue, in a case such as the present one, it is enough to note that the private respondent was none other than the natural guardian of the minor being her biological mother. Once that fact is ascertained, it can be presumed that the custody of the minor with his/her mother is lawful. In such a case, only in exceptionable situation, the custody of the minor (girl child) may be ordered to be taken away from her mother for being given to any other person including the husband (father of the child), in exercise of writ jurisdiction. Instead, the other parent can be asked to resort to a substantive prescribed remedy for getting custody of the child."

9. The question of maintainability of a habeas corpus petition under Article 226 of the Constitution of India for custody of a minor was examined in **Tejaswini Gaud and others vs. Shekhar Jagdish Prasad Tewari and others12,** and it was held that the petition would be maintainable where detention by parents or others is found to be illegal and without any authority of law and the extraordinary remedy of a prerogative writ of habeas corpus can be availed in exceptional cases where ordinary remedy provided by the law is either unavailable or ineffective. The observations made in the judgment in this regard are as follows:-

"14. Writ of habeas corpus is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from an illegal or improper detention. The writ also extends its influence to restore the custody of a minor to his guardian when wrongfully deprived of it. The detention of a minor by a person who is not entitled to his legal custody is treated as equivalent to illegal detention for the purpose of granting writ, directing custody of the minor child. For restoration of the custody of a minor from a person who according to the personal law, is not his legal or natural guardian, in appropriate cases, the writ court has jurisdiction.

x x x

19. Habeas corpus proceedings is not to justify or examine the legality of the

custody. Habeas corpus proceedings is a medium through which the custody of the child is addressed to the discretion of the court. Habeas corpus is a prerogative writ which is an extraordinary remedy and the writ is issued where in the circumstances of the particular case, ordinary remedy provided by the law is either not available or is ineffective; otherwise a writ will not be issued. In child custody matters, the power of the High Court in granting the writ is qualified only in cases where the detention of a minor by a person who is not entitled to his legal custody. In view of the pronouncement on the issue in question by the Supreme Court and the High Courts, in our view, in child custody matters, the writ of habeas corpus is maintainable where it is proved that the detention of a minor child by a parent or others was illegal and without any authority of law.

20. In child custody matters, the ordinary remedy lies only under the Hindu Minority and Guardianship Act or the Guardians and Wards Act as the case may be. In cases arising out of the proceedings under the Guardians and Wards Act, the jurisdiction of the court is determined by whether the minor ordinarily resides within the area on which the court exercises such jurisdiction. There are significant differences between the enquiry under the Guardians and Wards Act and the exercise of powers by a writ court which is of summary in nature. What is important is the welfare of the child. In the writ court, rights are determined only on the basis of affidavits. Where the court is of the view that a detailed enquiry is required, the court may decline to exercise the extraordinary jurisdiction and direct the parties to approach the civil court. It is only in exceptional cases, the rights of the parties to the custody of the minor will be determined in exercise of extraordinary jurisdiction on a petition for habeas corpus."

10. The exercise of the extraordinary jurisdiction for issuance of a writ of habeas corpus would, therefore, be seen to be dependent on the jurisdictional fact where the applicant establishes a prima facie case that the detention is unlawful. It is only where the aforementioned jurisdictional fact is established that the applicant would become entitled to the writ as of right.

11. In an application seeking a writ of habeas corpus for custody of minor child, as is the case herein, the principal consideration for the court would be to ascertain whether the custody of the child can be said to be unlawful and illegal and whether his welfare requires that the present custody should be changed and the child should be handed over in the care and custody of somebody else other than in whose custody he presently is.

12. Proceedings in the nature of habeas corpus may not be used to examine the question of the custody of a child. The prerogative writ of habeas corpus, is in the nature of extraordinary remedy, and the writ is issued, where in the circumstances of a particular case, the ordinary remedy provided under law is either not available or is ineffective. The power of the High Court, in granting a writ, in child custody matters, may be invoked only in cases where the detention of a minor is by a person who is not entitled to his/her legal custody.

13. The role of the High Court in examining cases of custody of a minor, in a

petition for a writ of habeas corpus, would have to be on the touchstone of the principle of *parens patriae jurisdiction* and the paramount consideration would be the welfare of the child. In such cases the matter would have to be decided not solely by reference to the legal rights of the parties but on the predominant criterion of what would best serve the interest and welfare of the minor.

14. In a given case, while dealing with a petition for issuance of a writ of habeas corpus concerning a minor child, directions may be issued for return of the child or the Court may decline to change the custody of the child, keeping in view all the attending facts and circumstances and taking into view the totality of the facts and circumstances of the case brought before the Court; the welfare of the child being the paramount consideration.

15. In the facts of the present case it is undisputed that the petitioner no. 2, presently of age about six years, is stated to be under the exclusive care and custody of his mother-respondent no.4, since the time when he was an infant of about two years of age. It is also admitted position that the petitioner no. 1 and the respondent no. 4 are living separately for quite some time and also certain other legal cases are pending between the parties.

16. The subject matter relating to custody of children during the pendency of the proceedings under the Hindu Marriage Act, 195513 is governed in terms of the provisions contained under Section 26 thereof. The aforesaid section applies to "any proceeding" under the HMA and it gives power to the court to make provisions in regard to: (i) custody, (ii) maintenance, and (iii) education of minor children. For this purpose the court may make such provisions in the decree as it may deem just and proper and it may also pass interim orders during the pendency of the proceedings and all such orders even after passing of the decree.

17. The provisions under Section 26 of the HMA were considered in **Gaurav Nagpal v Sumedha Nagpal14,** and it was held as follows:-

"Section 26 of the Hindu Marriage Act, 1955 provides for custody of children and declares that in any proceeding under the said Act, the Court could make, from time to time, such interim orders as it might deem just and proper with respect to custody, maintenance and education of minor children, consistently with their wishes, wherever possible."

18. In a petition for a writ of habeas corpus concerning a minor child, the Court, in a given case, may direct to change the custody of the child or decline the same keeping in view the attending facts and circumstances. For the said purpose it would be required to examine whether the custody of the minor with the private respondent, who is named in the petition, is lawful or unlawful. In the present case, the private respondent is none other than the biological mother of the minor child. This being the fact, it may be presumed that the custody of the child with his mother is not unlawful. It would only be in an exceptional situation that the custody of a minor may be directed to be taken away from the mother for being given to any other person-including father of the child, in exercise of writ jurisdiction. This would be so also for the reason that the other parent, in the present case, the father, can

take resort to the substantive statutory remedy in respect of his claim regarding custody of the child.

19. In a child custody matter, a writ of habeas corpus would be entertainable where it is established that the detention of the minor child by the parent or others is illegal and without authority of law. In a writ court, where rights are determined on the basis of affidavits, in a case where the court is of a view that a detailed enquiry would be required, it may decline to exercise the extraordinary jurisdiction and direct the parties to approach the appropriate forum. The remedy ordinarily in such matters would lie under the Hindu Minority and Guardianship Act, 195615 or the Guardians and Wards Act, 189016, as the case may be.

20. Counsel for the petitioners has not disputed the aforesaid legal and factual position and the only grievance, which is sought to be raised, is with regard to a claim for visitation rights on behalf of the father.

21. The contention which has been sought to be raised by the counsel for the petitioner with regard to the father's claim for custody and/or visitation rights, are matters which are to be agitated in appropriate proceedings.

22. Having regard to the aforesaid, this Court is not inclined to exercise its extraordinary jurisdiction to entertain the present petition seeking a writ of habeas corpus.

23. The petition stands dismissed accordingly.

(2022)01ILR A1173
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.10.2021

BEFORE

THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Habeas Corpus Writ Petition No. 671 of 2021

Smt. Jayanti (corpus) & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Awadh Bihari Pandey

Counsel for the Respondents:
A.G.A.

Constitution of India, Article 226 - Juvenile Justice (Care and Protection of Children) Model Rules, 2016 - Rule 18 (8) - placement of a child under the care of a parent, made by the CWC - Habeas Corpus writ petition - Maintainability - in a case where the custody of the corpus has been handed over as per a judicial order passed a Judicial Magistrate or a court of competent jurisdiction or a CWC constituted under the JJ Act, the said order cannot be assailed in a petition seeking a writ of habeas corpus - Habeas Corpus writ petition not maintainable (Para 23)

In the present case, petitioner no.1 (minor) placed under the care of her father-respondent no.4 pursuant to an order passed by the CWC exercising powers under the JJ Act and the Rules made thereunder – Held - custody which is presently with the father cannot be said to be illegal and a petition for a writ of habeas corpus through her husband would not be entertainable in the facts of the case (Para 24)

Dismissed. (E-5)

List of Cases cited:

1. Greene Vs Home Secretary (1941) 3 All ER 388

2. Kanu Sanyal Vs District Magistrate, Darjeeling & ors. (1973) 2 SCC 674

3. Col. Dr. B. Ramachandra Rao Vs The St. of Orissa & ors. (1972) 3 SCC 256

4. Manubhai Ratilal Patel Vs St. of Guj. & ors. (2013) 1 SCC 314

5. Secy. of St. for Home Affairs Vs O'Brien 1923 AC 603

6. Ranjit Singh Vs St. of Pepsu AIR 1959 SC 843

7. Ummu Sabeena Vs St. of Kerala (2011) 10 SCC 781

8. Saurabh Kumar Vs Jailor, Koneila Jail & anr (2014) 13 SCC 436

9. St. of Mah. & ors.. Vs Tasneem Rizwan Siddiquee (2018) 9 SCC 745

10. Serious Fraud Investigation Office Vs Rahul Modi & anr. Etc. (2019) 5 SCC 266

11. Sanjay Dutt Vs St. (1994) 5 SCC 410

12. Gautam Navlakha Vs National Investigation Agency 2021 SCC Online SC 382

13. Km. Rachna & anr. Vs St. of U.P. & ors. 2021 (3) ADJ 415

(Delivered by Hon'ble Dr. Yogendra Kumar Srivastava, J.)

1. Heard Sri Awadh Bihari Pandey, learned counsel for the petitioners and Sri Vinod Kant, learned Additional Advocate General assisted by Sri Pankaj Saxena, learned Additional Government Advocate-I and Sri Arvind Kumar, learned Additional Advocate General appearing for the State-respondent.

2. The present petition seeking a writ of habeas corpus has been filed on behalf of petitioner no.1-corpus through the petitioner no.2 asserting to be her husband, seeking to contend that the petitioner corpus has been illegally detained by her father-respondent no.4.

3. Learned Additional Advocate General, has pointed out that instructions have been received to the effect that in terms of an order dated 9.8.2021 passed by the Child Welfare Committee1 constituted under the Juvenile Justice (Care and Protection of Children) Act, 20152, the petitioner no.1, stated to be a minor, has been placed under the care of her father-respondent no.4 and in view thereof since the custody has been handed over pursuant to a judicial order, the same cannot be said to be illegal and the present petition seeking a writ of habeas corpus would not be entertainable. It is pointed out that the order, for placement of a child under the care of a parent, made by the CWC, would be referable to the provisions under sub-rule (8) of Rule 18 of the Juvenile Justice (Care and Protection of Children) Model Rules, 20163.

4. In response to the aforesaid objection with regard to entertainability of the petition, learned counsel for the petitioners has sought to refer to the factual aspects of the case and has asserted that he was unaware of the proceedings before the CWC.

5. Learned Additional Advocate General has referred to the provisions of the JJ Act to point out that the Child Welfare Committee is a committee having a statutory status constituted as per the provision contained under Section 27 of the

JJ Act. For ease of reference, Section 27 of the JJ Act is being extracted below:-

"27. Child Welfare Committee.--(1) The State Government shall by notification in the Official Gazette constitute for every district, one or more Child Welfare Committees for exercising the powers and to discharge the duties conferred on such Committees in relation to children in need of care and protection under this Act and ensure that induction training and sensitisation of all members of the committee is provided within two months from the date of notification.

(2) The Committee shall consist of a Chairperson, and four other members as the State Government may think fit to appoint, of whom atleast one shall be a woman and another, an expert on the matters concerning children.

(3) The District Child Protection Unit shall provide a Secretary and other staff that may be required for secretarial support to the Committee for its effective functioning.

(4) No person shall be appointed as a member of the Committee unless such person has been actively involved in health, education or welfare activities pertaining to children for atleast seven years or is a practicing professional with a degree in child psychology or psychiatry or law or social work or sociology or human development.

(5) No person shall be appointed as a member unless he possesses such other qualifications as may be prescribed.

(6) No person shall be appointed for a period of more than three years as a member of the Committee.

(7) The appointment of any member of the Committee shall be terminated by the State Government after making an inquiry, if--

(i) he has been found guilty of misuse of power vested on him under this Act;

(ii) he has been convicted of an offence involving moral turpitude and such conviction has not been reversed or he has not been granted full pardon in respect of such offence;

(iii) he fails to attend the proceedings of the Committee consecutively for three months without any valid reason or he fails to attend less than three-fourths of the sittings in a year.

(8) The District Magistrate shall conduct a quarterly review of the functioning of the Committee.

(9) The Committee shall function as a Bench and shall have the powers conferred by the Code of Criminal Procedure, 1973 (2 of 1974) on a Metropolitan Magistrate or, as the case may be, a Judicial Magistrate of First Class.

(10) The District Magistrate shall be the grievances redressal authority for the Child Welfare Committee and anyone connected with the child, may file a petition before the District Magistrate, who shall consider and pass appropriate orders."

6. It has further been pointed out that as per sub-section (9) of Section 27 of the JJ Act, the Committee is to function as a Bench and shall have the powers conferred by the Code of Criminal Procedure, 1973 on a Metropolitan Magistrate or, as the case may be, a Judicial Magistrate of First Class. It has been submitted that procedure in relation to children in need of care and protection is provided under Chapter V of the Rules, 2016. Rule 18 prescribes the procedure with regard to production of a child in need of care and protection before

the Committee and the procedure for enquiry is delineated under Rule 19 of the aforesaid Rules. The aforementioned Rules are being set out herein below:-

"**18. Production before the Committee.**--(1) Any child in need of care and protection shall be produced before the Committee during the working hours at its place of sitting and beyond working hours before the member as per the duty roster:

Provided that where the child cannot be produced before the Committee, the Committee shall reach out to the child where the child is located.

(2) Whoever produces the child before the Committee shall make a report in Form 17 containing the particulars of the child as well as the circumstances in which the child was received or found.

(3) In case of a child less than two years of age, who is medically unfit, the person or the organisation who comes in contact with the child in need of care and protection shall send a written report along with the photograph of the child to the Committee within twenty-four hours and produce the child before the Committee as soon as the child is medically fit along with a medical certificate to that effect.

(4) The Committee after interaction with the child may issue directions for placing the child with the parent or guardian or Children's Home, where such Home is available in the vicinity of the Committee before which the child is produced, and in the absence of such Home, to direct the placing of the child in safe custody of a fit person or a fit facility.

(5) The Committee or the member on duty shall issue the order for placing the child in Children's Home in Form 18.

(6) The Committee or the member on duty shall order immediate medical examination of the child produced before the Committee or the member on duty, if such examination is needed.

(7) In the case of abandoned or lost or orphaned child, the Committee, before passing an order granting interim custody of the child pending inquiry, shall see that, the information regarding such child is uploaded on a designated portal.

(8) The Committee may, while making an order in Form 19 for placing a child under the care of a parent, guardian or fit person, pending inquiry or at the time of restoration, as the case may be, direct such parent, guardian or fit person to enter into an undertaking in Form 20.

(9) Whenever the Committee orders a child to be kept in an institution, it shall forward to the Person-incharge of such institution, a copy of the order of short term placement pending inquiry in Form 18 with particulars of the Child Care Institution and parents or guardian and previous record. A copy of such order shall also be forwarded to the District Child Protection Unit.

19. Procedure for inquiry.--(1) The Committee shall inquire into the circumstances under which the child is produced and accordingly declare such child to be a child in need of care and protection.

(2) The Committee shall, *prima facie* determine the age of the child in order to ascertain its jurisdiction, pending further inquiry as per Section 94 of the Act, if need be.

(3) When a child is brought before the Committee, the Committee shall assign the case to a social worker or Case Worker or Child Welfare Officer or to any

recognised non-governmental organisation for conducting the social investigation under sub-section (2) of Section 36 of the Act through an order in Form 21.

(4) The Committee shall direct the person or organisation concerned to develop an individual care plan in Form 7 including a suitable rehabilitation plan. The individual care plan prepared for every child in the institutional care shall be developed with the ultimate aim of the child being rehabilitated and re-integrated based on the case history, circumstances and individual needs of the child.

(5) The inquiry shall satisfy the basic principles of natural justice and shall ensure the informed participation of the child and the parent or guardian. The child shall be given an opportunity to be heard and his opinion shall be taken into consideration with due regard to his age and level of maturity. The orders of the Committee shall be in writing and contain reasons.

(6) The Committee shall interview the child sensitively and in a child friendly manner and will not use adversarial or accusatory words or words that adversely impact the dignity or self-esteem of the child.

(7) The Committee shall satisfy itself through documents and verification reports, before releasing or restoring the child, as per Form 19, in the best interest of the child.

(8) The social investigation conducted by a social worker or Case Worker or Child Welfare Officer of the institution or any non-governmental organisation shall be as per Form 22 and must provide an assessment of the family situation of the child in detail, and explain in writing whether it will be in the best interest of the child to restore him to his family.

(9) Before the Committee releases or restores the child, both the child as well as the parents or guardians may be referred to the Counsellor.

(10) The Committee shall maintain proper records of the children produced before it including medical reports, social investigation report, any other report(s) and orders passed by the Committee in regard to the child.

(11) In all cases pending inquiry, the Committee shall notify the next date of appearance of the child not later than fifteen days of the previous date and also seek periodic status report from the social worker or Case Worker or Child Welfare Officer conducting investigation on each such date.

(12) In all cases pending inquiry, the Committee shall direct the person or institution with whom the child is placed to take steps for rehabilitation of the child including education, vocational training, etc., from the date of first production of the child itself.

(13) Any decision taken by an individual member, when the Committee is not sitting, shall be ratified by the Committee in its next sitting.

(14) At the time of final disposal of a case, there shall be at least three members present including the Chairperson, and in the absence of Chairperson, a member so nominated by the Chairperson to act as such.

(15) The Committee shall function cohesively as a single body and as such shall not form any subcommittees.

(16) Where a child has to be sent or repatriated to another district or state or country the Committee shall direct the District Child Protection Unit to take necessary permission as may be required, such as approaching the Foreigners

Regional Registration Offices and Ministry of External Affairs for a no-objection certificate, contacting the counterpart Committee, or any other voluntary organisation in the other district or state or country where the child is to be sent.

(17) At the time of final disposal of the case, the Committee shall incorporate in the order of disposal, an individual care plan in Form 7 of such child prepared by the social worker or Case Worker or Child Welfare Officer of the institution or any non-governmental organisation, as the case may be.

(18) While finally disposing of the case, the Committee shall give a date for follow-up of the child not later than one month from the date of disposal of the case and thereafter once every month for the period of first six months and thereafter every three months for a minimum of one year or till such time as the Committee deems fit.

(19) Where the child belongs to a different district, the Committee shall forward the age declaration, case file and the individual care plan to the Committee of the district concerned which shall likewise follow up the individual care plan as if it had passed such disposal order.

(20) The individual care plan shall be monitored by means of a rehabilitation card in Form 14 issued for the purpose by the Committee passing the disposal order and which shall form part of the record of the Committee which follow up the implementation of the individual care plan. Such rehabilitation card shall be maintained by the Rehabilitation-cum-Placement Officer.

(21) All orders passed by the Committee in respect of a child in need of care and protection shall also be uploaded on the designated portal with due regard to the confidentiality and privacy of the child.

(22) When a parent or guardian, wishes to surrender a child under sub-section (1) of Section 35 of the Act, such parent or guardian shall make an application to the Committee in Form 23. Where such parent or guardian is unable to make an application due to illiteracy or any other reason, the Committee shall facilitate the same through the Legal Aid Counsel provided by the Legal Services Authority, the deed of surrender shall be executed as per Form 24.

(23) The inquiry under sub-section 3 of Section 35 of the Act shall be concluded by the Committee expeditiously and the Committee shall declare the surrendered child as legally free for adoption after the expiry of sixty days from the date of surrender.

(24) In case of orphan or abandoned child, the Committee shall make all efforts for tracing the parents or guardians of the child and on completion of such inquiry, if it is established that the child is either an orphan having no one to take care, or abandoned, the Committee shall declare the child legally free for adoption.

(25) In case an abandoned or orphan child is received by a Child Care Institution including a Specialised Adoption Agency, such a child shall be produced before the Committee within twenty-four hours (excluding the time necessary for the journey) along with a report in Form 17 containing the particulars and photograph of the child as well as the circumstances in which the child was received by it and a copy of such report shall also be submitted by the Child Care Institution or a Specialised Adoption Agency to the local police station within the same period.

(26) The Committee shall issue an order in Form 18 for short term

placement and interim care of the child, pending inquiry under Section 36 of the Act.

(27) The Committee shall use the designated portal to ascertain whether the abandoned child or orphan child is a missing child while causing the details of the orphan or the abandoned child to be uploaded.

(28) The Committee, after taking into account the risk factors, and in the best interest of the child, may direct the publication of the particulars and photograph of an orphan or abandoned child in national newspapers with wide circulation within seventy two hours from the time of receiving the child for the purposes of tracing out the biological parents or the legal guardian(s).

(29) The Committee, after making inquiry as per the provisions of the Act, shall issue an order in Form 25 declaring the abandoned or orphan child as legally free for adoption and send the same information to the Authority.

(30) Where the parents of the child are traced, the procedure for restoration of the child shall be as per rule 82 of these rules."

7. It is submitted that it is as per the procedure under sub-rule (8) of Rule 18 that the CWC has passed an order for placing of the child i.e. the petitioner no.1 under the care of her father and the necessary order has been passed in the requisite Form 19 as provided under the Rules.

8. The question with regard to entertainability of a petition seeking a writ of habeas corpus in a case where the custody of the corpus has been handed over pursuant to a judicial order would be the question which therefore falls for consideration.

9. Before examining the aforesaid question, it would be apposite to advert to the ambit and scope of a habeas corpus petition.

10. The meaning of the term habeas corpus is "you must have the body". In **Halsbury Laws of England, 4th Edition, Vol. 114,** it has been observed as follows:

"The writ of *habeas corpus ad subjiciendum"* which is commonly known as the writ of habeas corpus, is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from the unlawful or unjustifiable detention whether in prison or in private custody. It is a prerogative writ by which the queen has a right to inquire into the causes for which any of her subjects are deprived of their liberty. By it the High Court and the judges of that Court, at the instance of a subject aggrieved, command the production of that subject, and inquiry into the cause of his imprisonment. If there is no legal justification for the detention, the party is ordered to be released. Release on habeas corpus is not, however, an acquittal, nor may the writ be used as a means of appeal."

11. In **"Constitutional History of England (1912), Vol. II5"** by May, writ of habeas corpus has been described as "the first security of civil liberty". **Blackstone** has referred to the writ of habeas corpus as "the great and efficacious writ in all manner of illegal confinement."

12. **Julius Stone** in **Social Dimensions of Law and Justice, (1966)6,** has described writ of habeas corpus as a writ with an extraordinary scope and flexibility of application.

13. According to **Dicey, Introduction to the Study of Law of the Constitution7,** Macmillan and Co., Ltd., (1915): "if, in short, any man, woman or child is, or is asserted on apparently good grounds to be deprived of liberty, the court will always issue a writ of habeas corpus to anyone who has the aggrieved person in his custody to have such person brought before the court and if he is suffering restraint without lawful cause, set him free."

14. In **Greene vs. Home Secretary8**, it has been observed:

"Habeas corpus is a writ in the nature of an order calling upon the person who has detained another to produce the later before the court, in order to let the court know on what ground he has been confined and to set him free if there is no legal jurisdiction of imprisonment."

15. The nature and scope of a writ of habeas corpus was considered in extenso in a Constitution Bench decision in ***Kanu Sanyal* v. District Magistrate, Darjeeling & Ors.9,** wherein it was observed that a writ of habeas corpus is essentially a procedural writ dealing with machinery of justice with the object to secure release of a person who is illegally restrained of his liberty. It was stated thus:-

"4. It will be seen from this brief history of the writ of habeas corpus that it is essentially a procedural writ. It deals with the machinery of justice, not the substantive law. The object of the writ is to secure release of a person who is illegally restrained of his liberty. The writ is, no doubt, a command addressed to a person who is alleged to have another person unlawfully in his custody requiring him to bring the body of such person before the Court, but the production of the body of the person detained is directed in order that the circumstances of his detention may be inquired into, or to put it differently, "in order that appropriate judgment be rendered on judicial enquiry into the alleged unlawful restraint". The form of the writ employed is "We command you that you have in the King's Bench Division of our High Court of Justice -- immediately after the receipt of this our writ, the body of A. B. being taken and detained under your custody -- together with the day and cause of his being taken and detained -- *to undergo and receive all and singular such matters and things as our court shall then and there consider of concerning him in this behalf*". The italicized words show that the writ is primarily designed to give a person restrained of his liberty a speedy and effective remedy for having the legality of his detention enquired into and determined and if the detention is found to be unlawful, having himself discharged and freed from such restraint. The most characteristic element of the writ is its peremptoriness and, as pointed out by Lord Halsbury, L.C., in *Cox v. Hakes (supra)* "the essential and leading theory of the whole procedure is the immediate determination of the right to the applicant's freedom" and his release, if the detention is found to be unlawful. That is the primary purpose of the writ; that is its substance and end. ..."

16. The question as to whether a writ of habeas corpus can be granted in a situation where the person has been

committed to jail custody by a competent court and the order of detention *prima facie* was not without jurisdiction or wholly illegal, was examined in **Col. Dr. *B. Ramachandra Rao* v. The State of Orissa & Ors.10,** and it was held that the position in this regard is well settled and a writ of habeas corpus cannot be granted in such a situation.

17. The aforementioned position that a habeas corpus petition cannot be entertained when a person is committed to judicial custody or police custody by a competent court by order which *prima facie* does not appear to be without jurisdiction nor is wholly illegal, was reiterated in **Manubhai Ratilal Patel v. State of Gujarat & Ors.11. Referring to P. Ramanatha Aiyar's Law Lexicon12 and the decisions in Secy. of State for Home Affairs v. O'Brien13, Ranjit Singh v. State of Pepsu14, Greene v. Secy. of States for Home Affairs, *Kanu Sanyal* v. District Magistrate, Darjeeling, Ummu Sabeena v. State of Kerala15** and **Col. *B. Ramachandra Rao* v. State of Orissa,** it was observed as follows:-

"11. ... The writ of habeas corpus has always been given due signification as an effective method to ensure release of the detained person from prison. In P. *Ramanatha Aiyar's Law Lexicon* (1997 Edn.), while defining "habeas corpus", apart from other aspects, the following has been stated:

"The ancient prerogative writ of habeas corpus takes its name from the two mandatory words habeas corpus, which it contained at the time when it, in common with all forms of legal process, was framed in Latin. The general purpose of these writs, as their name indicates, was to obtain the production of an individual."

12. In *Secy. of State for Home Affairs v. O'Brien,* it has been observed that: (AC p. 609)

"... It is perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement. It is of immemorial antiquity, an instance of its use occurring in the thirty-third year of Edward I. It has through the ages been jealously maintained by the courts of law as a check upon the illegal usurpation of power by the executive at the cost of the liege."

13. In *Ranjit Singh v. State of Pepsu, after referring to Greene v. Secy. of States for Home Affairs,* this Court observed that: (*Ranjit Singh case,* AIR pp. 845-46, para 4)

"4. ... the whole object of proceedings for a writ of habeas corpus is to make them expeditious, to keep them as free from technicality as possible and to keep them as simple as possible."

The Bench quoted Lord Wright who, in Greene case, had stated thus: (AC p. 302)

... The incalculable value of habeas corpus is that it enables the immediate determination of the right to the applicant's freedom."

Emphasis was laid on the satisfaction of the court relating to justifiability and legality of the custody.

14. In *Kanu Sanyal v. District Magistrate, Darjeeling,* it was laid down that the writ of habeas corpus deals with the machinery of justice, not the substantive law. The object of the writ is to secure release of a person who is illegally restrained of his liberty.

15. Speaking about the importance of the writ of habeas corpus, a two-Judge Bench in *Ummu Sabeena v. State of Kerala* has observed as follows: (SCC p. 786, para 15)

"15. ... the writ of habeas corpus is the oldest writ evolved by the common law of England to protect the individual liberty against its invasion in the hands of the executive or may be also at the instance of private persons. This principle of habeas corpus has been incorporated in our constitutional law and we are of the opinion that in a democratic republic like India where Judges function under a written Constitution and which has a chapter on fundamental rights, to protect individual liberty the Judges owe a duty to safeguard the liberty not only of the citizens but also of all persons within the territory of India. The most effective way of doing the same is by way of exercise of power by the court by issuing a writ of habeas corpus."

In the said case, a reference was made to *Halsbury's Laws of England*, 4th Edn., Vol. 11, para 1454 to highlight that a writ of habeas corpus is a writ of highest constitutional importance being a remedy available to the lowliest citizen against the most powerful authority.

16. Having stated about the significance of the writ of habeas corpus as a weapon for protection of individual liberty through judicial process, it is condign to refer to certain authorities to appreciate how this Court has dwelled upon and expressed its views pertaining to the legality of the order of detention, especially that ensuing from the order of the court when an accused is produced in custody before a Magistrate after arrest. It is also worthy to note that the opinion of this Court relating to the relevant stage of delineation for the purpose of adjudicating the legality of the order of detention is of immense importance for the present case.

17. In *Col. B. Ramachandra Rao v. State of Orissa*, it was opined that a writ of habeas corpus is not granted where a person is committed to jail custody by a competent court by an order which *prima facie* does not appear to be without jurisdiction or wholly illegal."

***

31. ... It is well-accepted principle that a writ of habeas corpus is not to be entertained when a person is committed to judicial custody or police custody by the competent court by an order which *prima facie* does not appear to be without jurisdiction or passed in an absolutely mechanical manner or wholly illegal. As has been stated in *B. Ramachandra Rao and Kanu Sanyal*, the court is required to scrutinise the legality or otherwise of the order of detention which has been passed. Unless the court is satisfied that a person has been committed to jail custody by virtue of an order that suffers from the vice of lack of jurisdiction or absolute illegality, a writ of habeas corpus cannot be granted. It is apposite to note that the investigation, as has been dealt with in various authorities of this Court, is neither an inquiry nor trial. It is within the exclusive domain of the police to investigate and is independent of any control by the Magistrate. The sphere of activity is clear cut and well demarcated. Thus viewed, we do not perceive any error in the order passed by the High Court refusing to grant a writ of habeas corpus as the detention by virtue of the judicial order passed by the Magistrate remanding the accused to custody is valid in law."

18. A similar view was taken in ***Saurabh Kumar v. Jailor, Koneila Jail* & Anr.16,** wherein it was opined that writ of habeas corpus would not be maintainable

against a judicial order remanding a person to custody. It was observed as follows:-

"22. The only question with which we are concerned within the above backdrop is whether the petitioner can be said to be in the unlawful custody. Our answer to that question is in the negative. The record which we have carefully perused shows that the petitioner is an accused facing prosecution for the offences, cognizance whereof has already been taken by the competent court. He is presently in custody pursuant to the order of remand made by the said Court. A writ of habeas corpus is, in the circumstances, totally misplaced. ..."

19. The aforesaid view was again reiterated in the decision in **State of Maharashtra & Ors. v. Tasneem Rizwan Siddiquee17**, and a petition seeking a writ of habeas corpus was held to be not maintainable in a case of a police custody pursuant to remand order passed by a jurisdictional Magistrate.

20. The question with regard to maintainability of a petition seeking a writ of habeas corpus against a judicial order remanding accused to custody again came up for consideration in **Serious Fraud Investigation Office v. Rahul Modi And Another Etc.18,** and it was held that the act of directing remand of accused is a judicial function and challenge to order of remand is not to be entertained in a habeas corpus petition. Referring to the earlier decisions in **Manubhai Ratilal Patel v. State of Guajarat, *Kanu Sanyal* v. Distt. Magistrate, Darjeeling, *B. Ramachandra Rao* v. State of Orissa, *Sanjay Dutt v. State*19, *Saurabh Kumar v. Jailor, Koneila Jail* and State of *Maharashtra v. Tasneem Rizwan Siddiquee,*** following observations was made in the judgement:-

"20.1. In *Manubhai Ratilal Patel v. State of Gujarat* a Division Bench of this Court extensively considered earlier decisions in the point including cases referred to above. It also dealt with an issue whether habeas corpus petition could be entertained against an order of remand passed by a Judicial Magistrate. The observations of this Court in paras 20 to 24 and para 31 were as under: (SCC pp. 323-324 and 326)

"20.After so stating, the Bench in *Kanu Sanyal* case opined that for adjudication in the said case, it was immaterial which of the three views was accepted as correct but eventually referred to para 7 in *B. Ramachandra Rao* wherein the Court had expressed the view in the following manner: (SCC p. 259)

"7. ... in habeas corpus proceedings the court is to have regard to the legality or otherwise of the detention at the time of the return and not with reference to the institution of the proceedings.'

Eventually, the Bench ruled thus: (*Kanu Sanyal case*, SCC p. 148, para 5)

"5. ... The production of the petitioner before the Special Judge, Visakhapatnam, could not, therefore, be said to be illegal and his subsequent detention in the Central Jail, Visakhapatnam, pursuant to the orders made by the Special Judge, Visakhapatnam, pending trial must be held to be valid. This Court pointed out in *B. Ramachandra Rao* v. State of Orissa (SCC p. 258, para 5) that a writ of habeas corpus cannot be granted

"5. ... where a person is committed to jail custody by a competent court by an order which *prima facie* does not appear to be without jurisdiction or wholly illegal".'

21. The principle laid down in *Kanu Sanyal*, thus, is that any infirmity in the detention of the petitioner at the initial stage cannot invalidate the subsequent detention and the same has to be judged on its own merits.

22. At this juncture, we may profitably refer to the Constitution Bench decision in *Sanjay Dutt v. State* wherein it has been opined thus: (SCC p. 442, para 48)

"48. ... It is settled by Constitution Bench decisions that a petition seeking the writ of habeas corpus on the ground of absence of a valid order of remand or detention of the accused, has to be dismissed, if on the date of return of the rule, the custody or detention is on the basis of a valid order.'

* * *

31. ... The order of remand which is a judicial act, as we perceive, does not suffer from any infirmity. The only ground that was highlighted before the High Court20 as well as before this Court is that once there is stay of investigation, the order of remand is sensitively susceptible and, therefore, as a logical corollary, the detention is unsustainable. It is worthy to note that the investigation had already commenced and as a resultant consequence, the accused was arrested. Thus, we are disposed to think that the order of remand cannot be regarded as untenable in law. It is well-accepted principle that a writ of habeas corpus is not to be entertained when a person is committed to judicial custody or police custody by the competent court by an order which *prima facie* does not appear to be without jurisdiction or passed in an absolutely mechanical manner or wholly illegal. As has been stated in *B. Ramachandra Rao* and *Kanu Sanyal*, the court is required to scrutinise the legality or otherwise of the order of detention which has been passed. Unless the court is satisfied that a person has been committed to jail custody by virtue of an order that suffers from the vice of lack of jurisdiction or absolute illegality, a writ of habeas corpus cannot be granted. It is apposite to note that the investigation, as has been dealt with in various authorities of this Court, is neither an inquiry nor trial. It is within the exclusive domain of the police to investigate and is independent of any control by the Magistrate. The sphere of activity is clear-cut and well demarcated. Thus viewed, we do not perceive any error in the order passed by the High Court refusing to grant a writ of habeas corpus as the detention by virtue of the judicial order passed by the Magistrate remanding the accused to custody is valid in law."

20.2. In *Saurabh Kumar v. Jailor, Koneila Jail* the issue was dealt with in para 13 of the leading judgment as under: (SCC p. 440)

13. It is clear from the said narration of facts that the petitioner is in judicial custody by virtue of an order passed by the Judicial Magistrate. The same is further ensured from the original record which this Court has, by order dated 9-4-2014, called for from the Court of the Additional Chief Judicial Magistrate, Dalsingsarai, District Samastipur, Bihar. Hence, the contention of the learned counsel for the petitioner that there was illegal detention without any case is incorrect. Therefore, the relief sought for by the petitioner cannot be granted. Even though there are several other issues raised in the writ petition, in view of the facts

narrated above, there is no need for us to go into those issues. However, the petitioner is at liberty to make an application for his release in Criminal Case No. 129 of 2013 pending before the Court of the learned Additional Chief Judicial Magistrate, Dalsingsarai."

Thakur, J. (as the learned Chief Justice then was) who agreed with the leading judgment authored by Ramana, J., also dealt with the matter in para 22 of his concurring opinion as under: (*Saurabh Kumar case*, SCC p. 442)

"22. The only question with which we are concerned within the above backdrop is whether the petitioner can be said to be in the unlawful custody. Our answer to that question is in the negative. The record which we have carefully perused shows that the petitioner is an accused facing prosecution for the offences, cognizance whereof has already been taken by the competent court. He is presently in custody pursuant to the order of remand made by the said Court. A writ of habeas corpus is, in the circumstances, totally misplaced. Having said that, we are of the view that the petitioner could and indeed ought to have filed an application for grant of bail which prayer could be allowed by the court below, having regard to the nature of the offences allegedly committed by the petitioner and the attendant circumstances. The petitioner has for whatever reasons chosen not to do so. He, instead, has been advised to file the present petition in this Court which is no substitute for his enlargement from custody."

20.3. A Bench of three learned Judges of this Court in State of *Maharashtra v. Tasneem Rizwan Siddiquee* concluded as under: (SCC pp. 751-52, paras 10-12)

"10. The question as to whether a writ of habeas corpus could be maintained in respect of a person who is in police custody pursuant to a remand order passed by the jurisdictional Magistrate in connection with the offence under investigation, this issue has been considered in *Saurabh Kumar v. Jailor, Koneila Jail* and *Manubhai Ratilal Patel v. State of Gujarat.* It is no more res integra. In the present case, admittedly, when the writ petition for issuance of a writ of habeas corpus was filed by the respondent on 18-3-2018/19-3-2018 and decided by the High Court on 21-3-201821 her husband Rizwan Alam Siddiquee was in police custody pursuant to an order passed by the Magistrate granting his police custody in connection with FIR No. I-31 vide order dated 17-3-2018 and which police remand was to enure till 23-3-2018. Further, without challenging the stated order of the Magistrate, a writ petition was filed limited to the relief of habeas corpus. In that view of the matter, it was not a case of continued illegal detention but the incumbent was in judicial custody by virtue of an order passed by the jurisdictional Magistrate, which was in force, granting police remand during investigation of a criminal case. Resultantly, no writ of habeas corpus could be issued.

* * *

21. The act of directing remand of an accused is thus held to be a judicial function and the challenge to the order of remand is not to be entertained in a habeas corpus petition. The first question posed by the High Court, thus, stands answered. In the present case, as on the date when the matter was considered by the High Court and the order was passed by it, not only were there orders of remand passed by the Judicial Magistrate as well as the Special

Court, Gurugram but there was also an order of extension passed by the Central Government on 14-12-2018. The legality, validity and correctness of the order or remand could have been challenged by the original writ petitioners by filing appropriate proceedings. However, they did not raise such challenge before the competent appellate or revisional forum. The orders of remand passed by the Judicial Magistrate and the Special Court, Gurugram had dealt with merits of the matter and whether continued detention of the accused was justified or not. After going into the relevant issues on merits, the accused were remanded to further police custody. These orders were not put in challenge before the High Court. It was, therefore, not open to the High Court to entertain challenge with regard to correctness of those orders. The High Court, however, considered the matter from the standpoint whether the initial order of arrest itself was valid or not and found that such legality could not be sanctified by subsequent order of remand. Principally, the issue which was raised before the High Court was whether the arrest could be effected after period of investigation, as stipulated in the said order dated 20-6-2018 had come to an end. The supplementary issue was the effect of extension of time as granted on 14-12-2018. It is true that the arrest was effected when the period had expired but by the time the High Court entertained the petition, there was an order of extension passed by the Central Government on 14-12-2018. Additionally, there were judicial orders passed by the Judicial Magistrate as well as the Special Court, Gurugram, remanding the accused to custody. If we go purely by the law laid down by this Court with regard to exercise of jurisdiction in respect of habeas corpus petition, the High Court was not justified in entertaining the petition and passing the order."

21. The question as to whether a writ of habeas corpus would lie when a person is remanded to judicial custody or police custody, was subject matter of consideration in a recent decision in the case of **Gautam Navlakha v. National Investigation Agency22,** and after discussing the legal position on the point it was held that only in a situation where the remand is absolutely illegal or the order suffers from the vice of lack of jurisdiction or the same has been passed in an absolutely mechanical manner, the person can seek remedy of habeas corpus and barring such situations, a habeas corpus petition would not lie. It was stated thus:-

"67. A Habeas Corpus petition is one seeking redress in the case of illegal detention. It is intended to be a most expeditious remedy as liberty is at stake. Whether a Habeas Corpus petition lies when a person is remanded to judicial custody or police custody is not res integra. We may notice only two judgments of this court. In *Manubhai Ratilal Patel v. State of Gujarat*,. We may notice paragraph 24.

"(24) The act of directing remand of an accused is fundamentally a judicial function. The Magistrate does not act in executive capacity while ordering the detention of an accused. While exercising this judicial act, it is obligatory on the part of the Magistrate to satisfy himself whether the materials placed before him justify such a remand or, to put it differently, whether there exist reasonable grounds to commit the accused to custody and extend his remand. The purpose of remand as postulated under Section 167 is that investigation cannot be completed within 24 hours. It enables the Magistrate to see

that the remand is really necessary. This requires the investigating agency to send the case diary along with the remand report so that the Magistrate can appreciate the factual scenario and apply his mind whether there is a warrant for police remand or justification for judicial remand or there is no need for any remand at all. It is obligatory on the part of the Magistrate to apply his mind and not to pass an order of remand automatically or in a mechanical manner."

68. However, the Court also held as follows:

"31. It is well-accepted principle that a writ of habeas corpus is not to be entertained when a person is committed to judicial custody or police custody by the competent court by an order which *prima facie* does not appear to be without jurisdiction or passed in an absolutely mechanical manner or wholly illegal. As has been stated in *B. Ramachandra Rao*and *Kanu Sanyal*, the court is required to scrutinise the legality or otherwise of the order of detention which has been passed. Unless the court is satisfied that a person has been committed to jail custody by virtue of an order that suffers from the vice of lack of jurisdiction or absolute illegality, a writ of habeas corpus cannot be granted."

69. One of us (U.U. Lalit, J.) speaking for a Bench of two, followed the aforesaid line of thought in the decision of *Serious Fraud Investigation Office v. Rahul Modi* and held as follows:

"(21) The act of directing remand of an accused is thus held to be a judicial function and the challenge to the order of remand is not to be entertained in a habeas corpus petition."

70. We may also notice paragraph 19 from the same judgment.

"(19) The law is thus clear that "in habeas corpus proceedings a court is to have regard to the legality or otherwise of the detention at the time of the return and not with reference to the institution of the proceedings".

71. Thus, we would hold as follows:

If the remand is absolutely illegal or the remand is afflicted with the vice of lack of jurisdiction, a Habeas Corpus petition would indeed lie. Equally, if an order of remand is passed in an absolutely mechanical manner, the person affected can seek the remedy of Habeas Corpus. Barring such situations, a Habeas Corpus petition will not lie."

22. Reference may also be had to a Full Bench decision of this Court in the case of **Km. Rachna and Another v. State of U.P. and Others23,** wherein one of the questions which was referred was as to whether a writ of habeas corpus was maintainable against a judicial order passed by a Magistrate or by the Child Welfare Committee appointed under Section 27 of the JJ Act. The aforementioned question was answered by the Full Bench in the following manner:-

"79. ... If the petitioner corpus is in custody as per judicial orders passed by a Judicial Magistrate or a Court of Competent Jurisdiction or a Child Welfare Committee under the J.J. Act. Consequently, such an order passed by the Magistrate or by the Committee cannot be challenged/assailed or set aside in a writ of habeas corpus. ..."

23. Having regard to the foregoing discussion, the legal position which emerges is that in a case where the custody

of the petitioner corpus as been handed over as per a judicial order passed a Judicial Magistrate or a court of competent jurisdiction or a CWC constituted under the JJ Act, the said order cannot be assailed in a petition seeking a writ of habeas corpus.

24. In the present case, the petitioner no.1 having been placed under the care of her father-respondent no.4 pursuant to an order passed by the CWC exercising powers under the JJ Act and the Rules made thereunder, the custody which is presently with the said respondent cannot be said to be illegal and a petition for a writ of habeas corpus would not be entertainable in the facts of the case.

25. Learned counsel for the petitioners has not been able to dispute the aforesaid legal position.

26. No other ground was urged.

27. In view of the aforesaid, this Court is not inclined to exercise its extraordinary jurisdiction under Article 226 of the Constitution, so as to entertain the petition seeking a writ of habeas corpus.

28. The petition thus fails, and is accordingly **dismissed.**

(2022)01ILR A1188
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 14.12.2021

BEFORE

THE HON'BLE RAKESH SRIVASTAVA, J.
THE HON'BLE SHAMIM AHMED, J.

Habeas Corpus No. 29158 of 2021

Abhishek Kumar Singh ...Petitioner

Versus

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

Counsel for the Petitioner:
Sushil Kumar Singh

Counsel for the Respondents:
G.A.

Constitution of India, Article 226 - Habeas Corpus writ petition - Maintainability - If a person is in judicial custody and is confined to jail pursuant to a judicial order passed by the competent court of law , such detention cannot be said to be illegal - Habeas Corpus writ petition not maintainable (Para 13, 14)

Dismissed. (E-5)

List of Cases cited:

1. Arnesh Kumar Vs St.of Bihar, (2014) 8 SCC 273

2. D. K. Basu Vs St. of W.B.I, (1997) 1 SCC 416

3. St. of Mah. & ors. Vs Tasneem Rizwan Siddiquee, (2018) 9 SCC 745

4. Rachna & ors. Vs St.of U.P. & ors., 2021 (3) ALJ 322

(Delivered by Hon'ble Shamim Ahmed, J.)

1. Heard Shri Jyotindra Mishra, learned Senior Advocate, assisted by Shri Sushil Kumar Singh, learned counsel for the petitioner and Shri Shiv Nath Tilhari, learned Additional Government Advocate.

2. This habeas corpus petition has been filed seeking the following reliefs:

(i) issue a writ, order or direction in the nature of "Habeas Corpus' declaring the petitioner's arrest/ detention bad in law, consequently a writ of Habeas Corpus be issued and the petitioner be set at liberty forthwith.

(ii) issue any other suitable order or direction which this Hon'ble Court may deem fit, just and proper under the circumstances of the case may also be passed in favour of the petitioner.

(iii) allow the petition of petitioner with cost.

3. Learned counsel for the petitioner submits that the petitioner is challenging his arrest and detention by the respondents on 09.12.2021 at about 05.00 hours, which was made unlawfully without following the provisions of Section 41-A of the Criminal Procedure Code by issuing and giving a notice under the said provision.

4. It has been submitted on behalf of the petitioner that he is a practicing advocate at Civil Court as well as the High Court at Lucknow since 2001. In the year 2017, with respect to an incident relating to Mrs. Sandhya Srivastava, the then Chief Judicial Magistrate, Lucknow an FIR dated 25.03.2017 was registered bearing FIR No. 149 of 2017, under Sections 147, 149, 504, 506, 186, 353, 354, 341, 228 I.P.C. and Section 7 of Criminal Law Amendment Act, P.S. Wazirganj, District Lucknow against two named accused, Anurag Trivedi and Saifi Hasan Mirza and 25 to 30 unknown advocates/ persons. It was submitted that there is no allegation against the petitioner in the said FIR and that serious allegations had been made only against Anurag Trivedi and Saifi Hasan Mirza. The contents of the FIR are being reproduced hereinbelow:

नकल तहरीर हिन्दी वादिनी टाइपशुदा प्रेषिका, संध्या श्रीवास्तव, मुख्य न्यायिक मजिस्ट्रेट, लखनऊ सेवा में, थानाध्यक्ष वजीरगंज लखनऊ विषय–अधिवक्ता अनुराग त्रिवेदी, सैफी मिर्जा एवं उनके 25–30 साथियों द्वारा गाली दिये जाने व अभद्र व्यवहार किये जाने के कारण उनके विरूद्ध प्रथम सूचना रिपोर्ट दर्ज करके कार्यवाही किये जाने हेतु महोदय निवेदन है कल दिनांक 24.3.2017 को मैं न्यायालय समय पर माननीय जनपद न्यायाधीश, महोदय के विश्राम कक्ष से आज होने वाली मानीटरिंग सेल की मीटिंग पर चर्चा करके अपने विश्राम कक्ष में आ रही थी तभी अपने कार्यालय एवं न्यायालय कक्ष का दरवाजा बन्द देखकर मैने अपने स्टाफ राकेश बाबू से पूछा कि यह दरवाजा बन्द क्यों है तभी अधिवक्ता अनुराग त्रिवेदी ने मेरे पास आकर कहा कि मैंने बन्द करवाया है, इस पर मैने पूछा क्यों, तभी अधिवक्ता ने कहा कि आप ने रजनीश मिश्रा,(अपर मुख्य न्यायिक मजिस्ट्रेट, प्रथम) के यहाँ से फाइल मंगवायी है क्या मैने कहा कि हाँ मंगवायी है, लेकिन आप किस हक से मुझसे यह पूछ रहे है तब इस पर वहां खड़े एक अन्य अधिवक्ता सैफी मिर्जा ने कहा ये उपाध्यक्ष है, तभी अनुराग त्रिवेदी ने सीना ठोककर कहा कि मैं अधिवक्ता हूँ, आप ने उस कोर्ट से फाइल क्यों मंगायी इसके बाद लगभग 25–30 अधिवक्ता ने मुझे घेर लिया, मेरा गनर इरशाद उन लोगों को हटाता रहा, परन्तु अनुराग त्रिवेदी ने लगभग चीखते हुए मुझसे कहा मादरचोद साली भ्रष्टाचार का अड्डा बना रखा है मैं तुरंत ही वापस मुड़कर चैम्बर की ओर जाने लगी, मेरे पीछे–पीछे अनुराग त्रिवेदी एवं सैफी मिर्जा तथा उनके साथ 25–30 अधिवक्ता माँ बहन की गाली देते हुए एवं यह कहते हुए कि रण्डी, साली तुझे छोड़ेंगे नहीं देखता हूँ कैसे नौकरी करती है, किसी मजिस्ट्रेट को कार्य नहीं करने देंगे आग लगा दिया जायेगा देखता हूँ हाईकोर्ट और जिला जज तथा तू अधिवक्ताओं का क्या उखाड़ लेगा तथा जिन्दा व मुर्दाबाद के नारे लगाते हुए सभी मजिस्ट्रेट न्यायालयों एवं कार्यालयों को बन्द करा दिया गया शोर सराबे, नारेबाजी के कारण न्यायालयों एवं कार्यालयों में कार्य करने का माहौल भी नहीं रह गया मेरे चैम्बर में आ जाने पर भी चैम्बर के दरवाजे पर 25–30 अधिवक्ता आकर नारे बाजी एवं जोर–जोर से मादरचोद, रण्डी आदि गाली देने लगे मेरे द्वारा तुरंत माननीय जनपद न्यायाधीश, महोदय, व वरिष्ठ पुलिस अधीक्षक, लखनऊ को दूरभाष से सूचना दी गई महोदय आप को अवगत कराना है कि अधिवक्ता अनुराग त्रिवेदी मु0 अ0 सं0 349/2016 अंतर्गत धारा 395 भारतीय

दंड विधान, थाना कैसरबाग, लखनऊ का वादी है तथा व मुकदमा अपराध संख्या 351/2016, अन्तर्गत धारा 395/353/504/506 भारतीय दंड विधान एवं लोक सम्पत्ति क्षति निवारण अधिनियम, थाना कैसरबाग, लखनऊ एवं मुकदमा अपराध संख्या 348/2016 अन्तर्गत धारा 395/397/332/353 भारतीय दंड विधान एवं लोक सम्पत्ति क्षति निवारण अधिनियम एवं 7 क्रि0 लॉ0 एमेंडमेन्ट अधिनियम, थाना कैसरबाग, लखनऊ तथा मुकदमा अपराध संख्या 350/2016 अन्तर्गत धारा 395/397/307/332/353/426 भारतीय दंड विधान एवं लोक सम्पत्ति क्षति निवारण अधिनियम, थाना कैसरबाग, लखनऊ में अभियुक्त है अधिवक्ता अनुराग त्रिवेदी एवं सैफी मिर्जा तथा उनके साथियों द्वारा सबसे पहले तो न्यायालय कक्ष बन्द करवाया गया उसके बाद कार्यालय बन्द करवाकर वादकारियों के समक्ष मेरे साथ अभद्र व्यवहार किया गया, जिससे न्यायालय की गरिमा प्रतिकूल रूप से प्रभावित हुई अधिवक्ताओं का उक्त कृत्य अत्यन्त पीड़ादायक तथा न्यायिक गरिमा को ठेस पहुंचाने वाला है, जिससे कल पूरे दिन मैं मानसिक सदमे में रही, जिसके कारण तुरन्त प्रथम सूचना रिपोर्ट नही लिखा पाई अधिवक्ताओं का उक्त कृत्य आपराधिक प्रकृति का है, जो कि सम्पूर्ण न्याय व्यवस्था के लिए घातक है जिस पर यथाशीघ्र अंकुश लगाया जाना आवश्यक है अतः निवेदन है कि इस प्रकरण एवं उपरोक्त अधिवक्तागण अनुराग त्रिवेदी एवं सैफी मिर्जा व उनके साक्षी अधिवक्ताओं के द्वारा किये गये अपराध व उनके विरूद्ध आपराधिक इतिहास को दृष्टिगत रखते हुए यथोचित धाराओं में मुकदमा पंजीकृत कर कार्यवाही करें सादर भवदीया ैव अंग्रेजी हस्ताक्षर अपठनीय, 25.3.17 (संध्या श्रीवास्तव) मुख्य न्यायिक मजिस्ट्रेट, लखनऊ दिनांक 25.3.2017 नोट– तहरीर की नकल मुझ का0 29, शैलेन्द्र प्रताप सिंह द्वारा अक्षरशः कम्प्यूटर से टाइप किया गया कायमी का0 दिनेश पाल सिंह के द्वारा किया गया।

5. The learned counsel for the petitioner submitted that Anurag Trivedi and Saifi Hasan Mirza were arrested with respect to the aforesaid FIR No. 149 of 2017. After investigation, the Investigating Officer submitted charge sheet on 24.05.2017 and the learned Magistrate also took cognizance on the charge sheet and the trial of the case is pending in the court of Additional Chief Judicial Magistrate, C.B.I., (Ayodhya Matter), Lucknow. Furthermore, statements of Smt. Sandhya Srivastava, informant and the witnesses, namely, Shri Ram Kripal (Clerk of C.J.M. Office, Lucknow), Shri Sarju Prasad (Junior Assistant of C.J.M. Office, Lucknow), Constable Shri Irshad Ullah Khan (Gunner/ Security Personnel of C.J.M., Lucknow), Shri Rakesh Kumar (Case Clerk of C.J.M. Court, Lucknow) and Ms. Deepali Srivastava (Junior Clerk of the Court of C.J.M., Lucknow) were also recorded under Section 161 Cr.P.C. on 29.03.2017.

6. The learned counsel submitted that on 30.10.2021, when the trial was in progress against the named accused Anurag Trivedi and Saifi Hasan Mirza in the court of Special Chief Judicial Magistrate/CBI (Ayodhya Prakaran), Lucknow, an incident took place between Piyush Srivastava, Advocate, and his colleagues with another group of Advocates. Due to the clashes and tussle which ensued, Piyush Srivastava, Advocate and his colleagues sustained injuries. An FIR with respect to this incident was registered on 30.10.2021 vide Case Crime No. 368 of 2021, under Sections 147, 323, 504, 506 I.P.C. Shri Piyush Srivastava filed a writ petition before this Court bearing Writ Petition No. 25848 (MB) of 2021. In the said writ petition this Court passed orders on 15.11.2021, 17.11.2021, 23.11.2021 and 30.11.2021. The orders dated 17.11.2021 and 23.11.2021, being relevant, are being reproduced hereinbelow:

Order dated 17.11.2021

In pursuance of the order passed by this Court Sri Somen Verma, Deputy

Commissioner of Police, West Zone, Lucknow, Sri Raj Kishore Pandey, Station House Officer, Police Station Wazirganj and Sri Tej Prakash Singh, the Investigating Officer are present in person.

Supplementary affidavit dated 15.11.2021 as well as the supplementary affidavit filed today are taken on record.

The petitioner, Piyush Srivastava, Shailendra Kumar Misra and Ms Suchita Singh have filed this writ petition praying inter alia the following relief:

i) Issue a writ, order or direction in the nature of mandamus commanding any responsible administrative or judicial officer to be appointed by the Hon'ble Court to conduct a thorough inquiry into the incident dated 30.10.2021 at about 4.30 p.m. adjacent to Gate No. 6, old High Court, Kaiserbagh, Lucknow and punish the culprits and pass other appropriate orders, in the interest of justice.

The petitioners are advocates practicing at Lucknow. On 30.10.2021 they filed a bail application in connection to FIR No. 581 of 2018 in the court of Special Additional Chief Judicial Magistrate, Central Bureau of Investigation (Ayodhya Prakaran), Lucknow. The said application was taken up at 1 pm and was allowed and the accused persons were ordered to be enlarged on bail.

It is alleged that at about 1.30 pm Satish Kumar Verma, the complainant in the case, claiming himself to be an advocate practicing at Collectorate, Lucknow accosted the petitioners and asked them not to file bail bonds of the accused persons. At about 3 pm Shailendra Kumar Misra verified the bail bonds as well as the sureties and about 4 pm the accused persons were released on bail.

It is alleged that at about 4.40 pm the same day, 30 to 40 advocates surrounded the petitioners near Gate No. 6, Old High Court Building and hurled abusive language and badly assaulted the petitioners. A first information report was also lodged with the Wazirganj police station. In support of their allegation the petitioners have brought on record some photographs and a video CD recording of the incident.

It is stated that it is not safe to perform lawful duties in the District Courts of Lucknow as violence with litigants, police personnel and lawyers has become the rule of the day. In order to demonstrate the rising violence in court campus, the petitioners have brought on record a first information report dated 25.3.2017 lodged by the then Chief Judicial Magistrate, Lucknow against Anurag Trivedi, Saifi Mirza and others complaining about the violent behaviour of the lawyers.

We have heard the petitioners who have appeared in person and Sri H.P. Srivastava learned Additional Chief Standing Counsel at some length.

This court cannot sit and watch the unprofessional and unruly behaviour of the lawyers as a mute spectator and is duty bound to ensure that the citizens do not face any difficulty in accessing justice. Any effort to obstruct the rule of law has to be curbed with a heavy hand.

In this background, the Deputy Commissioner of Police is directed to hold an inquiry and identify the persons who are involved in the incident. While doing so it would be open to him to take help of the averments made in the writ petition as well as the photographs and CD annexed with the writ petition. The District Judge, Lucknow, the President of Lucknow Bar Association and Central Bar Association are directed to extend all help to the Deputy Commissioner of Police in identifying the culprits.

The Deputy Commissioner of Police shall submit a comprehensive report regarding the unfortunate incident and also the details of the action taken in connection with the first information report dated 25.03.2017 in a sealed cover to this Court by the next date fixed.

It is strange that on the report of the Chief Judicial Magistrate, no arrest has been made although the charge-sheet is alleged to have been filed.

The District Judge, Lucknow is directed to send a comprehensive report regarding the incident of 30.10.2021 wherein he shall also state the action taken on the reference made by the Chief Judicial Magistrate

In the affidavit filed by the petitioners today the petitioners have stated that they are being extended threat by the advocates involved in this case.

In the circumstances, the Deputy Commissioner of Police is directed to provide armed security to the petitioners, namely, Piyush Srivastava, Shailendra Kumar Mishra and Ms. Suchita Singh.

All the officers who are present today shall appear again on the date fixed.

Let the case be listed on 23.11.2021.

The Senior Registrar is directed to communicate this order to the District Judge, Lucknow.

And then

Order dt. 23.11.2021

In pursuance of the order passed by this Court Sri Somen Barma, Deputy Commissioner of Police, West Zone, Lucknow, Sri Raj Kishore Pandey, Station House Officer, Police Station Wazirganj and Sri Tej Prakash Singh, the Investigating Officer are present in person.

The petitioners Piyush Srivastava, Shailendra Kumar Mishra and Ms. Suchita Singh are present.

Sri Arvind Kumar, Advocate has filed his vakalatnama along with counter affidavit on behalf of respondent no. 6. The same is taken on record.

A copy of the said counter affidavit has been served upon the counsel for the petitioners as well as Sri H.P. Srivastava, learned Additional Chief Standing Counsel appearing on behalf of State-respondents and Sri Subhash Chandra Pandey, learned counsel representing Bar Council of Uttar Pradesh.

Report dated 18.11.2021 along with photographs (32 in number) filed by Sri Somen Barma as well as the report dated 26.11.2021 submitted by the In-charge District Judge, Lucknow are taken on record.

Sri Somen Barma at the outset prays for a week's further time to complete the investigation and submit a comprehensive report in terms of the order passed by this Court earlier.

Let that be done.

As prayed, list on 30.11.2021.

The officers, who are present today, shall appear again on the date fixed.

7. In pursuance of the orders passed by this Court in Writ Petition No. 25848 (MB) of 2021, further investigation was started in Case Crime No. 149 of 2017, by the orders of the learned Magistrate. The submission of the petitioner is that it was only thereafter, that the statement of the victim-informant, Smt. Sandhya Srivastava, the then Chief Judicial Magistrate, Lucknow was recorded under Section 164 Cr.P.C., wherein she named five accused including namely, Abhishek Singh (present petitioner), Idrisi @ Atmad Husain Idrisi, Advocate, Sharad Yadav, Rajkumar Sharma and Saurabh Singh. Based upon the statement made by the victim-informant, the petitioner was taken into custody by the

police on 09.12.2021 and thereafter the learned Magistrate also gave judicial remand of fourteen days vide order dated 10.12.2021. Since then, the petitioner has been confined to jail. The other advocate, Idrisi @ Atmad Husain Idrisi, was also in custody.

8. It was argued on behalf of the petitioner that the petitioner was illegally arrested in connection with the FIR No. 149 of 2017 as Section 41 and 41-A of the Cr.P.C. have not been complied with. Reliance has been placed on the judgments of the Hon'ble Apex Court in the case of *Arnesh Kumar v. State of Bihar, (2014) 8 SCC 273 and D. K. Basu v. State of West Bengal*, (1997) 1 SCC 416. It was further argued that the remand order dated 10.12.2021 passed by the learned Judicial Magistrate is also illegal, as the same has been passed without due application of mind. Violation of fundamental rights guaranteed under Article 21 of the Constitution of India has also been alleged by the petitioner, and a prayer for the release of the petitioner has been made.

9. Per contra, learned Additional Government Advocate has submitted that the present Habeas Corpus petition is not maintainable and the same is liable to be dismissed as the petitioner is a hardcore criminal and is already in custody in pursuance of the judicial order dated 10.12.2021 passed by the learned Judicial Magistrate. It was argued that therefore the petitioner's confinement cannot be said to be illegal. It was also submitted that the allegations made by the then Chief Judicial Magistrate against the accused persons, in the FIR No. 149 of 2017 dated 25.03.2017, are very serious in nature and the conduct of the petitioner and his other associates are condemnable in the eyes of law. Reference was made to another FIR No. 368 of 2021, under Sections 147, 148, 149, 323, 504, 506, 341, 352, 355, 419 I.P.C., Police Station Wazirganj, District Lucknow which was alleged to have been lodged against the petitioner. The learned counsel argued that the petitioner has other remedy for redressal of his grievance, but as the detention is not illegal and the same is in accordance with law, the petitioner cannot take benefit of Section 41 and 41-A Cr.P.C. In view of the above, it was submitted that the present Habeas Corpus petition is liable to be dismissed.

10. In support of his submissions, the learned Additional Government Advocate relied upon the judgment of the Hon'ble Apex Court in the case of *State of Maharashtra and others v. Tasneem Rizwan Siddiquee, (2018) 9 SCC 745*, to argue that a writ of habeas corpus cannot be issued in the present matter, since the petitioner is in police custody in connection with a criminal case under investigation, and the said custody is pursuant to an order of remand passed by a court of competent jurisdiction. It was further contended that the order of remand passed by the competent court has not been challenged, which implies that the detention cannot be said to be illegal. In this regard reliance has been placed on paragraphs 3 and 9 of the aforesaid judgment, which are being reproduced hereinbelow:

"3. The decision of the High Court is assailed essentially on two counts. First, that no writ of habeas corpus could be issued in respect of a person who was in police custody in connection with a

criminal case under investigation, pursuant to an order of remand passed by the court of competent jurisdiction. Second, in any case, the High Court should have refrained from making scathing observations against the concerned police officials and the said remarks should be expunged.

xxxx xxxx xxxx

9. The question as to whether a writ of habeas corpus could be maintained in respect of a person who is in police custody pursuant to a remand order passed by the jurisdictional Magistrate in connection with the offence under investigation, this issue has been considered in the case of *Saurabh Kumar through his father Vs. Jailor, Koneila Jail and Anr., (2014) 13 SCC 436 and Manubhai Ratilal Patel Vs. State of Gujarat and Ors., (2013) 1 SCC 314*. It is no more res integra. In the present case, admittedly, when the writ petition for issuance of a writ of habeas corpus was filed by the respondent on 18th/19th March, 2018 and decided by the High Court on 21st March, 2018 her husband Rizwan Alam Siddique was in police custody pursuant to an order passed by the Magistrate granting his police custody in connection with FIR No.I−31 vide order dated 17th March, 2018 and which police remand was to enure till 23rd March, 2018. Further, without challenging the stated order of the Magistrate, a writ petition was filed limited to the relief of habeas corpus. In that view of the matter, it was not a case of continued illegal detention but the incumbent was in judicial custody by virtue of an order passed by the jurisdictional Magistrate, which was in force, granting police remand during investigation of a criminal case. Resultantly, no writ of habeas corpus could be issued."

11. Learned Additional Government Advocate further placed reliance on the judgment of Full Bench of this Court in the case of *Rachna and others v. State of U.P. and others, 2021 (3) ALJ 322*, wherein it has been held that a writ of habeas corpus would not be maintainable if accused is in custody by the order passed by a competent court. He has placed reliance on paragraphs 38 to 41 of the aforesaid judgment which are being reproduced herein below:

"38. In Greene vs. Home Secretary, (1941) 3 All ER 388, it has been observed:

"Habeas corpus is a writ in the nature of an order calling upon the person who has Patna High Court CR. WJC No.1355 of 2019 dt. 05-03-2020 detained another to produce the later before the court, in order to let the court know on what ground he has been confined and to set him free if there is no legal jurisdiction of imprisonment."

39. In India, by Articles 32 and 226 of Constitution of India, the Supreme Court and all the High Courts got jurisdiction to issue writ of habeas corpus throughout their respective territorial jurisdiction when the Constitution came into force. Article 21 of the Constitution of India provides that no person shall be deprived of his life or personal liberty except according to procedure established by law.

40. In Smt. Maneka Gandhi vs. Union of India & Anr., AIR 1978 SC 597, it has been held by the Apex Court that the procedure established by law as contemplated under Article 21 should be just, fair and reasonable and any unjust, unfair and unreasonable procedure by which liberty of a person is taken away shall destroy such freedom. There is also difference between a writ of Habeas Corpus maintained under Article 32 and under Article 226 of Constitution of India. A writ of habeas corpus under Article 32 of the Constitution of India in the Supreme

Court is available in case of violation of fundamental rights guaranteed under Article 21 but it does not relate to interference with the personal liberty by a private citizen. However, the High Court has jurisdiction to issue writ of habeas corpus under Article 226 of the Constitution of India not only for violation of fundamental rights of freedom but also for other purposes. The High Court can issue such writ against a private person also.

41. The nature and scope of the writ of habeas corpus has been considered by the Constitution Bench of the Hon'ble Apex Court in the case of Kanu Sanyal vs. District Magistrate, Darjeeling & Ors., (1973) 2 SCC 674, and it was held:-

"It will be seen from this brief history of the writ of habeas corpus that it is essentially a procedural writ. It deals with the machinery of justice, not the substantive law. The object of the writ is to secure release of a person who is illegally restrained of his liberty. The writ is, no doubt, a command addressed to a person who is alleged to have another person unlawfully in his custody requiring him to bring the body of such person before the Court, but the production of the body of the person detained is directed in order that the circumstances of his detention may be inquired into, or to put it differently, "in order that appropriate judgment be rendered on judicial enquiry into the alleged unlawful restraint". The form of the writ employed is "We command you that you have in the King's Bench Division of our High Court of Justice -- immediately after the receipt of this our writ, the body of A.B. being taken and detained under your custody -- together with the day and cause of his being taken and detained -- to undergo and receive all and singular such matters and things as our court shall then and there consider of concerning him in this behalf". The italicized words show that the writ is primarily designed to give a person restrained of his liberty a speedy and effective remedy Patna High Court CR. WJC No.1355 of 2019 dt. 05-03-2020 for having the legality of his detention enquired into and determined and if the detention is found to be unlawful, having himself discharged and freed from such restraint. The most characteristic element of the writ is its peremptoriness and, as pointed out by Lord Halsbury, L.C., in Cox v. Hakes (supra), "the essential and leading theory of the whole procedure is the immediate determination of the right to the applicant's freedom" and his release, if the detention is found to be unlawful. That is the primary purpose of the writ; that is its substance and end. ..."

12. After considering the arguments advanced by the learned counsel for the parties and after perusal of the record, we find that the petitioner, who is in judicial custody and is confined to jail since 10.12.2021, pursuant to a judicial order passed by the competent court of Judicial Magistrate, the detention of the petitioner cannot be said to be illegal.

13. A writ of habeas corpus is essentially a procedural writ. It deals with the machinery of justice and not the substantive law. The object of the writ is to secure release of a person, who is illegally restrained of his/ her liberty. Further, the present writ petition cannot be entertained

as the petitioner is in jail in furtherance of the judicial order passed by the competent court of law. Prima facie, the said judicial order does not appear to be without jurisdiction and has been passed in a legal manner. Since the petitioner is in custody by virtue of a judicial order passed by a Judicial Magistrate, hence it cannot be said to be an illegal detention.

14. In view of the judgment of Hon'ble Apex Court in the case of *Tasneem Rizwan Siddiquee* (supra) and the judgment of this Court in the case of *Rachna and others* (supra), the present habeas corpus petition is not maintainable.

15. Accordingly, in view of the discussions and observations made above, the present habeas corpus petition is not maintainable and the same is dismissed.

16. No order as to costs.

(2022)01ILR A1196
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.01.2022

BEFORE

THE HON'BLE CHANDRA KUMAR RAI, J.

Writ B No. 47744 of 2016

Om Pal ...Petitioner
Versus
Deputy Director of Consolidation & Ors. ...Respondents

Counsel for the Petitioner:
Sri Suyigya Kumar Sharma, Sri Sudhir Kumar Pandey, Sri Madan Ji Pandey, Sri Suvigya Kumar Mishra

Counsel for the Respondents:
C.S.C., Sri Rahul Kumar Tyagi, Sri Mazhar Abbas Zaidi

Civil Law - U.P. Consolidation of Holdings Act, 1953 - Sections 19(1)(e) & 48 - Allotment of chak - Validity - petitioner original tenure holder of plot No 217 & 218 which are roadside plot - Petitioner's road side plot has not been disturbed till the S.O.C. stage but at the revisional stage without considering the hardship of the petitioner, roadside plot of the petitioner has been taken away at the revisional stage, in order to make the holding of both parties compact - Comparative hardship not considered - comparative hardship of both parties are to be considered specially when the chak of the tenure holder is going to be disturbed - Reading of S.19(1)(e) shows that consolidation authorities cannot pass arbitrary order in order to make chak compact without any reasons - original holding situated adjacent to public road should not be allotted to any one except the original tenure holder or to be excluded from consolidation operation - Allotment of chak, illegal and set aside - tenure holder may not be deprived from his original road side plot in the name of compactness of the chak (Para 5, 6, 9, 10, 11)

Allowed. (E-5)

List of Cases cited:

1. Baid Urrahman @ Obedurrahman Vs Deputy Director of Consolidation 2018 (138) R.D. 558

2. Mahabeer Vs Deputy Director of Consolidation, Jaunpur & ors. 2005 (99) RD 65

3. Ram Chandar Vs Deputy Director of Consolidation, Varanasi 2006 (100) RD 212

4. Ram Badan Vs Deputy Director of Consolidation, Azamgarh & ors. 2020 (147) R.D. 219

(Delivered by Hon'ble Chandra Kumar Rai, J.)

Heard Mr. S K Mishra & Mr. S.K. Pandey, learned counsel for the petitioner and Mr. Rahul Kumar Tyagi, Advocate for contesting respondent No. 2.

1. The instant writ petition has been filed by the petitioner for quashing the impugned revisional order dated 9.9.2016 passed by respondent no. 1 in Revision No. 558, under Section 48 of U.P. C.H. Act (Annexure No-2 to the writ petition).

2. The brief fact of the case are as follows:

Petitioner is chak holder no. 131 and respondent no.2 is chak holder nos. 12 & 180. Petitioner is original tenure holder of plot no. 217, area 0.0460 hectare and plot no. 218, area 0.0460 hectare as well as of plot no. 560, 543 & 560, total area 0.2693 hectare and the Assistant Consolidation officer has proposed chak in the year 2013, comprising of plot No. 214/1, area 0.2152, plot no. 215, area 0.0050, plot no. 216 area 0·0350, plot no. 217, area 0.0050, total area 0.2602 hectare. CH. 23 part 1 relating to petitioner has been annexed as Annexure No - 1 to the writ petition. Petitioner has annexed the village map as Annexure No-6 to the writ petition to demonstrate that original plot No-217 & 218 are road side plot and road was numbered as plot No- 713 & 714 in the village map. Petitioner has also annexed C.H. form 2-Ka as Annexure R.A.1 to the rejoinder affidavit in which plot No. 713 & 714 are mentioned as sarak, this clearly demonstrate that plot No. 217 & 218 are road side original plots of petitioner. It is material to state that respondent No. 2 is not original tenure holder of plot No - 217 & 218 nor had any share in the same in any manner.

3. Against the proposal of Assistant Consolidation Officer, respondent no. 2 filled objection under section 20 of U.P. C.H. Act to the effect that he should be given plot No. 528 in his chak, as well as purchased chak No. 390 be also given in his earlier chak, the Consolidation Officer by order dated 30.4.2014, partly allowed the objection of respondent No. 2 by which petitioner was not effected in any manner. Against the order of Consolidation Officer dated 30-4-2014, respondent no. 2 filed an appeal under Section 21 (2) of U.P. C.H. Act with the changed demand that his chak in eastern side of sector be abolished and he should be accommodated in the western side with his chak No-12, 180 & 390. It was further prayed that chak of opposite parties be given either in northern side or in the eastern side. The appeal was initially decided on 29-11-2014 but on the application of respondent no. 2 himself, the appeal was restored & the same was again heard and decided by order dated 29.6.2015 by which the claim of respondent no. 2 was partly accepted, affecting the chak holder no. 100 but petitioner was not affected in any manner.

4. Respondent No-2 challenged the order dated 29.6.2015 through revision under section- 48 of UPCH Act before respondent no. 1. The revision was numbered as Revision No- 558 under Section 48(1) of the U.P.C.H. Act. In revision respondent No 2 further increased his demand to the effect that he should be given chak of petitioner. The respondent no. 1 in cursory manner allowed the revision filed by petitioner only considering the demand of petitioner & there was no consideration that what damage will be caused to petitioner who will be deprived of his roadside original holding. The

revisional order was passed by respondent no-1 on 9.9.2016. Petitioner challenged the revisional impugned order dated 9.9.2016 through present writ portion in which following interim - order was passed on 03.10.2016:

"Notice on behalf of respondent-1 has been accepted by Chief Standing Counsel.

Issue notice to respondents-2 to 4.

The counsel for the petitioner submits that plot nos. 217 and 218 were original holdings of the petitioner. The petitioner was allotted chak from the stage of ACO on these plots, which are road side lands, but the DDC has illegally disturbed the chak of the petitioner and allotted him chak in the back side.

The matter requires consideration.

Till the next date of listing, operation of the order dated 9.9.2016 shall remain stayed. "

5. Learned Counsel for the petitioner contended that petitioner is original tenure holder of plot No 217 & 218 which are roadside plot. Respondent No-2 has no concern with plot Nos. 217 & 218. Petitioner's road side plot has not been disturbed till the S.O.C. stage but at the revisional stage respondent No. 1 without considering the hardship of the petitioner, allowed the revision of the petitioner and roadside plot of the petitioner has been taken away at the revisional stage, as such, impugned revisional order is liable to be set aside.

6. On the other hand, learned Counsel for respondent no. 2 argued that respondent no. 2 has rightly allowed the revision in order to make the holding of both parties compact as provided under Section 19(1)(e) of the U.P. C.H. Act. Learned counsel placed reliance upon the judgment of this Court reported in **2018 (138) R.D. 558 (Baid Urrahman @ Obedurrahman Vs. Deputy Director of Consolidation)** and prayed that writ petition filed by petitioner is liable to be dismissed as equity has been adjusted between the parties.

7. Considered the submission made by the learned counsel for the parties.

8. There is no dispute about the fact that petitioner is original tenure holder of plot Nos. 217 & 218. On the point whether plot Nos. 217 & 218 are roadside plot or not, petitioner has annexed the C.H. form 2 Ka in which plot Nos- 713 & 714 are mentioned as Sarak and in the village map, plot nos. 217 & 218 are shown as adjacent to plot nos. 713 & 714 which demonstrate that plot nos. 217 & 218 are roadside plot. On the other hand, counsel for the respondent no. 2 is arguing that "sarak" is "Kachhi Sarak" but there is no document for that in the counter affidavit. Accordingly plot nos. 217 & 218 will be treated as road side plot. Respondent No. 2 was changing / increasing his demand from stage to stage. The Consolidation Officer and S.O.C. have partly satisfied the demand of the respondent no. 2 but respondent No-1 arbitrarily and in cursory manner, allowed the revision of the petitioner, without considering the comparative hardship of the petitioner. Under the revisional order, petitioner has been deprived of his original holding which in roadside also in the name of making the chak of respondent No 2 compact which is not permissible under Section 48 of the U.P. C.H. Act. Section -19(1)(e) of UP. CH Act is as follows:

"19. <u>Conditions to be fulfilled by a Consolidation Scheme.-(1)</u> A consolidation scheme shall fulfill the following conditions, namely,

(a).....

(b).....

(c).....

(d).....

(e) every tenure-holder is, as far as possible, allotted a compact area at the place where he holds the largest part of his holding :

Provided that no tenure-holder may be allotted more *chaks* than three, except with the approval in writing of the Deputy Director of Consolidation:

Provided further that no consolidation made shall be invalid for the reason merely that the number of *chaks* allotted to a tenure-holder exceeds three"

9. From reading of Section 19(1)(e) and considering the case of the parties, it is clear that consolidation authorities can not pass arbitrary order in order to make the chak compact without any rhyme or reasons. Good and strong reasons in support of the order will have to be assigned by the concerned authorities so that tenure holder may not be deprived from his original road side plot in the name of compactness of the chak. It is no doubt correct that during chak allotment proceedings, the allotment cannot be made in such a manner which may satisfy every tenure holder but the consolidation authorities are required to make adjustment in a manner that mandate of the Act / Rules is not flouted.

10. This Court in a case reported in **2005 (99) RD 65 (Mahabeer vs. Deputy Director of Consolidation, Jaunpur and Others)** has held that comparative hardship of both parties are to be considered specially when the chak of the tenure holder is going to be disturbed. The Court has also held that revisional court is the last court of fact as such it is expected from the revisional court to exercise the jurisdiction with utmost care and caution.

11. This Court in a case reported in **2006 (100) RD 212, Ram Chandar vs. Deputy Director of Consolidation, Varanasi** and Others, has held that original holding situated adjacent to public road should not be allotted to any one except the original tenure holder or to be excluded from consolidation operation.

12. This Court in another recent decision reported in **2020 (147) R.D. 219, Ram Badan vs. Deputy Director of Consolidation, Azamgarh & Others,** has held that roadside land either to be excluded from consolidation operation or to be included in the chak of that chak holder who held it as original.

13. The Consolidation Commissioner, U.P. by the notification dated 26.5.1981 issued under the U.P. C.H. Act has laid down principle for exclusion of the land situated on the main road, national, provincial or any other main road in all villages from the chak allotment proceedings.

14. The case law cited by learned counsel for the respondent no. 2 is not applicable in the present facts of the case where petitioner has been deprived from his original roadside plot at the revisional stage.

15. Considering the provisions of the act and law laid down by this court as well as the reasons mentioned above, the impugned revisional order dated 9.9.2016 passed by respondent no. 1 in Revision No. 558 of U.P.C.H. Act cannot be sustained and is liable to be set aside. There is no need to remand the matter back for fresh consideration as by the order of Settlement Officer Consolidation, respondent no. 2 - Abdul Gaffar and chak holder no. 100 - Mohd. Ikbal were effected and chak holder no. 100 has not challenged the appellate order in revision, as such order dated 20.6.2015 is liable to be maintained so that petitioner's original roadside plot may not be effected.

16. The writ petition succeeds and is **allowed.** The revisional order dated 9.9.2016 passed by respondent No-1 in Revision No. 558 is quashed and appellate order dated 29.6.2015 passed in Appeal No.442 is maintained. No orders as to costs.

(2022)01ILR A1200
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 17.01.2022

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Writ B No. 863 of 2014
with
Writ B No. 248 of 2015

Gokaran Nath & Ors. ...Petitioners
Versus
Dy. Director of Consolidation Bahraich & Ors. ...Respondents

Counsel for the Petitioners:
R.N. Gupta, B.L. Mishra, Bajrangi Lal Mishra, Sunil Kumar Singh, Vijai Bahadur Verma

Counsel for the Respondents:
C.S.C., Sanjay Tripathi, Virendra Singh

A. Civil Law - U.P. Consolidation of Holding Rules, 1954 Rule 25-A - Disposal of cases relating to claim of land - In deciding disputes on the basis of conciliation in terms of section 9-A(1), the Assistant Consolidation Officer or the Consolidation Officer before whom the compromise is placed, should verify from the Village Level Consolidation Committee about the compromise filed by the parties and also avoid proceeding against any party to the compromise ex parte (Para 59)

B. Civil Law - U.P. Consolidation of Holdings Act, 1954 - Constitution of India, Article 226 of India - Scope of Interference in the orders passed by the Consolidation Authorities - writ Court may interfere in the orders passed by the Consolidation Authorities if such orders suffer from perversity, if they fail to appreciate correctly the facts placed on record before them or if orders are patently arbitrary or if they do not interpret the law correctly or apply the law incorrectly (Para 59)

Petitioners specifically pleaded before the Appellate Court and the Revisional Court that their names were not mentioned in the compromise that was filed before the Consolidation Officer, their signatures were not appended to the so called compromise - Assistant Consolidation Officer/Consolidation did not verify from the Village Level Consolidation Committee about the compromise filed by the parties - judgments cited by the Appellants were mentioned but not considered by the Settlement Officer (Consolidation) in his order - Revisional Court being the last Court of facts was duty bound to peruse the records and verify the compromise - It only observed that notice had been duly served of the compromise by the Consolidation Officer and therefore it could not be said that his order was passed in violation of principles of natural justice - Deputy Director Consolidation without adverting to the burden of proof being discharged first by the claimants and without any documentary evidence on

record, held that the property in dispute was ancestral - DDC has recorded pleas in detail in his order, but has dealt with them in a cursory manner - findings given by the DDC erroneous - order of the DDC set aside - matter is remanded to the DDC to consider afresh (Para 59)

Disposed off. (E-5)

List of Cases cited :

1. Dharmraj Vs DDC Pratapgarh 1987 RD 107

2.Ramnaresh Vs DDC & ors. 1978 RD 118;

3.Paras Nath Vs Mazir ul Hasan 1974 Revenue Cases 615

4.Shivnath Vs Deputy Director of Consolidation 1983 RD 107

5.Radheshyam Vs DDC & ors. 1981 RD page 21

6.Paras Nath Singh & ors. Vs DDC & ors.

7.Radha Mohan Dutt Vs Abad Ali Biswas AIR 1931 Allahabad 294

8.Kalu Vs Deputy Director of Consolidation Pratapgarh 1983(1) LCD page 189

9.Tahir Vs DDC 1988(6) LCD 486

10.Smt. Shakuntala Kapoor & anr. Vs VII Addl. Session Judge Meerut 19 93(11) LCD447

11.Admin General of West Bengal Vs Collector Varanasi 1988(2) SCC 150

12.State of Andhra Pradesh v I Chandra Shekhar (73) Reddy 1998(7) SCC 141

13.Prithipal Singh & anr. Vs Amrik Singh & ors. 2013(9) SCC 576

(Delivered by Hon'ble Mrs. Sangeeta Chandra, J.)

1. These are the two writ petitions filed by Gokaran Nath (now substituted) along with heirs of Ayodhya Prasad his brother, against orders passed by the Consolidation Authorities on objections filed by the Predecessor in interest of the respondent nos. 4 to 8 on Section 9A(2) objections and on application under Rule 109 of the Rules framed under the Consolidation of Holding Act (hereinafter referred to as "the Act"). The facts in both the writ petitions are common stated in the writ petitions that land of Khata Nos.26, 27, 106 and 107 are situated in village Nibia Raibhoja, Tehsil Naanpara district Bahraich. The Land of Khata number 26 was recorded solely in the name of Gokaran Nath where as land of Khata number 27 was jointly recorded in the name of Gokarannath and Anand Swaroop the father of opposite party number 2 to 8 with one half share each Land of Khata number 106 was recorded jointly in the name of Gokarannath along with his three brothers all sons of Raghunandan Prasad, with one fourth share of each and land of Khata number 107 was recorded jointly in the name of Gokarannath and his three brothers sons of Raghunandan Prasad and Anand Swarup grandson of Mahadev Prasad To the tune of one fifth share each In the basic year Khatauni.

2. During consolidation operations objections were filed under the section 9A2 by Anand Swaroop and the Assistant Consolidation Officer passed orders on 2212 1986 and on 23.12.986 on the basis of conciliation directing that land of Khata number 27 and all other Khatas be recorded in the name of Gokaran Nath and his three brothers, sons of Raghunandan Prasad, and also in the name of Anand Swaroop Grandson of Mahadeo Prasad. Land of all Khatas except Khata number 26 were treated as ancestral land and Gokaran Nath

and his three brothers and Anand Swaroop were all given 1/5 share in each of the Khatas. The order dated 22 December 1986 and 23 December 1986 passed by the ACO under section 9A2 was implemented in the records and Chak of the parties were carved out under section 21 of the Act. The extract of CH form 23 has been filed as Annexure 6 to the petition.

3. After the death of Anand Swarup his legal heirs the opposite parties number 4 to 8 filed a time barred appeal against the orders dated 22 December 1986 and 23 December 1986. It has been stated that without any notice or summons being served upon the petitioner number one and other respondents to the appeal, the Appeal was allowed and the matter remanded ex-parte on 28 February 1990. After remand of the case On 5.1.1991 an order was passed by the Consolidation Officer that in spite of publication in the Gazette the defendant Gokarannath was not present and the case would proceed ex-parte against him and fixed the date of 22 January 1991 for hearing.

4. On 28.09.1991 a forged compromise was filed on behalf of the opposite party number 4 to 8 through their advocate Shri Ram Narayan Mishra. One Dushyant Kumar Mishra advocate who was the Junior of Shri Ram Narayan Mishra filed power in the name of Ayodhya Prasad and Mahavir Prasad, sons of Raghunandan, but neither Ayodhya Prasad nor Mahavir Prasad had ever engaged him. On the basis of such compromise the Consolidation Officer assumed that the land in question was the ancestral property of the petitioners and the respondents acquired by their common ancestor Vikramjeet Tiwari And determined the share of opposite party number 4 to 8 as one fourth share each and the share of the petitioners as One eighth each. Aggrieved by such order which was passed behind the back of the petitioner Number 1 and his brothers; and on coming to know of the order dated 22 February 1992.the petitioners filed appeals.

5. It has been submitted that neither Gokarannath or nor any of his brothers signed the compromise. No compliance was made of rule 25 A of the Rules of 1954. The application under Rule 109 A2 of the rules Was made only in August 2008 and after deriving knowledge of order passed for implementation/ Amaldaramad on 30 August 2008 the petitioners filed a time barred appeal under section 11 (1) of the Act along with an application for condonation of delay on 15 October 2008. Initially an interim order was passed staying the operation and implementation of the ex-parte order dated 22 February 1992 till further orders and directed the parties to maintain status quo. However the appeal was dismissed by the SOC on 15 April 2013. Against such order the petitioners filed a revision under section 48 before the DDC. Initially an interim was granted on 17 July 2013 staying the operation of the order dated 15 April 2013. Later on the revision was dismissed on 11 November 2014.

6. It has been submitted that the Deputy Director of Consolidation Is the last Court of facts and it should have at least examined the correctness, illegality or the irregularity in the order but no such attempt was made by the DDC. A copy of ZA form 61, prepared under rule 214 of the UPZALR rules Has been filed as Annexure 10 to the writ petition. If the land in dispute was held to be ancestral the shares had to be divided per stirpes. The opposite parties however could not plead or prove the land

in dispute to be ancestral property by producing any document to show that title having been derived on the basis of inheritance.

7. It has been mentioned in Paragraph-19 of the writ petition that the share agreed upon in conciliation proceedings before the Assistant Consolidation Officer are still operative between the petitioners and respondents The compromise that was filed before the Consolidation Officer after remand in appeal is not signed by the petitioner number 1 and Kashi Prasad. The validity of the alleged compromise had not been adjudicated nor decided by the Appellate Court or the Revisional Court although the same was challenged in appeal by raising a specific ground that Ayodhya Prasad and his brothers had not engaged any person by the name of Dushyant Kumar advocate to appear on their behalf. The order dated 22 February 1992 was not implemented For a long time therefore a doubt should have arisen regarding its genuineness. Consolidation Officer wrongly observed that notice of the appeal and of the remand of the matter to his Court had both been given to the petitioners though regd post. Petitioners have also Stated that the land in question has already been sold off by the opposite parties number 4 to 8 and third-party interest have been created despite there being an interim order passed in appeal and a similar interim order being passed in revision and interim order passed by this Court on 4.12.2014.

8. The writ petition was filed by Gokaran Nath Tiwari along with sons and heirs of Ayodhya Prasad Tiwari. The petitioner no. 1 died during the pendency of the petition and has been substituted by his sons and legal heirs namely Manoj Kumar Tiwari, Prem for Tiwari and Rajiv Kumar Tiwari. The opposite party number 7 has died during the pendency of the petition and is substituted by his heirs incorporated in July 2021.

9. In the counter affidavit filed on behalf of opposite parties number 4 to 8. It has been stated that the Consolidation Officer had only found one Khata that is, Khata number 26 separately recorded in the name of Gokarannath and therefore had separated such Khata from the claim made by the opposite parties. It has also been argued that the original order passed by the assistant Consolidation Officer on 23 December 1986 was passed on the basis of a forged and fabricated compromise and it was also wrongly implemented and therefore on coming to know the same it was Challenged in appeal. Kashi Prasad filed a reply in this Appeal on 9.5.1988. After hearing the counsel for both the parties the appeals were allowed on 28 February 1990, and the matter was remanded to the Court of Consolidation Officer. Kashi Prasad Tiwari had full knowledge of the matter being heard on its merits by the Consolidation Officer again. He had also sent an application/letter Dated 6 November 1990 along with a copy of his reply in the appeal dated 9 May 1988 but he did not appear before the Court of Consolidation Officer to verify the contents of his application and therefore it was rightly ignored by the Consolidation Officer. In so far as Gokaran Nath is concerned, he was issued notice through registered post and also through publication but he refused to appear and therefore cannot now say that no opportunity of hearing was given to him. It has also been stated that Gokaran Nath lived in Kasba Naanpara and the land in dispute was

situated within ten kilometers of his house And was being cultivated by him throughout. He cannot say that he had no notice. Before the Consolidation Officer compromise was filed on 28 September 1991. Since no objection was filed to the said compromise by the petitioners, it was rightly accepted on 22 February 1992. The property in question was the self acquired property of Vikramjeet Tiwari and after his death the property in question came in the name of Shri Mahadeva Prasad and Raghunandan Prasad because his three other sons had died issueless during his lifetime. After the death of Mahadeva Prasad his son Saraswati Prasad and thereafter his grandson Anand Swaroop Tiwari inherited the share of Mahadev Prasad which was half of the Property of Vikramjeet Tiwari. After the death of Anand Swaroop Tiwari his four sons, that is, the respondent nos. 4 to 8, inherited the property with one eighth share each. Similarly when Raghunandan Prasad died his Half share was divided amongst his four sons Mahavir Prasad, Kashi Prasad , Ayodhya Prasad and Gokaran Nath Tiwari. They inherited one eighth share each of Property of Vikram Jeet Tiwari. It has also been Stated in the counter affidavit that the compromise was duly entered into by all the parties to the dispute and it was duly verified by the advocates engaged by them respectively. With regard to delay in filing the application for Amaldaramad, it has been stated in the counter affidavit that the application under rule 109 was filed on 14 June 1993 and not after 16 years. Notice was issued by the Consolidation Officer on the said application but none appeared, except counsel engaged by Gokaran Nath Tiwari. No objection was filed by Gokaran Nath Tiwari against the application but only time was prayed for deferring its disposal.The delay in disposal of such application was caused due to non-availability of no objection from the chief revenue officer Bahraich. The order passed by the Consolidation Officer, The SOC And The DDC has been defended on the ground that they had rightly treated the property to have been acquired from joint family funds by common ancestor Vikramjeet Tiwari and therefore it was divided per stirpes as per the undisputed Pedigree. The petitioners had failed to provide any evidence either before the appellate Court or the Revisional Court that the property in question was acquired by them separately and as such the same should not be treated as common ancestral property.

10. In the rejoinder affidavit filed by the petitioners it has been reiterated that the name of Anand Swaroop the father of opposite party number 4 to8 was recorded only over land of Khata number 27 jointly along with petitioner number 1, and over Khata number 107 along with petitioner number 1 and his three brothers. The Consolidation Officer had noted that the name of Anand Swaroop was not recorded in Khata number 26 Nor in Khata number 106. It has also been Stated that the objections to the basic year Khatauni Was made by Anand Swaroop and therefore Anand Swaroop should have filed evidence that the property in dispute was earned by Vikramjeet Tiwari through joint family funds. On the alleged compromise neither the signatures of Ayodhya Prasad nor that of Mahavir Prasad were present. They never appeared before the Court of Consolidation Officer for verification. Gokarannath and Kashi Prasad were not made parties to the compromise. Their names are absent from the memo of the compromise that was filed as Annexure to the writ petition and this fact has not been

disputed in the counter affidavit filed by the respondents It was also Stated in the rejoinder affidavit that on 4.12.2014 this Court has been pleased to stay the operation of the order dated 11 November 2014 and directed the parties to maintain status quo on the spot as It existed on that day. However despite such orders having been passed, the opposite parties number 4 to 8 had sold the land in question to several persons on various dates , copies of three such sale deeds have been filed as Annexures to The rejoinder affidavit.

11. An application for impleadment of subsequent purchasers as opposite parties number 11,12 and 13 was also filed in August 2015 on which notices were issued. Service was deemed sufficient and impleadment allowed on 30 July 2021. A supplementary affidavit has been filed by the petitioners wherein details of old Khata numbers and new Khata numbers have been given. It has been stated that old Khata number 4 (new Khata No.26) was recorded in the name of Gokarannath alone. Old Khata number 54, (new Khata number 27) was recorded in the name of Raghunandan Prasad and Saraswati Prasad son of Mahadev Prasad, and therefore half share in such Khata was rightly given by the assistant Consolidation Officer. Old Khata number 24 and old Khata number 125 were joined together and given new Khata number 106 , which was recorded only in the name of Gokarannath and his three brothers ,sons of Raghunandan Prasad, and therefore no share could have been given to Anand Swaroop or to the respondent number 4 to 8 in such Khata number 106. Old Khata number 25 and 124 were combined to make new Khata number 107 , in which the name of Raghunandan Prasad and Anand Swaroop were recorded. Gokarannath and his three brothers became entitled to half share of Raghunandan Prasad over such land. Anand Swaroop used to give Land revenue for only 1/5 portion of such Khata number 107 , as is evident from extract of the Khatauni and ZA form number 61D. Copies of the relevant extract of the Khatauni And the form number 61 have been filed as an Annexure to the supplementary affidavit.

12. A Reply to such supplementary affidavit has been filed by the opposite parties number 4 to 8 in November 2017 wherein they have denied its contents reiterated that no such documentary evidence was produced before the consolidation authorities that the property in question was not the joint property of the entire family and had been acquired separately by the petitioners. A substitution application was filed in January 2018 which has been allowed after issuance of notice by this Court, in September 2018 substituting the petitioner number 1 and the opposite party number 7 by the legal heirs and dependents. An Affidavit has been filed by the petitioners placing on record the The fact that at least four sale deeds Have been made out in favour of different persons by the respondent number 4 to 8 And their legal heirs during the pendency of the writ petition and the currency of the interim order passed by this Court on 4.12.2014.

13. Learned counsel for the petitioners during the course of arguments has pointed out from Z.A. Form-61 filed as Annexure No.10 and mention in the pleadings in Paragrap-16 that the Petitioner

no.1 Gokaran Nath was recorded as the sole tenure holder of Khata Nos.26 & 27, and with his brothers namely Mahaveer Prasad, Kashi Prasad and Ayodhya Prasad in Khata No.106, whereas Anand Swaroop from whom the Opposite party nos.4 to 8 derived title was mentioned as co-sharer only in Khata No.107 only since prior to 1360 Fasli.

14. The objections were filed under Section 9A(2) by the predecessor in interest of the Opposite party no.4 to 8 i.e. Anand Swaroop belonging to the branch of Saraswati and Mahadev praying for share in such Khatas which belonged to the branch of Raghunandan and were recorded in the name of the Petitioner no.1 and his three brothers Mahaveer Prasad, Kashi Prasad and Ayodhya Prasad, therefore the burden lay upon them to prove that the Khatas that they were disputing were ancestral property and hence liable to be partitioned into two branches i.e. of Raghunandan and Mahadev sons of Vikram Tiwari. No such proof was ever produced before the Consolidation Officer. Before the Consolidation Officer only a compromise was relied upon which compromise has been filed as Annexure-7 to the petition which shows that it has not been signed by Gokaran Nath, the Petitioner No.1. On the basis of such compromise dated 28.09.1991 the Consolidation Officer passed an order on 20.02.1992. The predecessor in interest of Opposite party nos.4 to 8 kept quiet after passing of the order dated 20.02.1992 and did not file any application under Rule 109 for its endorsement on the Revenue Records till 2008. When such application was filed in 2008 the petitioners were issued notice and they filed objections through their counsel requesting the Consolidation Officer not to proceed further in the matter as they wished to file an Appeal against the order dated 20.02.1992. The Consolidation Officer, however passed the order under Rule 109 A Sub clause 2, the petitioners approached the Settlement Officer (Consolidation) by filing two Appeals one Appeal was filed against the order dated 22.02.1992 and the other Appeal was filed against the order dated 30.08.2008 passed under Rule 109 (A) 2. Both the Appeals were clubbed and heard together by the Settlement Officer (Consolidation). The Settlement Officer (Consolidation) dismissed the Appeals both on merits and on delay. Although the Settlement Officer (Consolidation) in his order has observed that Gokaran Nath had not agreed to the compromise which was made the basis of the order passed by the Consolidation Officer. He nevertheless directed even Khata Nos.26 and 27 besides Khata No.107 and Khata No.106, to be ancestral property and therefore liable to be partitioned in accordance with the joint Hindu Family Custom. As per the joint Hindu Family Custom the ancestral property was to be divided per stripes between the branches of Raghunandan and Mahadev sons of Vikram Tiwari. The petitioners filed a Revision which Revision has also been rejected by the Deputy Director of Consolidation, Despite the petitioners pleadings before the Deputy Director of Consolidation that the proceedings were vitiated on account of fraud and misrepresentation resorted to by the opposite party nos.4 to 8.

15. Shri Sanjay Tripathi, appeared for the Opposite party nos.4 to 8. He has argued that the petitioners relied upon a compromise filed before the Assistant Consolidation Officer but were disputing the compromise filed before the Consolidation Officer. Even the

compromise filed before the Assistant Consolidation Officer on which the initial order of the Assistant Consolidation Officer was passed on 22.12.1986 had directed the partition of the property between the two branches equally. The Appeal was filed against the Assistant Consolidation Officer's order dated 22.12.1986 and the Settlement Officer (Consolidation) remanded the matter to the Consolidation Officer to decide on merits observing that there was no compromise between the parties, and it was the contested case, therefore it should be decided on merits. The order of the Settlement Officer (Consolidation) was never challenged by the petitioners. However, when the matter was remanded to the Consolidation Officer even though they had knowledge that the case was pending before the Consolidation Officer, they failed to appear despite publication of notice in the Newspaper. Before the Consolidation Officer, the petitioners were disputing the claim made by the predecessor in interest of Opposite party nos.4 to 8 that the property in question was ancestral property, but at no such application was filed before the Consolidation Officer by the petitioners for giving evidence to show that the property in question was a self acquired. The Consolidation Officer and thereafter even the Settlement Officer (Consolidation) in Appeal, rightly presumed that being the property of Vikram Tiwari and having devolved upon his two sons, the property was ancestral and therefore directed for its division which orders should not be interfered with lightly as findings of fact have been recorded by three learned Courts below.

16. It has also been argued that if the petitioners failed to produce any evidence before the Consolidation Courts, the Consolidation Courts had no option, but to rely upon the family pedigree which the petitioners also did not dispute, and pass the orders impugned. It has also been argued that the opportunity was not denied by the Consolidation Officers. Notice was issued and thereafter publication in the Newspapers was also made and the petitioner no.1 lived in the same village and was cultivating the land in question, therefore, it cannot be said that he had no knowledge of the proceedings pending before the Consolidation Officer, more so when the Settlement Officer (Consolidation) had remanded the Appeal filed against the order of the Assistant Consolidation Officer after hearing both the parties. Learned counsel for the respondents also argued that the original Khata was in the name of their great grand father Mahadev, and thereafter the name of Saraswati and Anand Swaroop were recorded also on the Khatauni, therefore his sons being legal heirs cannot be denied the share in the ancestral property.

17. Shri Sanjay Tripathi, learned counsel appearing on behalf of the contesting-respondent has pointed out that the Hon'ble Supreme Court as well as this Court in its several judgments has observed that findings of fact recorded by the Consolidation Authorities should not ordinarily be interfered with in writ jurisdiction. The exceptions that have been passed on relate to misrepresentation and fraud depriving of opportunity, perversity and misrepresentation of law, failure to exercise jurisdiction and Acting in excess of jurisdiction by the lower Courts. The case of the petitioners is not covered in any of these exceptions and therefore this Court in writ jurisdiction should not

reappraise the evidence before learned consolidation authorities. On the facts of the matter, Shri Sanjay Tripathi states that it was not as if the Consolidation Officer was hearing the matter for the first time and then passed the impugned order. It so happened that C.O. had earlier passed order which was challenged in appeal and the appeal partly allowed and the matter remanded to him by an order dated 28.02.1990. It is apparent from the perusal of the order dated 28.02.1990 that all the parties were heard. It was not open for the petitioner to stay away from the hearing before the Consolidation Officer on remand of the case. It has also been stated that the documents that have been filed along with writ petition and supplementary affidavit filed therein are such documents which have not been produced before the Consolidation Officer and they cannot be looked into now as it would allow the petitioners to improve upon the case set-up before the Consolidation Authorities. It has also been argued that co-sharers praying for partition have to prove their own case. The onus of proof lies upon each of them with regard to the share claimed by them. More so when the family pedigree/ sijra has not been disputed between the parties. The petitioners did not produce any evidence before the Consolidation Authorities to prove that the entries in the khatauni was not found to be wrongly made then it would be followed by all the Courts. Learned counsel for the respondents has cited judgments of the Hon'ble Supreme Court and of this Court to say that where there is no denial of the opportunity and no misrepresentation, the jurisdiction of the writ Court in consolidation cases is very limited and should be exercised with caution and circumspection.

18. Shri Vijay Bahadur Verma has in rejoinder submitted that the judgment of all the learned Courts below has not considered the fact that the compromise was ex-parte. The case can be decided ex-parte but a compromise cannot be acted upon if it is ex-parte.

19. In rejoinder, Shri Vijay Bahadur Verma also submitted that the pleadings in the Appeal and the Revision are specific in so far as at least two Khatas are concerned, one of them being recorded solely in the name of the Petitioner no.1 and the second Khata recorded in the name of the Petitioner no.1 alongwith his three brothers. There is no mention of the branch of Saraswati on these Khatas, and the Annexures that have been relied upon by the petitioners have not been disputed. Only a bald denial in the counter affidavit would not help the respondents.

20. Shri Vijay Bahadur Verma, further argued that paragraph 16 of the writ petition specifically says that till date the Khatauni mentions names of the petitioners. True photocopies along with type copies of Z.A. Form No.16 kha along with extracts of khatauni of petitioner no.1 and his three brothers Mahavir Prasad, Kashi Prasad and Ayodhya Prasad along with that of Anand Swaroop the predecessor in interest of the respondent have been filed as Annexure no.10 to the writ petition.

21. It has also been argued that the consolidation authorities wrongly assumed that the property belonged to Vikramjit Tiwari, the common ancestor of all the parties, however, there was no evidence on record that the property in dispute was ever recorded in the khatauni in the name of

either Vikramjit Tiwari or Raghunandan and Mahadev, his two sons.

22. Learned counsel for the petitioner also says that the compromise that was filed before the Consolidation Officer had left out plot no.26 which is new number of old plot no.4. He has pointed out that old plot no.24 and 125 were converted into new plot no.106, old plot no.25 and 124 were converted into new plot no. 107, old plot no. 4 was converted into new plot no.26 and old plot no.54 was converted into new plot no.27.

23. In old plot no.54 (new number 27) half share of Saraswati Prasad is admitted (ancestor of the opposite parties). The compromise was defective because while giving half share of plot no.27 to the ancestor of the opposite party, Saraswati Prasad, it also gave half share of other three plots that belonged solely to either the petitioner or his three brothers and where there was no share of the Mahadev and Saraswati. In plot number 106 the names of the opposite parties or their predecessor in interest were never recorded whereas they were recorded in plot no.107 as co-sharers.

24. Learned counsel for the petitioner has also pointed out that the petitioners had filed two appeals, one against the order passed by the Consolidation Officer under Section 9 A (2) of the Act and the other against the order passed under Rule 109 (A). Both appeals were rejected and thereafter two revisions were filed which revisions have also been rejected which have led to filing of these two writ petitions.

25. It has been argued by the learned counsel for the petitioner that the order passed by the Consolidation Officer was an ex-parte order and, therefore, at least during the appeal and revision the petitioner should have been heard properly.

26. It has also been argued that the question of shares with regard to co-tenure holder is a question of law and cannot be decided on the basis of compromise. It should only be decided on the basis of pleadings and evidence produced by both the parties.

27. Learned counsel for the petitioner has pointed out from the copy of the compromise filed before the Consolidation Officer that there are no signatures of the petitioner on them, hence, it is not binding on them. With regard to the specific query made by the Court about current status of the property in question, Shri Vijay Bahadur Verma, learned counsel has submitted that during the pendency of the appeal there was an interim order passed by the S.O.C. which lapsed when the appeal was rejected. In the petitioner's revision there was also interim order granted by the Deputy Director of Consolidation which came to an end on the rejection of the revision. When the writ petition was filed, this Court on the first day of hearing on 04.12.2020 had directed the parties to maintain status-quo and had also stayed the order passed by the DDC dated 11.11.2014 till the next date of listing. Ignoring the interim order granted during the appeal and revision and thereafter by this Court, the opposite parties have sold all the land in question and, therefore, application for impleadment was filed before this Court on which notice were issued and service found sufficient by this Court. Impleadment application was allowed. The subsequent

purchasers have not put in appearance before this Court but Section 52 of the Transfer of Property Act would apply and since the transfer was during the pendency of the litigation before the appellate Court revision Court and High Court, it should be treated as null and void.

28. This Court has perused the order dated 22 February 1992 passed by the Consolidation Officer in Case No.398 to 401, and finds that the Consolidation Officer First recorded that except for Gokarannath and Kashinath, sons of Raghunandan Prasad, all other parties in litigation with respect to Khatas Nos.26, 27, 106, 107 had submitted a compromise dated 28.09.1991. Gokaran Nath had been sent notice through registered post and substituted notice through Gazette publication was also resorted to but he failed to appear. Kashi Prasad Tiwari sent a letter on 06.11.1990 along with a copy of reply submitted on 9.5.1988 in Appeal before the SOC, but Kashi Prasad Tiwari did not appear nor did he file any response to the notice sent to him therefore his letter dated 06.11.1990 was not being taken into consideration. In the compromise dated 28.09.1991 the 4 Khata in dispute were shown to be ancestral property. However Khata No.26 was shown to be recorded in the name of Gokarannath alone and the parties to the litigation had not showed any evidence that said Khata No.26 was in fact ancestral property. The Consolidation Officer observed that for co-tenancy rights to be claimed on property acquired before the U.P. Zamindari Abolition and Land Reforms Act, the Provisions of U.P. Tenancy Act were applicable but after U.P. Zamindari Abolition and Land Reforms Act came into being, to claim co-tenure ship in a particular piece of land, there was no provision, hence, in so far as Khata No.26 was concerned the compromise dated 28.09.1991 could not be made applicable. Only with respect to Khatas Nos.27, 106 and 107, the compromise dated 28.09.1991 would govern the shares of the parties, thus the compromise in respect to Khata Nos.27, 106 and 107 would become part of the order. The Consolidation Officer also observed that the rest of the lands on which the compromise dated 28.09.1991 had been accepted, were covered by the imposition of Ceiling on Land Holdings Act, and therefore the file be sent to the Chief Revenue Officer for his comments before the order dated 22.02.1992 can be made applicable.

29. Two Appeals were filed by Gokaran Nath and others against the order dated 22.02.1992 and order dated 30.08.2008 passed on an application under Rule 109 A(2). Both the Appeals were taken up together by the Appellate Authority. This Court has gone through the order passed by the SOC. The SOC dealt with the facts of the case regarding compromise being submitted in the Court of Consolidation Officer with respect to Khata in question describing them as ancestral property. The Consolidation Officer after hearing the parties had declared Khata No.26 to remain in the sole possession and ownership of Gokarannath whereas other khatas were to be divided per stripes. The appellant had argued that the Consolidation Officer had proceeded ex-parte and pass the order relying upon the compromise which compromise had been done fraudulently. In the basic year Khatauni, Khata No.26 was recorded in the sole name of Gokaran Nath. Khata No.27 was recorded in the name of Gokaran Nath Son of Raghunandan along with Anand Swaroop son of Saraswati. Khata No.106

was recorded in the name of Mahavir Prasad, Kashi Prasad, Ayodhya Prasad and And Gokarannath all sons of Raghunandan. Khata No.107 was recorded in the name of Mahavir Prasad, Kashi Prasad, Ayodhya Prasad And Gokarannath sons of Raghunandan and Anand Swaroop son of Saraswati in the basic year Khatauni. The Assistant Consolidation Officer on basis of conciliation passed an orders on 22.12.1986 and 23.12.1986 declaring 1/5 share in all Khatas leaving out Khata No.26. The said order was also implemented. The Chaks were also carved out. Later on, an Appeal was filed which was accepted on 28.02.1990 and the matter remanded back to the Consolidation Officer to decide afresh as it was a contested case.

30. It was argued before the SOC that after remand Order was passed by the SOC, the case file did not reach the Court of the Consolidation Officer and the order dated 22.02.1992 was passed without going through the records only on the basis of an ex-parte agreement. A Gazette Publication dated 23.07.1990 was said to have been done but knowledge could not be derived by the appellants And the matter proceeded ex-parte and on the basis of a forged compromise dated 28.9.1991 the order dated 22.02.1992 , was passed. The respondents filed an application for implementation of the order on 14.06.1993 and thereafter sat quietly. On 10.10.2006 another application for implementation (Amaldaramad) was filed but no implementation was done. Ajay Kumar, the respondent filed mutation application again which was taken into account and the order 30.08.2008 was passed under rule 109 A(2). Only on implementation of the order dated 30.08.2008 knowledge could be derived by the appellants. Consequently the Appeal was filed with delay.

31. With regard to the merits of the case, it had been observed by the SOC that Kashi Prasad was Posted as Inspector General in PAC and his son was living in America. Mahavir Prasad was Income Tax Commissioner. These two parties had not appeared in the case. The Appeal was heard in their absence. In the Appeal memo it was claimed that the land of the disputed Khata was not ancestral property as the Revenue Records do not show the name of Vikramjit being recorded thereon. However, in the conciliation before the Assistant Consolidation Officer 1/5th share was declared for each of the parties which was not challenged and can be treated as an estoppel.

32. It was argued before the SOC that in the agreement the names of seven parties have been mentioned including that of Gokarannath. With respect to the Appellants' family the name of only two of the parties were mentioned. The names of Ayodhya Prasad and Mahavir Prasad were added later on. It was also argued that when the Court had ordered proceeding ex-parte against the respondents on 05.07.1991, it is not clear as to how such parties came to Court and signed the compromise before the it on 28.09.1991 it is evident that the compromise was a forged document the Vakalatnama that was filed on behalf of the Appellants had been signed in 1989. It was actually filed in September 1991 when the case file was remanded in 1990 no notice was ever issued. Reference was made to two judgements of the High Court Reported in 1987 (RD) 416, and in 1982

(RD) 107, praying for condoning the delay. Appellant also placed reliance upon 1987 (RD) 411, 1983 (RD) 107 and 1987 (RD) 180 to substantiate their claim.

33. The respondents on the other hand while filing their objection to the Appeal stated that the Consolidation Officer had ordered to proceed ex-parte only against Gokarannath. The appellants had failed to show as to how the disputed lands had been acquired by them solely on the basis of their own income. Kashi Prasad had sent a letter indicating his consent and admission by one of the parties/respondents would bind others also. Neither Mahavir Prasad nor Kashi Prasad approached the Appellate Court against the order of the Consolidation Officer. The appeal being time barred ought to have been rejected as no sufficient cause has been shown to condone the delay. The delayed implementation of the order dated 22 February 1992 was only because approval by the chief Revenue officer was granted with much delay. When the Application under rule 109 was filed, a notice was again issued but only Gokarannath appeared And prayed for deferment of hearing. The compromise that was filed between the parties Having not been challenged on merit it Should not be disturbed.

34. After recording the submissions made by the appellant and the respondent, The SOC proceeded to give his findings on the basis of perusal of the original file. He came to the conclusion that the land in question was undisputedly joint family property as no evidence was produced by Appellant of having acquired the same through his own personal efforts it was presumed to have been Acquired jointly. Looking into the Pedigree of the parties the SOC observed that half share of the property of Vikramjit should go to the branch of Mahadeo Prasad/Anand Swaroop and the other half share Should go to the branch of Raghunandan. Such division per stirpes had actually been done. It was noticed that in so far as Khata number 26 was concerned since no evidence was filed of the same having been acquired jointly, it remained recorded in the name of Gokarannath. In so far as order dated 22 February 1992 was concerned the appeal having been filed on 15 October 2008 was with inordinate delay which could not be condoned. Even if the compromise that was relied upon to pass the order dated 22 February 1992 is ignored, still the order passed by the Consolidation Officer appeared to be just and correct as it divided Ancestral property per stirpes. As such the order dated 30 August 2008 implementing the same under rule 109 of the rules also did not warrant interference. The Appellant did not produce any evidence of his entitlement to a larger share of the ancestral property. The Question of remand cannot be considered as it would lead to unnecessary and frivolous litigation. Also the SOC observed that the appeal as well as the application for condonation of delay were supported by an affidavit which had only the signature of Gokarannath thereon. No other legal heir of Raghunandan Prasad was interested in getting the order dated 22 February 1992 set aside.

35. The order dated 11 November 2014 has also been perused by this Court. It decided revision number 404 and connected revisions filed by Gokarannath against the order dated 15 April 2013 rejecting his two appeals. In the revision the DDC has first considered the argument raised by the revisionist that matter relating to four different khatas were decided by four different orders Dated 18 December

1986, 22 December 1986, 31 December 1986, and 23 December 1986 respectively. Four appeals Were filed namely appeal number 2796, 2797, 2798,2799 Respectively against such order the appeals were allowed ex-parte and the matter remanded. On remand of the case a forged compromise was filed which did not have the signatures of Mahavir Prasad and Ayodhya Prasad although it was stated that they were agreeable to such compromise. The names of Gokaran Nath and Kashi Prasad were altogether absent from such compromise. Yet the compromise was believed and made part of the order by the Consolidation Officer. In respect of filing of the said compromise on 28 September 1991, no notice was ever issued to the revisionist hence the orders dated 22 February 1992 ought to be set aside on grounds of Violation of principle of natural justice.

36. It was also argued before the Deputy Director Consolidation that Khatauni Nos.26 and Khata number 106 did not contain the name of Anand Swarup. The Consolidation Officer rejected the claim of the heirs of Anand Swaroop to Khata number 26 as part of ancestral property and Khata number 26 was Directed to remain in the sole ownership of Gokarannath. On the other hand Khata number 106 also did not contain the name of Anand Swarup however he was given half share of such property amounting to almost 40 acres of land. Such an order was self contradictory in nature. On the one hand the claim of the heirs of Anand Swarup was not accepted on Khata number 26 as it did not contain the name of Anand Swaroop, On the other hand the claim of the heirs of Anand Swarup on Khata number 106 was allowed even though the name of Anand Swaroop was not mentioned in the record and there was no evidence filed of the said Khata being ancestral property.

37. It was also argued before the DDC that the respondents very cleverly waited for more than 16 years to get the order dated 22 February 1992 implemented before filing application under Rule 109 A(2) when Order dated 30 August 2008 was passed the revisionist derived knowledge and filed two separate appeals challenging the order dated 22 February 1992 as well as the order dated 30 August 2008, both the appeals were rejected by SOC arbitrarily. It was observed by the SOC that only Gokarannath was aggrieved by the order dated 22 February 1992 and the order dated 30 August 2008. The SOC failed to notice that since Ayodhya Prasad had died before filing of the appeal, his heirs had filed their Vakalatnama on substitution as Appellant number 2 to 6. The failure to notice the Substitution of the heirs of Ayodhya Prasad which Was very much on record made the order under challenge, perverse , And liable to be set aside on this ground alone.

38. It was also argued before the DDC that the SOC and the Consolidation Officer without looking into the fact that no evidence was filed To show that the property was ancestral in nature had assumed the same to be ancestral and divided it equally between the The heirs of Raghunandan Prasad and Mahadeo Prasad. The compromise having been obtained by fraud should have been ignored. The SOC however closed his eyes to such criminal conduct.

39. In the Revision filed against the order dated 30 August 2008 passed under Rule 1098 it was stated that the order dated 22 February 1992 had been implemented

Without issuing notice to all the parties concerned. Kashi Prasad and Mahavir Prasad had died In the meantime but the legal heirs were not substituted. In so far as Khata number 106 was concerned it's co tenure holder Kashi Prasad was survived by his son Ajay Kumar Tiwari who lived in America. He was not heard. The Consolidation Officer had wrongly observed in his order that notice was issued to all Concerned. Mahavir Prasad had died 20 years ago his widow had also died in 2006. Kashi Prasad had died 14 years ago. His son was living in America. No notice was ever issued to the legal heirs. Only after knowledge was derived through rumours, Gokarannath had filed an application for deferment on 19 July 2008 that against the original order a restoration application was pending therefore The hearing in application under rule 109 should be deferred. The Consolidation Officer ignored such an application.

40. It was argued before the DDC that the SOC had wrongly observed that the order dated 22 February 1992 had been implemented under rule 109 whereas the order dated 30th of August 2008 had not been passed under rule 109 It was rather passed under rule 109 A2 Under rule 109A2 the Chaks are adjusted so that each of the tenure holders is assigned both high-value and low value land on an equitable basis so that each of the shareholders would be relatively equally placed. On the other hand the Consolidation Officer in his order dated 30 August 2008 had assigned all good land only to the respondents.

41. In response to such revision, the opposite parties filed their written reply stating that after the compromise dated 28 September 1991 was filed in Court, notice was issued to Gokaran Nath through registered post and through publication in newspaper. A copy of the written statement filed on 9 May 1988 in the appeal filed under section 11 (1) of the Act by the respondent before the SOC against the order dated 22 December 1986 Clearly showed that both Kashi Prasad and Gokaran Nath had knowledge of the matter being remanded to the Consolidation Officer for decision afresh. On their Refusal to appear and plead the case before the Consolidation Officer it cannot be said that opportunity of hearing was denied.

42. In so far as delay in filing of the application for implementation (Amaldaramad) is concerned it was stated clearly by the Consolidation Officer in his order dated 22 February 1992 that the land in question may be declared surplus under the ceiling operations . Consequently the Tehsildar Nanpara had submitted a report on 5 March 2007 on which the comments of the Chief Revenue officer were called. The Chief Revenue Officer gave his comments on 12 September 2007 that the land in question was not being affected by ceiling operations. Later on the SOC also granted permission on 26 December 2007 for implementation of the order dated 22 February 1992 only thereafter that the assistant Consolidation Officer issued Notice to all the parties. Even after such notice was issued only Gokarannath appeared And filed his application for deferring of hearing. None of the other respondents appeared. The application of Gokarannath was rightly rejected and the order dated 30.8.2008 was passed.

43. In his order dated 11.11.2014, the DDC had observed that he had carefully gone through the written argument filed by the revisionist also. He has gone through the record of the lower Court. After

referring to the facts of the case as mentioned in the Orders dated 22 February 1992 and 15 April 2013 passed in the two appeals by the SOC, the DDC has given his own findings. He has found that notice was issued through registered post and through publication yet the revisionist had not filed any objections. it could not be said that the procedure was not followed by the Consolidation Officer while placing reliance upon the Compromise dated 28 September 1991. The Consolidation Officer was careful enough not to disturb the entry in so far as Khata number 26 was concerned as the parties could not show any evidence to prove that the same was ancestral property acquired through joint fund family funds. On the other hand the other khatas in question All had the names of the successors of The two branches Of Raghunandan Prasad and Mahadev Prasad entered already in the basic year Khatauni. The only question involved was that of determination of individual shares of each of such legal heirs. Such division was done per stirpes And strictly in accordance with the undisputed Pedigree.The order passed by the Consolidation Officer and the Settlement Officer (Consolidation) were on the whole just and did not need any interference. The revisions were consequently rejected.

44. This Court having heard the learned counsel for the parties at length and having perused the orders impugned finds from the annexures filed along with the pleadings on record that in objection filed under section 9A2 of the consolidation Of holdings Act a compromise was filed showing Pedigree of the petitioners and the respondents. Such Pedigree mentioned Vikramjeet Tiwari as the common ancestor having five sons of which Mahadeo Prasad Tiwari And Raghunandan Prasad were the main ancestors of the respondents and the petitioners here in. Mahadeva Prasad Tiwari was survived by his son Saraswati Prasad Tiwari and his son Anand Swaroop Tiwari. Raghunandan Prasad Tiwari had four sons Mahavir Prasad, Kashi Prasad, Gokaran Nath And Ayodhya Prasad Tiwari.

45. In the compromise filed as annexure to the writ petition it was mentioned that Khata Nos.26, 27,106 And 107 were the self acquired property of Vikram Jeet Tiwari. On his death the property was divided equally between his sons Mahadeo Prasad and Raghunandan Prasad Tiwari as his other three other sons had died issueless during the lifetime of Vikram Jeet Tiwari. Saraswati Prasad Tiwari Succeeded his father Mahadeo Prasad Tiwari. On his death Anand Swaroop Tiwari succeeded to his share. On the death of Raghunandan Prasad Tiwari his four sons namely Mahavir Prasad Ayodhya Prasad Kashi Prasad and Gokaran Nath succeeded to one eighth of his shares. The earlier order of the Consolidation Officer had wrongly decided one fifth share each in favour of Mahavir Prasad Ayodhya Prasad Kashi Prasad And Gokaran Nath although they were entitled to only one eighth of the share on which they were actually in possession. A prayer was made in the compromise that in all the four Khata the share of Abhay Kumar ,Sanjay Kumar, Rakesh Kumar ,Rajesh Kumar and Shailesh KumarSons of Anand Swarup Tiwari be decided as 1/10 where as the share of Mahavir Prasad, Ayodhya Prasad, Kashi Prasad and Gokarannath be decided as 1/8 th. The compromise was shown to have been signed by the sons of Anand Swaroop Tiwari identified through their counsel

Ravi Narain misra. Mahavir Prasad and Ayodhya Prasad sons of Raghunandan Prasad Tiwari did not sign such compromise dated 28 September 1991.

46. The learned counsel for the petitioners had cited *Dharmraj versus DDC Pratapgarh* 1987 RD 107; before the appellate Court which was not dealt with by the SOC. In this judgement rendered by coordinate bench of this Court, the Court was considering the claim of co tenancy rights made by the petitioner having been rejected by the DDC The brief facts of the case were that the plots in dispute were contained in two Khata numbers the petitioner was found in possession over the plot in dispute during consolidation operations along with respondent number 4 to8 to the writ petition. Whereas the respondents number 4 to 8 were recorded in the basic year. The petitioner filed an objection under section 9A2 of the Act claiming co tenancy rights on the basis that the plots of both the khatas were ancestral acquisition and the petitioner being the descendant of one of the Two sons of the original Khata holder was entitled to half share. Whereas the respondents number 4to 8 being descendants of the other son were entitled to the remaining half share. The respondents 4 to 8 on the other hand had filed an objection alleging that the plots were acquired only by their ancestor and not by the petitioners ancestor and hence they were the sole tenure holders. The Consolidation Officer decided the case against the petitioner who prefer two appeals. The appeal in respect of one of the Khatas was allowed in respect of the other Khata was dismissed. The petitioner preferred a revision in respect of his appeal which was dismissed. The respondent number 4 to 8 preferred a revision in respect of the appeal of the petitioner which was allowed claiming sole tenancy rights. The Deputy Director of Consolidation by the impugned order had allowed the revision of the contesting respondents as the sole tenure holders and dismissed the petitioners revision. The result was that the contesting respondents were held to be sold tenure holders in respect of both the Khatas The counsel for the petitioner submitted that oral evidence which was filed had not been considered. The High Court had held consistently in *Ramnaresh versus DDC and others* 1978 RD 118; Paras Nath versus Mazir ul Hasan 1974 unreported Revenue Cases 615; and *Radheshyam versus DDC and others* 1981 RD page 21; that the Deputy Director Consolidation was the last Court of facts and he should consider the oral and documentary evidence afresh, his orders should not be cryptic and there must be discussion of the oral evidence.

47. In the case before this Court in in Dharmraj, although just a reference was made to the witnesses examined on behalf of the petitioner and in respect of the mother of the petitioner, and the fact that she had not stated anything as to when partition took place in the Family, the DDC did not discuss other remaining portion of the statement made by her. The Court observed that the order Passed by the DDC was cryptic in nature and the DDC failed to apply his mind to the arguments put up by the parties. No points for determination were formulated by the DDC for decision. He had also failed to refer to the documents on record. It was observed by the Court that the DDC being the last Court of facts, should have passed a detailed order which he had not done while reversing the order of the SOC. The order of the DDC was set aside and the matter remanded to him for decision afresh.

48. In Shivnath versus Deputy Director of Consolidation 1983 RD 107; another judgment cited by the petitioners before the SOC but not considered by him, this Court was considering a case where certain land was recorded in the basic year Khatauni in the names of Radhe son of Shiv Pal and Lalta son of Fateh Singh. Kalika, the father of petitioner Sheo Nath and others filed an objection claiming to be co tenure holder in the holding in dispute with the allegations that it was a joint family holding and was acquired in a state of jointness with joint family funds. He claimed that he is a co tenant to the extent of one third share in the holding in dispute which was initially recorded in the name of Radhe in representative capacity. He also claimed to be in possession over the land in dispute . Another objection was filed by Radhe asserting that he is the sole tenant of the land in dispute and it was his sole acquisition. He further contended that the name of Lalta was incorrectly recorded as co-tenant along with him on the holding in dispute and prayed that the name of Lalta be expunged and that he be declared as the sole Sirdar tenant of it. Lalta contested the case asserting that he is cotenant in the holding in dispute and further supported the claim of Kalika father of Shivnath and others, who had pressed his claim of being co tenant along with the recorded persons Radhe and Lalta.

49. The Consolidation Officer after taking evidence of the parties rejected the claim of Kalika who died during the pendency of the case and was substituted by Shivnath and others ,the petitioners. The Consolidation Officer further found that in an earlier litigation in a suit under section 229B of the U.P. Zamindari Abolition and Land Reforms Act between Lalta and Radhe, Lalta was held to be co tenure holder along with Radhey. Consolidation Officer found the said judgement to be operative as Res Judicata between the parties and Lalta and Radhe to be co tenure holders of the disputed lands having equal share therein.

50. Aggrieved by the said order appeal was filed by Shivnath and others whose claim regarding co tenancy rights in the disputed holding was rejected by the Consolidation Officer. Radhey also preferred an appeal against the said order claiming to be sole tenant of the disputed holding. Both the appeals were heard together and decided by the Additional Settlement Officer (Consolidation). The appeal of Shivnath was allowed and they were held to be Co tenure holders entitled to 1/3 share in the disputed holding found to be joint family holding in which Radhe and Lalta were also held to be entitled to 1/3 share each. Aggrieved by the said order Radhey filed a revision which was allowed by the DDC and the DDC held that since in the earlier suit under section 229B of the UPZALR Act Lalta had claimed and a decree was passed in his favour only to the extent that he was entitled to only two bighas of land in the disputed holding and as such Lalta would not be entitled to co tenancy rights with half share in the entire holding in dispute. he also held that all the parties were bound by the decree passed in the aforesaid suit. The decision of the DDC was challenged in writ petition by Shivnath and others and Also by Radhey in separate writ petition. All of them were connected and decided together.

51. The Court Observed :-"it is well settled that the claim of co tenancy rights

cannot be upheld merely on the strength of recorded possession over certain plots of the disputed holding and receipt for rent and canal dues made by the claimant. *If a holding has been entered in the name of one or more members of the family and another member claims a share in the holding, the burden of proving that the holding was joint family property and the name of the recorded person or persons was in representative capacity lies heavily on the claimant. It has to be established that the claim to be co tenure holder . Was accepted by the other recorded tenure holders in the past in a mutual partition so as to entitle him to claim co tenancy rights by acquiescence or estopple.....*

(emphasis supplied)

52. The Court also observed that the law is fairly settled that a member of joint family or even a Karta of the family can acquire property for himself and in his own name and that the other members of the Family would have no interest or share in it, if he had acquired it from his own funds. But if the tenancy holding was acquired with the aid and assistance of the joint family funds but the family was joint, then other members of the joint family would also have a share in it, although it may be recorded in the name of individual member of the joint family. The Court relied upon judgement rendered by this Court earlier in *Rajendra Mishra versus Tirath Raj Mishra* AIR 1953 Allahabad 376 ,and in *Visvanath Singh and another versus Brij Dayal Singh and another* 1968 RD 396; and Bala Charan and others versus state of UP and others 1978 RD 551; where however it is established or admitted That the family possessed some joint family property which from its nature and relative value may have form the nucleus from which the property in question may have been acquired, the presumption arises that it was joint property and the burden would then shift to the party alleging self acquisition to establish affirmatively that the property was acquired without the aid of the joint family.

53. The Court also held that the person is not bound by the admission with regard to question of law. What would be his quantum of share, would be determined according to law on the basis of established facts and he will not be stopped from claiming a larger share in the property to which she would otherwise be legally entitled to receive. Admission made by a party with regard to his share is a question of law and it would not be binding and he not be would estopped from claiming a larger share because admission against law is not enforceable. The Court relied upon judgement rendered by the Supreme Court in *Banarasi Das versus Kashi Ram and others A.I.R 1963* Supreme Court 1165 where the Supreme Court had observed that an admission in so far as facts are concerned would bind the maker of the admission, but not in so far as it relates to a question of law. This Court also placed reliance upon judgement rendered by the Supreme Court in *Societe Belge de Banque SA Versus Rao Girdhari Lal Choudhary* A.I.R. 1940 privy council 90 where the lordships of the privy council while considering the question of admission and the relief to be granted by the Court observed that:-*"a counsels admission of a point of law cannot be binding upon the Court; and the Court is not precluded from deciding the rights of the parties on a true view of the law"* And it moulded the relief that was claimed by the petitioner therein of one third share in the disputed property and observe that the petitioner is entitled to half share in the entire disputed holding.

54. The next judgement on which reliance has been placed by the counsel for the respondent was Paras Nath Singh and others versus DDC and others ; where this Court was considering whether the DDC had power to set aside or modify a final order once made by it. It was held that except in matters specified in Sectn 42A the DDC had no inherent power to set aside or modify any final order once made merely because it is wrong. However the Court also considered the fact that the DDC was sitting as the final Court of fact and therefore not applying mind on every piece of material evidence on record, both oral and documentary led by the parties, could be one ground to recall an order. Even if such order Recalling the earlier order issued by mistake was without jurisdiction , the writ Court in exercise of extraordinary jurisdiction under article 226 would decline to set it aside if substantial justice had been done and the order had not resulted in manifest injustice to any of the parties. The Court observed that the DDC being the last Court of fact should analyse each and every aspect of the case and consider all admissible evidence on record while deciding revision on merit. If material and relevant evidence is ignored, such an order cannot be sustained and it was rightly recorded by the DDC. This Court has carefully perused the judgement in Paras Nath Singh and finds that the observations made by the Court in paragraphs 16 to 20 of the said judgement are in fact in favour of the petitioners herein . It had been argued in the application for recall that certain material documents which were filed by the revisionist before the Assistant Settlement Officer (Consolidation) which were on record, had been completely omitted to be considered by him while deciding the revision. The Court observed that it is settled law that where an Appellate or a Revisional Consolidation Court has not applied its mind on every piece of material evidence on record, both oral and documentary, led by the parties, the order cannot be sustained. It observed *"the Deputy Director of Consolidation, being the last Court of Appeal it should analyse each and every aspect of the case and should consider all admissible evidence on record while deciding the revision on merits. If material evidence on record, which is relevant for determining the fact in issue has been blatantly ignored, the order passed by the DDC would not be sustained and no time would be taken in quashing that order by this Court on being approached by the aggrieved party invoking jurisdiction of this Court under article 226 of the Constitution."* The Court Further observed that the contesting opposite parties had filed documentary evidence before the Settlement Officer (Consolidation) to prove their title in the land in dispute. Those documents were of earlier litigation in respect of the land in dispute, finally determining the claims of the parties thereto. Assistant Settlement Officer (Consolidation), omitted to consider those documents and in the memo of revision plea was specifically raised on behalf of the revisionist - opposite party number 2 to4, regarding omission of consideration of those documents by the Assistant Settlement Officer (Consolidation) while deciding the appeal. The Deputy Director Consolidation, *therefore, should have taken into consideration those documents while disposing of the revision on merits. He omitted to consider the same and corrected this Judicial falliblity in the order dated 18 . 1.1984 by which he recalled the order dated 8.11.1983 and directed the revision*

to be listed for hearing afresh on merits. - - ". The Court observed in paragraph 16 that *"it is no doubt correct to say that if the order passed by the day DDC is one of affirmance, Having been passed after hearing both the parties, it would not stand vitiated merely on the ground that the entire evidence led by the parties has not been referred to and discussed in the order. If the DDC while deciding the revision and passing the order of affirmance has generally agreed with the findings recorded by the subordinate consolidation authorities, then the order would not stand vitiated on the ground that any particular evidence has not been referred to by the DDC in his order. But where any particular relevant material for the decision of the point in issue has not been taken into consideration by the subordinate consolidation authorities,the DDC, who is a Court of fact as well, should take into consideration that evidence while passing even an order of affirmance generally agreeing with the findings recorded by the subordinate consolidation authorities." The Court observed that even though there was no inherent power in the DDC to recall his earlier order and direct hearing of The revision on merits afresh, such an order would not be quashed in order to restore a wrong and illegal order where grave injustice was apparently caused by blatantly ignoring material evidence on record by the DDC.*

55. The learned counsel for the respondent Shri Sanjay Tripathi has placed reliance upon several judgements of this Court and of the Supreme Court to say that a plea that was not raised before the consolidation authorities cannot be permitted to be raised before this Court in a writ petition challenging the orders passed by the Consolidation Officer, the Settlement Officer (Consolidation) and the DDC. The first such case cited is that of *Kalu versus Deputy Director of Consolidation Pratapgarh* 1983(1) LCD page 189; where the Court was considering an order passed by the DDC by which he had allowed the restoration application and recalled his earlier order passed on merits under section 48(3) of the U.P. Consolidation of Holdings Act /it appears that the reference was forwarded by the Assistant Consolidation Officer under section 48 (3)of the Act in January 1981 after hearing the parties. The reference came to be heard by the DDC and he passed an order in February 1981 by which the Chaks of the opposite parties number 2 and 3 were also altered. Some of the parties had appeared and they were heard but admittedly no Notice was issued from the Court of DDC for hearing in the reference to the opposite parties number 2 and 3. An application was moved by the opposite party number 2 in June 1981 for setting aside the aforesaid ex parte order. This application was allowed by the DDC by his order dated 3 August 1982 challenged in the writ petition. The learned counsel for the petitioner had submitted that since there was no provision in the Act for issuing notice to the parties in the reference proceeding under section 48 (3) of the Act, no notice was required to be issued by the DDC. This argument was rejected by the Court however on the basis of the language of the very subsection 3 of section 48. The Court observed that it is well settled that no decision can be rendered by a Court without affording opportunity of hearing by it to the concerned parties. It was incumbent upon the DDC to have directed notices to be issued to those persons who were likely to be affected by the order. The learned counsel for the petitioner next contended that the ex parte order cannot be

set aside Merely by way of clemency. The party concerned should show that he had no notice or knowledge of the proceeding. In support of his contention he placed reliance upon the full bench decision of the Court in *Radha Mohan Dutt versus Abad Ali Biswas* AIR 1931 Allahabad 294 ; The Court had observed that an application under order 9 rule 13 to set aside an ex parte decree cannot to be entertained unless the two conditions are satisfied firstly that summons were not duly served, and secondly that he was prevented from appearing on sufficient cause. The Court Rejected this argument also on the ground that when notice was never issued by the Court of DDC, it cannot be said that the opposite party number two was still aware of the date of hearing and did not appear wilfully before the DDC. The learned counsel for the petitioner had next contended that the opposite party number 2 and 3 had earlier filed an application in March 1981 for setting aside the order Passed in February 1981 and therefore it cannot be accepted that they were not aware of the said order prior to June 1981 ,when the recall application was actually filed. The Court disallowed raising of such argument on the ground that no such assertion was made before the Deputy Director of Consolidation and therefore it could not be said that the Deputy Director of Consolidation omitted to consider the said submission, which appears to have been made for the first time before the High Court.

56. The next judgement on which reliance has been placed is *Tahir versus DDC* 1988(6) LCD 486; where the Court observed that the DDC in exercise of revisional jurisdiction has to consider entire oral and documentary evidence led by the parties in support of their alleged possession. In paragraph 12 to 15 this Court made observations that are more in favour of the petitioners herein than that of the respondents. This Court Placed reliance upon Supreme Court decision in Pulavarthi Venkata Subbarao Versus Valluri Jagannadha Rao AIR 1967 Supreme Court 591 where the Supreme Court observed that *"....,a compromise decree is not a decision by the Court. It is acceptance by the Court of something to which the parties had agreed. The decree merely sets the seal of the Court on the agreement of the parties. The Court does not decide anything. Nor can it be said that the decision of the Court was implicit in it. Only that decision by the Court can be res judicata where the case has been heard and decided on merit . ...the statutory prohibition under section 11 of the code of civil procedure or that of constructive res judicata would apply as a matter of public policy ..... Such a decree cannot strictly be regarded as a decision on the matter which was heard and finally decided , and cannot operate as res judicata. ..Such a decree might create an estoppel by conduct between the parties, but such estoppel must be specially pleaded.,"*. The Court observed that although the petitioner had not specifically pleaded in his objection s with regard to the said decree to operate as *estopple* by conduct of the parties, the law of pleadings would not strictly apply before consolidation Authorities. The Court relied upon Full Bench decision of this Court in Vijay Sinha versus state of UP and others 1969 AWR 482 (High Court) where it had been held that the various Courts constituted under the U.P. Consolidation of Holdings Act can neither be held to create a civil jurisdiction nor be governed by the code of civil procedure in the matter of

procedure. It observed that The pleading in consolidation proceedings should not be construed strictly and that absence of a specific pleading and non-framing of issues would be a mere irregularity Where the parties have not been taken by surprise and no prejudice has been caused to them. Where a document is filed to establish a claim, then unless its genuineness is denied by the opposite party, it would not deserve to be thrown out and ignored for want of pleading A compromise decree certainly operates as *estopple* by conduct between the parties and therefore, it could not have been thrown out in consolidation proceedings merely on the technical rules of pleading as was done by the DDC. The DDC having not doubted the genuineness of the compromise decree, the original record of which was summoned and Perused by him,He committed an error in not placing reliance upon the decree merely on the technical ground that it was not pleaded in the objection. The Court observed in paragraph 12 that it did not find any merit in the contention of the Learned counsel that at the revisional stage the Deputy Director of Consolidation could not admit additional evidence filed in support of the claim. The Court observed that there is no statutory bar to the effect that the DDC at the Revisional stage cannot admit additional evidence tendered by the parties in support of their respective claims And record a finding on merits considering the same. Since under section 48 of the U.P. Consolidation of Holdings Act the DDC has got jurisdiction to decide questions both on facts and on points of law as such he can admit a document in evidence in the interest of justice, exercising discretion judiciously and also affording opportunity of rebuttal to the opposite party. The Court Set aside the order passed by the DDC as it had not taken into consideration the entire oral and documentary evidence on record. He had also not adverted to it himself correctly to the revenue record entries in respect of the land in dispute.

57. The Learned counsel for the respondent has also placed reliance upon **Smt. Shakuntala Kapoor and another versus seventh additional district judge Meerut 19 93(11) LCD447;** The Court considered the question as to whether while deciding a writ petition exercising supervisory jurisdiction under article 226 of the Constitution , any additional evidence could be allowed to be brought on record and considered?. The Court relied upon a full bench decision of this Court in the case of Uday Bhan Singh @Babban Singh and others versus board of revenue 1974 RD 107 which in turn placed reliance upon Supreme Court decision in ramesh and another versus Genda Lal Moti Lal Patni and others reported in AIR 1966 Supreme Court 1445, to hold that a proceeding under article 226 of the Constitution of India is not a continuation of a suit or proceeding giving rise to it. If a writ petition is not a continuation of original suit or proceeding, unlike an appeal or revision, the inference is not only reasonable but inevitable that the orders passed in original suit or proceeding or an appeal or revision arising therefrom do not merge in the orders passed in such a petition. The Court observed that while deciding a writ petition it has only to be seen if the judgement of the learned district judge suffers from any manifest error of law. *"Subsequent events particularly which required to be ascertained on evidence, cannot be taken into account for holding that the district judge had committed any manifest error of law in the circumstances of the case"*. It further observed that there is no escape

from the conclusion that additional evidence to assail the findings returned by the competent authority in the exercise of original or appellate jurisdiction in any proceeding cannot be allowed to be utilised as an additional evidence in the proceeding under article 226 of the Constitution of India referring to judgements rendered by it earlier, the Court observed that *"where a party wishes to produce further evidence affecting a matter of fact, it must get that evidence produced before the Court Which can decide a question of fact. It is useless for him to tender that evidence before a Court which is confined to question of law. ...The High Court in the exercise of its jurisdiction under article 226 of the Constitution of India, cannot re-appraise the evidence and come to its own conclusion which may be different from that reached by the district judge or the prescribed authority..."*

58. Counsel for the respondent has placed reliance upon the decisions of the Supreme Court as well to buttress the argument that the writ Court cannot reappraise evidence. They are :- *Admin General of West Bengal versus Collector Varanasi* 1988(2) SCC 150; State of Andhra Pradesh v I Chandra Shekhar Reddy 1998(7) SCC 141; Prithipal Singh And another versus Amrik Singh and others 2013(9) SCC 576; Which judgements it is not necessary to deal with in detail as they reiterate the settled position in law that where a new plea is sought to be raised before the High Court or the Supreme Court which has not been shown to have been raised before the trial Court or the Appellate or Revisional Court, and with which requires adjudication on facts, it should not be allowed to be raised for the first time before these Courts of extraordinary jurisdiction.

59. This Court having considered the law as cited before the Consolidation Authorities and before this Court finds therefrom a clear mandate that the writ Court in its extraordinary jurisdiction may interfere in the orders passed by the Consolidation Authorities which are Courts of facts for the litigants if such orders suffer from perversity, that is, if they fail to appreciate correctly the facts placed on record before them or are patently arbitrary in not so far as they do not interpret the law correctly or apply the law incorrectly. In the case at hand the petitioners had specifically pleaded before the Appellate Court and the Revisional Court that their names were not mentioned in the compromise that was filed before the Consolidation Officer or even if they were mentioned, their signatures were not appended to the so called compromise. A compromise having been filed before the Consolidation Officer, was not verified in terms of Rule 25A of the Rules of 1954, where it has been specifically provided that the Assistant Consolidation Officer or the Consolidation Officer before whom the compromise is placed, will verify from the Village Level Consolidation Committee about the compromise filed by the parties and also avoid proceeding against any party to the compromise ex parte. It was a question of law and fact which could have been verified by the Appellate or Revisional Court and dealt with appropriately. Unfortunately, this method was not adopted. The judgments cited by the Appellants were mentioned but not considered by the Settlement Officer (Consolidation) in his order. The Revisional Court being the last Court of facts was duty bound to peruse the records and verify the compromise. It only observed that notice had been duly served

of the compromise by the Consolidation Officer and therefore it could not be said that his order was passed in violation of principles of natural justice. The Deputy Director Consolidation further without adverting to the burden of proof being discharged first by the claimants and without any documentary evidence on record, held that the property in dispute was ancestral and therefore rightly divided amongst the co- parceners in accordance with the undisputed pedigree. The DDC with regard to pleas raised before him, has recorded them in detail in his order, but has dealt with them in a cursory manner altogether. The findings given by the DDC have thus become erroneous. The order of the DDC is set aside. The matter is remanded to the DDC to consider afresh.

60. In case any transfer has been made by the respondent nos.4 to 8 during the currency of interim orders of the Appellate Court or the Revisional Court and also of this Court, they shall be examined and notice to subsequent transferees shall be issued and they be heard also by the DDC before final orders are passed.

61. The order dated 30.08.2008 passed under Rule 109 are consequential orders and they are also set aside for the reasons that original orders of the consolidation authorities have now to be examined afresh by the DDC in the Revision which has been remitted by this Court to be decided afresh.

62. Both the writ petitions stands ***disposed of*** by this common order. It is expected that the DDC, will decide the matter afresh within six months from the receipt of a copy of this order.

(2022)01ILR A1224
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.01.2022

BEFORE

THE HON'BLE CHANDRA KUMAR RAI, J.

Writ-B No. 18178 of 2009

Bal Kishun ...Petitioner
Versus
Chief Revenue Officer & Ors. ...Respondents

Counsel for the Petitioner:
Niraj Tiwari

Counsel for the Respondents:
C.S.C., Sri A.P. Singh, Sri Anil Kant Tripathi

Civil Law - Allotment of Chak - U.P. Consolidation of Holdings Act, 1953 - Section. 48, explanation (3) - Scope - power under section 48 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 - revisional Court should examine the point raised in revision in detail and decide the revision (Para 13)

Both parties are co-sharer and belongs to same family as such, both parties are entitled to good and bad quality of land in the allotment of Chak proceeding in equal proportion as far as possible – ACO rightly made the proposal for allotment to both parties but the same was interfered with by the CO and SOC - Petitioner deprived of the Chak of better quality of land as well as in front of the house - while deciding the revision of the petitioner DDC has not taken into consideration the point taken into revision as well as argued before him - comparative hardship of the petitioner has also not been taken into consideration and in the cursory manner decided the revision - Impugned order quashed

- dispute remanded back to the DDC to decide the Revision afresh (Para 11, 12, 14, 15)

Allowed. (E-5)

List of Cases cited :

Mahabeer Vs Deputy Director of Consolidation, Jaunpur & ors. 2005 (99) R.D. 65

(Delivered by Hon'ble Chandra Kumar Rai, J.)

1. Heard Mr. Niraj Tiwari, learned counsel for the petitioner and Mr. A.P. Singh, learned counsel for respondent nos.3 and 4.

2. The present writ petition has been filed for quashing the impugned order dated 27.9.2006 passed by respondent no.2 and order dated 24.2.2009 passed by respondent no.1 in the allotment of Chak proceedings.

3. The brief facts of the case are that petitioner is Chak Holder No.154 and respondent nos. 3 and 4 are Chak Holder No.156, both parties are co-sharer accordingly Assistant Consolidation Officer proposed Chak to both parties according to the provisions of the Act specially in respect to Plot No.36 and 37 as Plot No.36 was not fit for cultivation so both parties were equally adjusted on Plot No.36 and 37. Against the proposal of Assistant Consolidation Officer, an objection under Section 20 of U.P.C.H. Act was filed by father of respondent nos.3 and 4 claiming Chak on Plot No.7. The excess area given on Ist and IIIrd Chak of respondent nos.3 and 4 be excluded and the same be adjusted on his original Plot no. 7. The shape of IInd Chak on Plot No.37 be modified to the effect that Chak be given on Plot No.37 in eastern side in North-South length. Petitioner also filed objection to the extant that double entry in respect of Chak Marg be expunged. The Consolidation Officer by order dated 27.1.2006 allowed the objection of respondent no.3 and 4 as well as of petitioner partly. Against the order of Consolidation Officer dated 27.1.2006, petitioner and respondent nos.3 and 4 filed their appeals separately under Section 21(2) of U.P.C.H. Act which were numbered as Appeal No.1178 & 1144 respectively. The Assistant Settlement Officer of Consolidation by order dated 12.7.2006 disposed of both the appeals reducing the Chakout area of Plot No.37/2 from 218 air to 56 air in the eastern side of abadi. Petitioner was given the Northern side and respondents were given in Southern side of the Plot No.37/2. The Chak allotted at the stage of Consolidation Officer stage was set aside. Petitioner's claim for allotment in the western side on Plot No.7 taking into account the petitioner's well, was accepted. The claim of the respondents in respect of Chak marg was accepted and Chak marg was given to him in Northern side. Against the order dated 12.7.1996, respondent no.4 filed a restoration application before respondent no.2 who has allowed the restoration application by order dated 27.9.2006 and schedule/chart was also amended accordingly. Petitioner filed a Revision No.7, under Section 48 of U.P.C.H. Act against the order dated 27.9.2006 with the prayer to set aside the order dated 27.9.2006 and maintain the earlier schedule dated 12.7.2006 and the stage of Assistant Consolidation Officer with respect to allotment be restored in the interest of justice. Respondent no.1 heard the Revision No.7 filed by the petitioner but respondent no.1 by impugned order dated 24.2.2009

dismissed the revision without considering the petitioner's case.

4. The contesting respondent no.4 filed Caveat in the aforementioned writ petition through Mr. Anil Kant Tripathi, Advocate and Hon'ble Court heard the writ petition in presence of counsel for the parties and passed order dated 15.4.2009 which is as follows:-

"Learned counsel for the petitioner is permitted to make necessary correction in the array of parties.

This writ petition arises out of chak allotment proceedings and the dispute is between real brothers. Petitioner is having one chak while his two brothers having a joint chak. During the course of arguments on the suggestion made by the Court, learned counsel for the parties state that their clients are ready to exchange the chak which will end dispute.

Let this fact be brought on record of the case on an affidavit to be filed by both the parties stating that they are ready to exchange the chak allotted to each other vide amended chart dated 27.1.2006 within one month from today.

List/put up on 18th May, 2009.

Till the next date of listing, effect and operation of the amended chart dated 27.9.2006 prepared in pursuance to the order of the Settlement Officer Consolidation shall not be given effect to."

5. Again on 23.11.2020, following interim order was passed:-

"On the suggestion made by the Court, that their clients are ready to exchange their chak which will end the dispute, this Court vide order dated 15.04.2009, directed to bring this fact on record by means of an affidavit to be filed by both the parties.

Petitioner has filed his affidavit, but respondent nos.4 and 5 have neither filed any affidavit nor anyone is present today.

Considering the facts and circumstances, interim order passed on 15.04.2009 is extended until further orders."

6. Respondent no.4 and 5 have not filed any counter affidavit in the writ petition nor accepted the proposal/suggestion made by the Court to exchange their respective Chak, however, petitioner has filed supplementary affidavit accepting the proposal of the Court to exchange their Chak as both parties are co-sharer and belongs to same family.

7. Hence there is no option except to decide the writ petition on merit.

8. Learned counsel for the petitioner contended that Assistant Consolidation Officer has rightly proposed the Chak to petitioner and respondent nos.4 and 5 according to their share but Consolidation Officer and Settlement Officer of Consolidation by order dated 27.9.2006 interfered with allotment by which respondent nos.4 and 5 have been given Chak in front of the house of petitioner. It is further contended that respondent nos.4 and 5 have been given major area on Plot No.37 and petitioner was given minor part on Plot No.37, all these points were taken in grounds of revision before respondent no.1 as well as very well argued and pressed but respondent no.1 has illegally and arbitrarily dismissed the revision filed by petitioner. Learned counsel for the petitioner further argued that comparative hardship of the petitioner has not been taken into consideration at all, as such, impugned orders are liable to be set aside

and stage of Assistant Consolidation Officer be maintained.

9. On the other hand, learned counsel for the respondent nos. 4 and 5, Mr. A.P. Singh argued that matter relates to allotment of Chak, both parties are co-sharer, equity has been adjusted between the parties, as such, no interference is required against impugned orders and writ petition is liable to be dismissed.

10. I have considered the submission of learned counsel for the parties.

11. There is no dispute about the fact that both parties are co-sharer, as such, both parties are entitled to good and bad quality of land in the allotment of Chak proceeding in equal proportion as far as possible. The Assistant Consolidation Officer has rightly made the proposal for allotment to both parties but the same was interfered with by the Consolidation Officer and Settlement Officer of Consolidation, hence petitioner filed the revision, under Section 48 of U.P.C.H. Act taking specific grounds in his grounds of revision which are as follows:-

"1. यह कि फैसला लायक अदालत मातहत खिलाफ कानून है लिहाजा निरस्त किये जाने योग्य है।

2. यह कि आदेश दि० 12.7.06 द्वारा ग०सं० 37/2 में 056 एयर रकवा चकबंदी बाहर किया गया शेष 37/2 में चक सं० 156 विपक्षीगण को जानिब दक्षिण तरफ से चक सं० 154 को जानिब उत्तर तरफ चक प्रदिष्ट किया गया एवं दोनो चको के बीच से नाली पूरब पश्चिम आवादी तक प्रदिष्ट किया गया इस प्रकार निगरानी कर्ता गण का चक उत्तर तरफ पूरब पश्चिम एवं विपक्षीगण का चक दक्षिण तरफ पूरब पश्चिम प्रस्तावित किया गया व दोनो चको के बीच से पूरब पश्चिम नाली दिया गया।

3. यह कि आदेश दि० 12.7.06 के विरूद्ध विपक्षीगण द्वारा तजवीजसानी प्रस्तुत की गयी जिसमें तजवीजसानी पर बहस हुई व कहा गया कि पक्षों को सुनकर आदेश पारित किया गया है तजवीजसानी बलहीन है निरस्त किया जाय लेकिन सहायक बन्दोबस्त अधिकारी चकबंदी ने तजवीजसानी पर आदेश दि० 12.7.06 बहाल रखते हुए संशोधन तालिका परिवर्तित कर दिया परिवर्तित संशोधन तालिका के अनुसार विपक्षीगण का चक पूरब तरफ उत्तर दक्षिण व निगरानी कर्ता गण का चक पश्चिम तरफ उत्तर दक्षिण प्रस्तावित कर दिया जो आदेश दिनांक 12.7.06 से टेली नहीं करता है।

4. यह कि संशोधन तालिका दि० 27.9.06 द्वारा निगरानी कर्ता गण के आवादी के सामने विपक्षीगण का चक प्रस्तावित हो गया है अ०सं० 37 का अधिकतम रकवा विपक्षीगण के चक में प्रस्तावित हो गया एवं गस० सं० 37 में कुछ रकवा देते हुए अधिकतम मालियत गा० सं० 36 में प्रस्तावित कर दिया गया जिससे संख्या हक तलफी निगरानी कर्ता गण है।

5. यह कि गा० सं० 36 खराब किश्म की भूमि है स०च०अ० स्तर पर गा० सं० 36 व 37 को मिलाकर इस तरीके से चक प्रस्तावित किया गया कि दोनो पक्षों को गा० सं० 36 व 37 में बराबर बराबर मालियत मिला लेकिन चकबंदी अधिकारी महोदय ने गा०सं० 37 में गलत करीके से 218 एयर चकबंदी बाहर कर दिया एवं गा०सं० 37 की अधिकत मालियत विपक्षीगण के चक में प्रस्तावित कर दिया एवं निगरानी कर्ता गण का चक गा० सं० 37 में 008 एयर व शेष मालियत गा० सं० 36 में प्रस्तावित कर दिया जिसके बावत अपील प्रस्तुत की गयी।

6. यह कि आदेश दि० 12.7.06 द्वारा उत्तर तरफ पूरब पश्चिम नि०कर्ता गण का चक एवं दक्षिण तरफ पूरब पश्चिम विपक्षीगण का चक प्रस्तावित किया गया इसी अनुसार संशोधन तालिका भी बनायी गयी लेकिन विपक्षीगण की तजवीजसानी पर पुनः दि० 17.9.06 को दि० 12.7.06 द्वारा बनायी गयी संशोधन तालिका निरस्त करके दूसरी संशोधन तालीका बना दी गयी एवं आदेश दि० 12.7.7.06 बहाल किया गया। दि० 12.7.06 द्वारा पारित आदेश से संशोधन तालिका दि० 7.9.06 टेली नहीं करती। इस कारण से संशोधन तालिका दि० 27.9.06 टेली नहीं करती इस कारण से संशोधन तालिका दि०

27.9.06 निरस्त किये जाने योग्य एवं आदेश दि० 12.7.06 द्वारा गलत तरीके से जो 056 एयर रकवा चकबन्दी बाहर किया गया है उसकी मालियत लगाकर चक में समयोजित किया जाना चहिए एवं मौकानुसार स०च०अ० स्तर का चक दिया जाना चाहिए।

7. यह कि पूरब तरफ नि०कर्तागण का मकान है उसको ध्यान में रखते हुए स०9अ० स्तर पर चक प्रस्तावित किया गया था उसी अनुसार चक प्रस्तावित किया जाना चाहिए।

8. यह कि ऐसा प्रतीत होता है कि सहायक ब०अधिकारी चकबंदी किसी नाजायज दबाव में आकर संशोधन तालिका परिवर्तित किये है। जो कायम रहने योग्य नहीं है।"

12. Respondent no.1 while deciding the revision of the petitioner filed under Section 48 of U.P.C.H. Act has not taken into consideration the point taken into revision as well as argued before him. The comparative hardship of the petitioner has also not been taken into consideration and in the cursory manner decided the revision which is against the principle prescribed under U.P.C.H. Act as well as the law laid down by the Court. Since the revisional Court is last Court of fact, as such, revisional Court should examine the matter with most care and caution. On the question of comparative hardship, this Court in the case of ***Mahabeer Vs. Deputy Director of Consolidation, Jaunpur and Others reported in 2005 (99) R.D. 6***5 has held that revisional Court should examine the comparative hardship of both parties in the allotment of Chak proceedings.

13. It is also noticed that scope of revision under Section 48 of U.P.C.H. Act by insertion of explanation (3) w.e.f. 10.11.1980 has become wider, as such, revisional Court should examine the point raised in revision in detail and decide the revision, accordingly and this Court expect most care and attention of the revisional Court in finalizing the matter. Section 48 of U.P.C.H. Act is as follows:-

"(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 and 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."

14. It is also material that allegation made in the writ petition has not been controverted by respondent no.4 and 5 by filing counter affidavit or by filing affidavit in terms of proposal of the Court to exchange their Chak in order to end the litigation, accordingly allegation made in the writ petition cannot be ignored that petitioner has been deprived of the Chak of better quality of land as well as in front of the house.

15. In facts and circumstances of the case, the impugned revisional order dated 24.2.2009 passed by respondent no.1 (Annexure No.7 to the writ petition) and order dated 27.9.2006 passed by respondent no.2 (Annexure No.4 to the writ petition) are quashed and the dispute is remanded back to the Deputy Director of Consolidation, Azamgarh to decide the Revision afresh in the light of the observation mentioned above after notice and opportunity of hearing to the parties preferably within a period of six months from the date of receipt of certified copy of this order.

16. The writ petition, accordingly, stands ***allowed***.

(2022)01ILR A1229
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 27.01.2022

BEFORE

THE HON'BLE VIVEK CHAUDHARY, J.

Writ-B No. 1003602 of 2010

Smt. Parvinder Kaur ...Petitioner
Versus
Board of Revenue U.P. Lko & Ors. ...Respondents

Counsel for the Petitioner:
M.G. Khan, Shamshad Ali

Counsel for the Respondents:
C.S.C., A.M. Shukla, Ashish Chaturvedi, Bidhan Chandra Rai, Kapil Misra, Manu Dixit, S.P. Shukla, Satyendra Kumar, Vishal Dixit

Civil Law - U.P. Zamindari Abolition and Land Reforms Act, 1950 - Sections 341, 344(1)(a), & 344(1)(f) - U.P. Zamindari Abolition and Land Reforms Rules,1950 – Rule 285 I - Limitation Act, 1963 – Section 29(2) - As per 29 (2) Limitation Act provisions contained in section 4 to 24 Limitation Act apply to special or local law only in so far as, and to the extent to which, they are not expressly excluded by special or local law – Applicability of Limitation Act - As per Section 341 of U.P. Z.A. & L.R. Act applies the Limitation Act to the proceedings held under it - Section 344 (1)(a) of UPZLR Act provides for framing of rules for imposing time limit, with or without power to extend such time limit imposed - Rule 285-I provides a period of only thirty days for filing objections against auction sale - *Held* - U.P. Z.A. & L.R. Act and Rules, for the purposes of recovery of sums, recoverable as arrears of land revenue, is a complete code in itself, it falls within the category of special local Act under section 29(2) of the Limitation Act & it specifically excludes the applicability of Sections 4 to 24 of the Limitation Act (Para 13)

Civil Law - U.P. Zamindari Abolition and Land Reforms Rules, 1950 – Rule 285 I – Application to set aside auction sale - Limitation Act, 1950 – Section 5 - Delay Condonation in filing objection beyond 30

days - Barred - As per Rule 285-I objections to the auction sale can be filed within a period of thirty days only from the date of sale - If objections are not filed within thirty days under Rule 285-J the collector is bound to confirm the sale - If no objections is filed within 30 days all claims on ground of irregularity or mistake in publishing or conducting the sale is barred and only remedy available is to file a suit on ground of fraud - objections under Rule 285-I could not be filed and entertained after thirty days from the date auction sale are held & even the commissioner or any superior court could condone the delay in filing objections after 30 days (Para 14)

Dismissed. (E-5)

List of Cases cited :

1. Kaushalya Rani Vs Gopal Singh; AIR 1964 SC 260

2. Hukum Dev Narain Yadav Vs Lalit Narain Mishra; AIR 1974 SC 480

3. U.O.I. Vs Popular Construction Co. (2001) 8 SCC 470

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

1. Heard Shri Shamshad Ali learned counsel for petitioners, Sri N.K. Seth, learned Senior Advocate assisted by Sri Ashish Chaturvedi advocate for respondent no. 6-auction purchaser and learned Standing Counsel for the State.

2. Petitioners, heirs of late Vijay Pal Singh (one of the five brothers), by the present writ petition have challenged the order dated 31.05.2010 passed by respondent no.1 Board of Revenue, U.P., Lucknow and further prayed for a mandamus commanding the respondent no.6-auction purchaser not to create any hindrance in the peaceful possession of the petitioners over the property in dispute.

3. It appears that at the very initial stage, the Court was not satisfied with regard to possession of the petitioners and, thus, on 15.06.2010 the interim order passed provided only that, *"opposite party no.6 shall not alienate the property in question till the next date of listing."* Even during the course of arguments no claim was made by the petitioners that they are in possession of the property in dispute.

4. Before coming to the facts it would be appropriate to narrate the long and checkered litigation parties went through to again reach this court by the present writ petition. The property in dispute, bearing Khasra No.295, 297, 272-A, 272-B, measuring 15 Biswa situated in Village Behsa, Tehsil and District-Lucknow, was auctioned to clear the electricity dues of the partnership firm M/s Walia Industries, setup in the year 1981, which had installed a factory for manufacturing of Saria on the same. The factory suffered losses and was ultimately closed. The recovery proceedings were initiated by UPPCL for its electricity dues against M/s Walia Industries by a recovery citation dated 17.01.2001. Admittedly, the said dues were recoverable as arrears of land revenue under the U.P. Zamindari Abolition and Land Reforms Act, 1950 (UP. Z.A. & L.R. Act). In the said recovery proceedings the property in dispute was attached and thereafter auctioned on 2.12.2002 and after confirmation of sale auction purchaser also got possession and his name mutated in records. On 23.10.2003 all the five brothers filed the sale objections under Rule 285-I of U.P. Zamindari Abolition and Land Reforms Rules, 1952 (U.P. Z.A. & L.R. Rules). The said objections were heard and rejected on the point of limitation vide order dated 29.10.2003 by the learned Additional Commissioner, holding that the same were filed beyond a period of thirty

days of auction, as provided by Rule 285-I. Being aggrieved, objectors preferred a revision before the Board of Revenue, which, by its order dated 18.08.2005, allowed the revision and quashed the entire auction proceedings. Aggrieved from the said order auction purchaser preferred a Writ Petition No.5464 (M/S) of 2005 (Revenue) before the high court. The writ petition was allowed by judgment and order dated 22.08.2007 and the order dated 18.08.2005 passed by the Board of Revenue was set aside, as without deciding the issue of limitation the Board of Revenue had wrongly proceeded to decide the revision on merits. The matter was remanded back to the Board of Revenue. The Board of Revenue again heard the matter and condoned the delay in filing of objections by its order-dated 12.02.2008 and remanded the matter back to the Commissioner for hearing the objections on merits. Auction purchaser filed a Writ Petition No.1196 (M/S) of 2008 against the said order dated 12.02.2008 of the Board of Revenue but a stay order was granted only on 21.08.2008 and communicated to the Additional Commissioner on 02.09.2008. The Additional Commissioner (Judicial), Lucknow however by its judgment and order dated 03.09.2008 allowed the objections on merits and set aside the auction proceedings. The said Writ Petition No.1196 (M/S) of 2008 of the auction purchaser also came to be heard and the Court dismissed the same as infructuous vide order dated 10.02.2009, with liberty to auction purchaser to raise all his issues in his revision before the Board of Revenue. The Revision No.1093 (Sale) of 2010 filed by the auction purchaser is allowed by order-dated 31.05.2010 by the Board of Revenue and that is now under challenge before this court.

5. The counsel for the petitioners submits that Late Surjeet Singh purchased the property in dispute in the year 1975 and after his death all five of his sons, including Sri Vijay Pal Singh and Sri Sarabjeet Singh inherited the said property. He claims that in the year 1981 Sri Vijay Pal Singh and Sri Sarabjeet Singh (also noted as Sarvjeet Singh in some records) had formed a partnership firm and installed a factory for manufacturing of Saria on the same. Since, after death of late Surjeet Singh all his five sons inherited the property in dispute, the same could not be sold in the auction for dues of the firm and its two promoter brothers. He further submits that property in dispute was sold on a low price without affecting proper notice on all the heirs of late Surjeet Singh and that the Board of Revenue has wrongly allowed the revision and rejected the objections of the petitioners.

6. Opposing the petition Sri N.K. Seth, learned Senior Advocate for respondent no.6-auction purchaser submits that the facts as submitted by the counsel for the petitioners are incorrect. It is only the two brothers namely Vijay Pal Singh and Sarabjeet Singh and their firm M/s Walia Industries that owned the property in dispute. Later the said two brothers also left the Firm and got new partners introduced and, thus, the present petition filed only on behalf of heirs of Late Vijay Pal Singh, is not maintainable, as the said other brothers have not approached this Court. He next submits that the objections filed by the petitioners under Rule 285-I of the U.P. Z.A. & L.R. Rules are barred by limitation and the delay in filing the objections cannot be condoned. He further submits that there is otherwise also no illegality in the auction sale and also there is no force in the objections to the auction sale and thus the petition should be dismissed.

7. I have heard counsels for the parties and learned Standing Counsel at length and perused the record. The questions raised by the parties for consideration of this court thus are:-

(i) Whether the objections of the petitioners to the auction sale are barred by limitation or the commissioner/any superior court has power to condone the delay in filing the objections;

(ii) Ownership of property in dispute and maintainability of present writ petition on behalf of petitioners; containing within issues whether all five brothers or only two, namely Sarabjeet Singh and Vijay Pal Singh, inherited the property in dispute and whether the said two sons also in view of later developments have any concern with the property in dispute and whether the objections or present writ petition is maintainable on their behalf,

(iii) If the above two are decided in favor of the petitioners, whether there is any force in the objections to the auction filed by the petitioners.

(i) Limitation and power to condone the delay

8. Counsel for the auction purchaser submits that admittedly the auction sale was held on 2.12.2002 and objections under Rule 285-I of U.P. Z.A. & L.R. Rules were filed on 23.10.2003, i.e., after ten months and twenty-one days. Rule 285-I provides a period of thirty days only for filing the objections and thus the objections filed after the said period are barred by time, which could not be condoned by the commissioner. He places reliance upon two single judge judgments of this court, namely, Abdul Wahid v. Additional Commissioner (admin.) Meerut Division and Others; 1989 AWC 1056; and Prabhu Dayal and others v. Board of Revenue and others 2012 SCC Online All 473. Opposing the same learned counsel for the petitioners submits that the case of Abdul Wahid was decided relying upon the judgment in case of Indu Engineering and Textiles Ltd. Nawalganj, Agra v. Commissioner Agra Division, Agra & Others; 1984 AWC 772, which itself was decided upon the law as it existed prior to 1979 amendment to the revenue manual and is therefore no more a good law. Similarly Prabhu Dayal case has nothing to do with recovery proceedings and is thus not applicable. He further submits that the commissioner had power to condone the delay under Section 5 of the Limitation Act, 1963 and the Board of Revenue had earlier rightly condoned the delay.

9. Initially there was a dispute as to whether the objections filed under Rule 285-I are judicial or administrative proceedings. The said question was referred to a full bench of this court and the full bench in ***''Ram Swaroop vs. Board of Revenue and others, 1990 LCD (8) 253'***, noting the amendments made to Paragraph 911 of the Revenue Manual in the year 1979, declared the same to be judicial proceedings and held Commissioner to be a revenue court while deciding them. The full bench further observed, "there is no dispute that Limitation Act will apply before any court of law." However, question still remains as to the extent to which section 5 or any other provision of the Limitation Act can be invoked to condone the delay in filing objections under Rule 285-I. The said question arises in view of Section 29(2) of the Limitation Act, 1963 which provides:-

*"**Section 29(2).** Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule,*

the provisions of section 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, ***the provisions contained in section 4 to 24 (inclusive) shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law."*** *(emphasis added)*

10. The scope of application of Section 29(2) of the Limitation Act including what would be a special act and when applicability of section 4 to 24 of the Limitation Act would be barred is considered at length by the Supreme Court in ***''Kaushalya Rani Vs. Gopal Singh; AIR 1964 SC 260***'. In the said case the issue before the court was the applicability of Section 29(2) of the Limitation Act with regard to amended Section 417 of the Code of Criminal Procedure, 1973 (Cr.P.C.). Section 417(3) of Cr.P.C. provided an opportunity to complainant also, with the leave of High Court, to file appeal against an order of acquittal. Section 417 (4) of Cr.P.C. provided that no application for grant of leave to appeal under sub-section (3) shall be entertained by the High Court after the expiry of sixty days from the order of acquittal. The Supreme Court in paragraph 6 and 7 held:-

"(6) It will appear that the section, which was recast by Act XXVI of 1955, for the first time made provision for an appeal by a private complainant from an order of acquittal, if he obtained special leave to appeal from the High Court. Previous to the Amending Act aforesaid, it was only the State Government which could come up in appeal from an order of acquittal. The section, thus, provides for an appeal by the State Government, as also by the complainant in a case instituted upon a complaint, provided that special leave of the Court is obtained. So far as appeal by the State Government is concerned, S. 417 itself does not provide for any period of limitation. The period of limitation for such an appeal is laid down in Art. 157 of the Limitation Act. Previous to the amendment of 1955, the period of limitation for such an appeal by the State Government was six months, which was reduced to three months by the Act XXVI of 1955 with effect from January 1, 1956. Hence, so far as an appeal by the State Government is concerned, the period of limitation thus reduced is a part of the general law of limitation and is amenable to the operation of S. 5 of the Limitation Act. But the provisions of sub-sec. (3) and (4) of S. 417 are in the nature of 'special provisions' introduced for the first time by the Amending Act XXVI of 1955. Sub-section (4), in terms, is very precise and mandatory, prohibiting the High Court from entertaining any application for special leave to appeal from an order of acquittal after the expiry of 60 days from the date of such an order. On a perusal of the bare provisions of the section and the history of the law on the subject, two things are clear; namely, (1) that the legislature thought it expedient in the interest of justice and public policy that the period of six months allowed to the State Government to appeal from an order of acquittal should be curtailed by half, thus evincing its clear intention to cut short the duration of the litigation which had already resulted in an order of acquittal; and (2) that in certain cases the High Court should have the power of granting special leave to a complainant, as distinguished from the

State Government, to come up in appeal from an order of acquittal, but at the same time indicating in clear and unambiguous terms that such an application must be made within 60 days from the date of the order of acquittal. This rule of 60 days bar of time has been specifically provided for in the section itself, unlike the general rule of limitation applicable to an appeal against acquittal, at the instance of the State Government. In our opinion, therefore, the position is clear that so far as appeal by the State Government is concerned, the law of limitation is the general law laid down in the Limitation Act (Art. 157) to which S. 5 would apply by its own force. But ***in so far as an appeal by a private prosecutor is concerned, the legislature was astute to specifically lay down that the foundation for such an appeal should be laid within 60 days from the date of the order of acquittal. In that sense, this rule of 60 days bar is a special law, that is to say, a rule of limitation which is specially provided for in the Code itself, which does not ordinarily provide for a period of limitation for appeals or applications.*** *It is the general law of limitation, as laid down in the Limitation Act, which governs appeals ordinarily preferable under the Code, vide Arts. 150, 154, 155 and 157. To such appeals the provisions of S. 5 would apply.*

(7). It has been observed in some of the cases decided by the High Courts that the Code is not a special or a local law within the meaning of S. 29(2) of the Limitation Act, that is to say, so far as the entire Code is concerned because it is a general law laying down procedure, generally, for the trial of criminal cases. But the specific question with which we are here concerned is whether the provision contained in S. 417(4) of the Code is a special law. The whole Code is indeed a general law regulating the procedure in criminal trials generally, but it may contain provisions specifying a bar of time for particular class of cases which are of a special character. For example, a Land Revenue Code may be a general law regulating the relationship between the revenue-payer and the revenue-receiver or the rent-payer and the rent-receiver. It is a general law in the sense that it lays down the general rule governing such relationship, but it may contain special provisions relating to bar of time, in specified cases different from the general law of limitation. Such a law will be a 'special law' with reference to the law generally governing the subject-matter of that kind of relationship. ***A 'special law', therefore, means a law enacted for special cases, in special circumstances, in contradistinction to the general rules of the law laid down, as applicable generally to all cases with which the general law deals. In that sense, the Code is a general law regulating the procedure for the trial of criminal cases, generally; but if it lays down any bar of time in respect of special cases in special circumstances like those contemplated by S. 417 (3) & (4), read together, it will be special law contained within the general law. As the Limitation Act has not defined 'special law', it is neither necessary nor expedient to attempt a definition. Thus, the Limitation Act is a general law laying down the general rules of limitation applicable to all cases dealt with by the Act; but there may be instances of a special law of limitation laid down in other statutes, though not dealing generally with the law of limitation. For example, rules framed under Defence of India Act, vide Surya Mohan v. State of Bihar ILR 30 Pat 126: (AIR 1951 Pat 462); Canara Bank Ltd. v. The Warden Insurance Co. [ILR (1952) Bom 1083]:***

(AIR 1953 Bom 35) dealing with the special rule of limitation laid down in the Bombay Land Requisition Act (Bom. XXXIII of 1948). These are mere instances of special laws within the meaning of S. 29(2) of the Limitation Act. Once it is held that the special rule of limitation laid down in sub-sec. (4) of S. 417 of the Code is a 'special law' of limitation, governing appeals by private prosecutors, there is no difficulty in coming to the conclusion that S. 5 of the Limitation Act is wholly out of the way, in view of S. 29(2)(b) of the Limitation Act*."(emphasis added)*

Similarly in *''**Hukum Dev Narain Yadav v Lalit Narain Mishra; AIR 1974 SC 480'***, the court in paragraphs - 17, 18 and 25 held that:-

"17. Though Section 29(2) of the Limitation Act has been made applicable to appeals both under the Act as well as under the Criminal Procedure Code, no case has been brought to our notice where Section 29(2) has been made applicable to an election petition filed under Section 81 of the Act by virtue of which either Section 4, 5 or 12 of the Limitation Act has been attracted. Even assuming that where a period of limitation has not been fixed for election petitions in the Schedule to the Limitation Act which is different from that fixed under Section 81 of the Act, Section 29(2) would be attracted, and what we have to determine is whether the provisions of this section are expressly excluded in the case of an election petition. It is contended before us that the words "expressly excluded" would mean that there must be an express reference made in the special or local law to the specific provisions of the Limitation Act of which the operation is to be excluded. As usual the meaning given in the Dictionary has been relied upon, but what we have to see is ***whether the scheme of the special law, that is in this case the Act, and the nature of the remedy provided therein are such that the Legislature intended it to be a complete code by itself which alone should govern the several matters provided by it. If on an examination of the relevant provisions it is clear that the provisions of the Limitation Act are necessarily excluded, then the benefits conferred therein cannot be called in aid to supplement the provisions of the Act. In our view, even in a case where the special law does not exclude the provisions of Sections 4 to 24 of the Limitation Act by an express reference, it would nonetheless be open to the Court to examine whether and to what extent the nature of those provisions or the nature of the subject-matter and scheme of the special law exclude their operation****. The provisions of Section 3 of the Limitation Act that a suit instituted, appeal preferred and application made after the prescribed period shall be dismissed are provided for in Section 86 of the Act which gives a peremptory command that the High Court shall dismiss an election petition which does not comply with the provisions of Ss. 81, 82 or 117. It will be seen that S. 81 is not the only section mentioned in Section 86, and if the Limitation Act were to apply to an election petition under S. 81 it should equally apply to Ss. 82 and 117 because under Section 86 the High Court cannot say that by an application of Section 5 of the Limitation Act, Section 81 is complied with while no such benefit is available in dismissing an application for non-compliance with the provisions of Section 82 and 117 of the Act, or alternatively if the provisions of the Limitation Act do not apply to Section 82 and Section 117 of the*

Act, it cannot be said that they apply to S. 81. Again, S. 6 of the Limitation Act which provides for the extension of the period of limitation till after the disability in the case of a person who is either a minor or insane or an idiot is inapplicable to an election petition. Similarly, Ss. 7 to 24 are in terms inapplicable to the proceedings under the Act, particularly in respect of the filling of election petitions and their trial.

18. It was sought to be contended that only those provisions of the Limitation Act which are applicable to the nature of the proceedings under the Act, unless expressly excluded, would be attracted. But this is not what S. 29(2) of the Limitation Act says, because it provides that Sections 4 to 24 (inclusive) shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law. If none of them are excluded, all of them would become applicable. Whether those sections are applicable is not determined by the terms of those sections, but by their applicability or inapplicability to the proceedings under the special or local law. A person who is a minor or is insane or is an idiot cannot file an election petition to challenge an election, nor is there any provision in the Act for legal representation of an election petitioner or respondent in that petition who dies, in order to make Section 16 of the Limitation Act applicable.

25. For all these reasons we have come to the conclusion that the provisions of Section 5 of the Limitation Act do not govern the filing of election petitions or their trial and, in this view, it is unnecessary to consider whether there are any merits in the application for condonation of delay."(emphasis added)

In ***''Union of India vs. Popular Construction Co. (2001) 8 SCC 470'*** the issue before the court was "whether the provisions of Section 5 of the Limitation Act, 1963 are applicable to an application challenging the award filed under Section 34 of the Arbitration and Conciliation Act, 1996". The Supreme Court again held:

"12. As far as the language of Section 34 of the 1996 Act is concerned, the crucial words are 'but not thereafter' used in the proviso to sub-section (3). In our opinion, this phrase would amount to an express exclusion within the meaning of Section 29(2) of the Limitation Act, and would therefore bar the application of Section 5 of that Act. Parliament did not need to go further. To hold that the Court could entertain an application to set aside the Award beyond the extended period under the proviso, would render the phrase 'but not thereafter' wholly otiose. No principle of interpretation would justify such a result.

13. Apart from the language, 'express exclusion' may follow from the scheme and object of the special or local law. "Even in a case where the special law does not exclude the provisions of Sections 4 to 24 of the Limitation Act by an express reference, it would nonetheless be open to the Court to examine whether and to what extent the nature of those provisions or the nature of the subject-matter and scheme of the special law exclude their operation." (SCC p.146, para 17) *(emphasis added)*

11. In the present case, Section 341 of U.P. Z.A. & L.R. Act applies the Limitation Act to the proceedings held under it, but, Section 344 (1)(a) and (f) provides for framing of rules for imposing time limit, with or without power to extend such time limit imposed, and applicability of different sections of the Limitation Act to

proceedings under it. Section 344 (1)(a) and (f) read:-

*"**344. Rules in general**. - (1) Every power to make rules given by this Act shall be deemed to include the powers to provide for-*

(a) imposing limits of time within which things to be done for the purposes of the rules must be done, with or without powers to any authority therein specified to extend limits imposed;

(f) the application of the provisions of the Indian Limitation Act, 1908 (X of 1908) to suits applications, appeals and proceedings under this Act;"

12. Rule 285(H) of UP. Z.A. & L.R. Rules provides that owner of property put to auction can by depositing the entire amount and expenses as provided in the said rule, with in a period of thirty days from the date of sale, can get the sale set aside. But, any person who files his objections under rule 285-I of the said Rules cannot move an application under rule 285-H. In the present case objections are filed under rule 285-I only. Rules 285(I) to 285(M) of U.P. Z.A. & L.R. Rules relevant for our purpose read:-

*"**285-I. (i)** At any time **within thirty days from the date of the sale, application may be made to the Commissioner to set aside the sale on the ground of some material irregularity or mistake in publishing or conducting it**; but no sale shall be set aside on such ground unless the applicant proves to the satisfaction of the Commissioner that he has sustained substantial injury by reason of such irregularity or mistake.*

(ii) [* *]*

(iii) The order of the Commissioner passed under this rule shall be final.

***285-J. On the expiration of thirty days from the date of the sale if no such application as is mentioned in** Rule 285-H **or Rule 285-I, has been made** or if such application has been made and rejected by the Collector or the Commissioner, the **Collector shall pass an order confirming the sale** after satisfying himself that the purchase of land in question by the bidder would not be in contravention of the provisions of Section 154. **Even order passed under this rule shall be final**.*

285-K. If no application under Rule 285-I is made within the time allowed therefor, all claims on the ground of irregularity or mistake in publishing or conducting the sale shall be barred:

Provided that nothing contained in this rule shall bar the institution of a suit in the Civil Court for the purpose of setting aside a sale on the ground of fraud.

***285-L**. Whenever the sale of any holding or other immovable property is set aside under Rule 285-H or Rule 285-I the purchaser shall be entitled to receive back his purchase money plus an amount not exceeding five per cent of the purchase money as the Collector or the Commissioner, as the case may be, may determine.*

***285-M**. (i) After a sale of holding or other immovable property under the Act, has been confirmed in the manner aforesaid, the Collector shall put the person declared to be purchaser into possession of such property, and shall grant him a certificate to the effect that he has purchased the property to which the certificate refers and such certificate shall be deemed to be a valid transfer of such property, but need not be registered as a conveyance except as provided by Section 89 of the Registration Act, 1908.*

(ii) The certificate shall state the name of the person declared at the time of sale to

be the actual purchaser and any suit brought or application made in a Civil or Revenue Court against the certified purchaser on the ground that the purchase was made on behalf of another person not the certified purchaser, though by agreement the name of the certified purchaser was used shall be dismissed with costs." (emphasis added)

13. A perusal of the provisions of U.P. Z.A. & L.R. Act and the Rules framed thereunder shows that the same provide a complete procedure for the complete manner of recovery, including, holding of auction sale, objections to sale and disposal of such objections including consequences of not filing the objections. Thus, the said Act and Rules fall within the category of special local Act under section 29(2) of the Limitation Act for the purpose of recovery proceedings held under the same. Schedule to the Limitation Act by entry 127 provides limitation of sixty days for filing an application to set aside a sale in execution of a decree. By entry 137 it provides limitation of three years for any other application for which no period of limitation is provided elsewhere. While Rule 285-I only provides a period of thirty days for filing objections against auction sale. Thus the special act not only provides the period of limitation for filing objections to the auction sale separately, the period of limitation provided by the special act is also different from that provided by the Limitation Act. Further, Rule 285-I provides that objections to the sale can be filed within a period of thirty days from the date of sale before the commissioner, only on grounds of irregularity or mistake in publishing or conducting the sale. If the objections are not filed under Rule 285-I within thirty days from the date of sale, under Rule 285-J the collector is bound to confirm the sale and such an order of confirmation of sale shall be final. Rule 285-K makes the position further clear by providing that thereafter all claims on ground of irregularity or mistake in publishing or conducting the sale shall be barred and only remedy available is to file a suit on ground of fraud. From the aforesaid, it is clear that U.P. Z.A. & L.R. Act and Rules, for the purposes of recovery of sums recoverable as arrears of land revenue, is a complete code in itself, which specifically excludes the applicability of Sections 4 to 24 of the Limitation Act.

14. In the present case admittedly auction took place on 02.12.2002 and the objections under Rule 285-I were filed on 23.10.2003, i.e. after ten months and twenty-one days of the auction. Any such objections were to be filed within thirty days from the date of auction. The collector meanwhile, since no objections were filed within thirty days, confirmed the sale on 07.01.2003. As per Rule 285-K only remedy available to any person after thirty days of auction sale is to file a suit on ground of fraud. The objections under Rule 285-I could not be filed and entertained after thirty days and any delay in filing objections cannot be condoned. Such an interpretation flows from the plain language of the sections and rules aforesaid. It also appears to be appropriate to bring finality to the auction proceedings. Therefore the delay in filing objections could not be condoned either by the commissioner or by any superior court. The objections filed beyond the period of thirty days from the auction sale are held as barred by time and not maintainable.

(ii) Ownership of property in dispute and Maintainability of present writ petition on behalf of petitioners

15. The submission of the counsel for the petitioners is that the property in dispute belonged to late Surjeet Singh and after his death all his five sons inherited the same. Thus, the same could not be sold for the dues of a partnership firm of which only two brothers were partners, as the same would amount to auction of shares of the other three brothers who had no concern with the partnership firm. Opposing the same counsel for auction purchaser submits that all the sons of late Surjeet Singh never became owners of the property in dispute. He submits that by a registered will dated 05.01.1989 late Surjeet Singh bequeathed the same to his two sons, namely, Vijay Pal Singh and Sarabjeet Singh. Further, from the partnership deeds executed from time to time it is clear that not only the other three sons of late Surjeet Singh never had any concern with the property in dispute but later even Vijay Pal Singh and Sarabjeet Singh had no concern as they also resigned from the partnership firm. No objections are filed against auction either by the partnership firm or the persons who were partners of the firm at the time of auction and they never disputed the auction.

16. Before coming to the merit of submissions, relevant is to note, that, though the objections under Rule 285-I were filed by all the five brothers but the present writ filed is filed only by the heirs of late Vijay Pal Singh, who was one of the the initial two partners of the firm. It is admitted before this court that the predecessor of the petitioners, late Vijay Pal Singh was a partner of the firm and was liable of the dues. Thus, once the other three brothers, who were never partners of the firm, are now not claiming any right in the property and not challenging the order of Board of Revenue before this Court, which has upheld the auction sale, it is not open for the liable petitioner to make any such claim. This ground, that, share of persons having no concern with the liability is wrongly sold, can only be taken by a person who makes any claim to the property while denying liability. The same cannot be taken by heirs of an admittedly liable partner.

17. Now coming to the merits of the claim that the other three brothers had shares in the property. With the assistance of parties I have perused the record. In the registered will dated 05.01.1989 late Surjeet Singh states that his wife has expired and thereafter details the circumstances of the family and of all his five sons. In his will late Surjeet Singh names the other three sons, and states, that, two of them are in government jobs and the third son is running his independent electricity goods shop and all of them are well settled in life. He states that his son Vijay Pal Singh is already partner with him in Walia Industries, which is running the Saria mill on the property in dispute. He is not worried about these three sons, but, for his youngest son Sarabjeet Singh, who is working with him in Walia Industries as his name is not entered in the records. Hence he is writing the will to settle that after his death name of his son Sarabjeet Singh should be entered in records and Sarabjeet Singh will inherit his entire half share of Saria Mill. It further states that he desires that finally both his sons Vijay Pal and Sarabjeet Singh should have half share each in the entire Saria Mill. He further notes that in his lifetime only he shall try to get the name of Sarabjeet Singh entered in the records and, even by such change in records, Vijay Pal Singh and Sarabjeet

Singh each would only get equal half share in the mill, so that a balance is retained. Since other three sons are well settled, hence, they will not get any right or share in the said Saria mill. Thereafter he details about his other properties and its succession. Thus the said will finally settled that his two sons namely Vijay Pal Singh and Sarabjeet Singh inherited the entire Saria mill in equal share and other three sons had no concern with the same. The petitioners or other brothers concealed the said registered will while filing objections under Rule 285-I and knowingly took an entirely contrary stand. The will is also not disputed before this court by the petitioners. As already noted above also, the other three brothers have not come before this court to challenge the order of the Board of Revenue by which their objections are rejected and the auction is upheld. There is also no other document brought on record that any other brother ever claimed any right over the property in dispute. Therefore I do not find any force in the submission of the counsel for the petitioners that all the five sons inherited the property in dispute after the death of their father. It is only Vijay Pal Singh and Sarabjeet Singh who inherited the same.

18. With regard to the right of petitioners to maintain the present petition as legal heirs of a partner of the firm, submission of counsel for auction purchaser is that the property was auctioned to clear the liabilities of the electricity department against M/s Walia Industries, a Partnership Firm. Sri Surjeet Singh and Sri Vijay Pal Singh (Father and son) as two partners had initially setup the said firm, as is clear from the will dated 05.01.1989. A fresh partnership was created in the year 1989 only whereby second son Sri Sarabjeet Singh was also included as third partner. On 03.02.1993 Sri Surjeet Singh (father) expired and thus another partnership deed dated 16.02.1993 was entered into between the Sri Vijay Pal Singh and Sri Sarabjeet Singh. Later Sri Sarabjeet Singh expressed his inability to continue with the partnership and certain new partners were to be inducted. Thus another partnership deed was executed on 30.9.1995 by which Sarabjeet Singh retired from the Partnership and Arvind Kumar Tripathi and Mrs. Mrinalini Tripathi (wife of Arvind Kumar Tripathi) joined as new partners along with Vijay Pal Singh. Again by a deed of ratification dated 01.07.1996 Sri Vijay Pal Singh also expressing his inability to continue with the partnership business and retired from the firm w.e.f. 30.06.1995. Thus, only Arvind Kumar Tripathi and Mrs. Mrinalini Tripathi were left as partners of the said business. These facts were also recorded and reflect in the records of Excise and Income Tax departments. He submits that all these records i.e. registered will, partnership and retirement deeds etc. were concealed by the petitioners from the court while setting up and contesting their objections in courts. He further submits that petitioners have no where set up a case that the firm never owned the property in dispute or the property was not transferred along with the firm to the new partners. The objections were filed and entire proceedings were contested only by concealing the entire relevant documents from the courts and not by explaining them. Even before this court the said documents are not disputed.

19. The record shows that the auction purchaser along with his counter affidavit dated 02.08.2010 filed the said registered will and other documents are filed along with his supplementary counter affidavit dated 22.01.2018 (filed on 27.01.2018).

Petitioners filed a rejoinder affidavit dated 23.12.2011 (filed on 04.01.2012) to the counter affidavit but in the same they have not disputed the registered will. Petitioners did not file any reply to the supplementary counter affidavit dated 22.01.2018 and thus did not dispute the record with regard to changes of partners in the partnership firm from time to time and record of different departments noting the said changes. The different partnership deeds and retirement deeds do note the changes in partnership as claimed by the counsel for the auction purchaser. The income tax order dated 05.02.1997 of the assessment year 1995-96 of the firm M/s Walia industries notes:-

"The assesse firm was constituted by two partners namely S/Shri V.P. Singh and Sarvjeet Singh. Presently, both the partners have retired and entirely new partnership is running the business. The books of a/c available with the present owners were produced and examined. It was stressed that the factory remained closed for considerable period during the previous year and hence the loss. In view of difficult situation and the fact that the aggregate losses ultimately forced both the partners to leave the business."

20. Similarly Central Excise Registration Certificate was also corrected and retirement of Sarabjeet Singh and Vijay Pal Singh and addition of Arvind Kumar Tripathi and Mrs. Mrinalini Tripathi was duly noted in the same. Counsel for the petitioners merely states that the said partnership deeds are not registered. However the said fact will not make them illegal. He does not dispute the deeds and the fact that they have been acted upon and consequential changes/effects were made in Excise and Income Tax departments. From the above this court finds that the other three sons of late Surjeet Singh had no concern with the property in dispute and the same was inherited only by Vijay Pal Singh and Sarabjeet Singh and even they retired from the partnership firm in the year 1995 and 1996 respectively and had no concern with the firm M/s Walia Industries or its properties thereafter. Thus they had no right to file objections against the auction sale held on 02.12.2002.

(iii) Whether there is any force in the objections to the auction filed by the petitioners.

21. This Court has found that the very objections filed under Section 285-I were barred by limitation and delay could not be condoned and has further found that predecessor of petitioners had no concern with the property in dispute at the time of auction. Therefore the petitioners also do not have any right to maintain the said objections and thus the present writ petition. In the given circumstances, since the objections are not maintainable, the merits of the same cannot be looked into.

22. In view of the aforesaid there is no force in the present writ petition and the same is ***dismissed.***

23. Before closing this judgment, this court strongly deprecates the manner of concealment of facts made, both in the objections filed under Rule 285-I and in the writ petition, and would like to caution the petitioners to approach any court with clean hands and narrate the correct and complete facts. The court is not imposing any costs for concealment of facts as the predecessor of the petitioners filed the objections and petitioners are widow and children, some being minor at the time of filing of this petition.
